Decisions of the Employees' Compensation Appeals Board

U.S. Department of Labor
Employees' Compensation Appeals Board
October 1, 1983 - September 30, 1984

Volume 35
Index Digest Supplement XI

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Decisions of the Employees' Compensation Appeals Board

U.S. Department of Labor
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Employees' Compensation Appeals Board

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October 1, 1983 — September 30, 1984

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PREFACE

The Employees' Compensation Appeals Board began functioning in the latter part of 1946 as a three-member, quasi-judicial body established within the Federal Security Agency in accordance with the provisions of Reorganization Plan No. 2 of 1946, effective July 16, 1946.

Reorganization Plan No. 19 of 1950, effective May 24, 1950, provided for the transfer of the Board and its functions to the Department of Labor, and the transfer to the Secretary of Labor of the functions of Federal Security Administrator with respect to the Board.

The Board has authority to hear and, subject to applicable law, make final decisions on appeals taken from determinations and awards with respect to claims of employees of the Federal Government arising out of the Federal Employees' Compensation Act of 1916, as amended and extended.[1] The Board's jurisdiction is strictly appellate in nature and extends to questions of law and fact and to questions concerning the exercise of discretion. The review is made upon the case record. New evidence is neither received nor considered by the Board.

The administration of the Federal Employees' Compensation Act is the responsibility of the Office of Workers' Compensation Programs which prior to July 2, 1974 was known as the Office of Federal Employees' Compensation.[2]

The decisions reported in this volume were issued within the period from October 1, 1983 to September 30, 1984.

During the past year the Board has had a very large number of appeals. The decisions of the Board with respect to the routine cases were not included in the volume; only those having a precedential value were included. Likewise, most of the Board's orders (decisions issued without opinions) were excluded. The majority of these orders set aside the decision of the Office of Workers' Compensation Programs in the particular case and remanded it, either on the Board's own initiative or on motion of the Office, to correct legal or procedural error or for further development from an evidentiary standpoint.

This year, in an effort to streamline operations and reduce printing costs, the Volume and Index Digest have been combined. The decisions have been printed without headnotes and the digest appears before the volume which begins at page 139. A separate section of orders has been included for the first time.

As was the case respecting the previous digests, Supplement XI follows as closely as possible the format and topic headings of the original Index Digest. The Supplement is composed of headnotes from the printed decisions. These headnotes are not to be regarded as adding to or modifying the result or text of the decisions in any manner. They are intended merely as a research tool.

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[1] Title 5, United States Code, section 8101 *et seq.* With respect to employees of the District of Columbia Government, effective May 3, 1979, all functions previously performed by the Secretary of Labor and the Employees' Compensation Appeals Board under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, were transferred to the Mayor of the District of Columbia. This transfer, which became effective May 3, 1979, resulted by virtue of the provisions of Section 204(e) of the District of Columbia Self-Government Reorganization Act, 87 Stat. 783; D.C. Code, Sec. 36-504; Public Law 93-196, and Section 2346 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

[2] In the case of employees of the Canal Zone Government and of the Panama Canal Company, the Adminstrator was the Governor of the Canal Zone. However, effective October 4, 1979, Title 5 United States Code 8101 *et seq.* became inapplicable to any individual (1) who is not a citizen of the United States, (2) whose initial appointment by the Commission occurs after October 1, 1979; and (3) who is covered by the Social Security System of the Republic of Panama pursuant to any provision of the Panama Canal Treaty of 1977 and related agreements. Sect. 1209(a), P.L. 96-70; 93 Stat. 463.

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ABUSE OF DISCRETION (See medical expenses, attorneys' fees, overpayment and review under section 8128)

APPEALS (See Procedure on appeal to or review by Board)

ARTHRITIS

The case was not in posture for decision on the issue of whether appellant's March 15, 1982 recurrence of disability from a left hip osteoarthritic condition was causally related to factors of his employment. While appellant's physician's reports lacked sufficient medical rationale to discharge appellant's burden of proving by the weight of reliable, probative and substantive evidence that appellant's disability was causally related to factors of his federal employment, this did not mean that they may be completely disregarded by the Office. It merely meant that their probative value was diminished. Appellant's physician's reports were sufficient to require further development of the record. The Office should prepare a new statement of accepted facts regarding appellant's employment duties and submit it, along with the case record, to a Board-certified orthopedic surgeon not previously connected with the case for examination of appellant and a rationalized medical opinion as to whether his disability beginning March 15, 1982 was related, by way of temporary or permanent aggravation, to factors of his employment. Joseph R. Guay, 35 ECAB 455 [1983].

ASBESTOSIS (See pulmonary or respiratory conditions, asbestos-related)

ASTHMA (See pulmonary or respiratory conditions, asthma)

ATTORNEYS' FEES

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on the criteria set forth in 20 CFR 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion. Russell Thomason, 35 ECAB 781 [1984].

The Board found that there was no abuse of discretion by the Office in refusing to approve an attorney's fee based upon a contingency fee agreement. The regulations governing approval of attorney's fees before the Office expressly prohibit recognition of "any contingent contract." Russell Thomason, 35 ECAB 781 [1984].

The Board found that the Office acted improperly in reducing the requested fee and that the case must be remanded to the Office for further development. The Board has held that where the Office proposes to reduce a requested attorney's fee, the attorney is entitled to notice of the reasons for the proposed reduction and an opportunity to respond with written comments and by affidavit prior to decision. The Office did not, prior to the issuance of its decision, advise the attorney of the prohibition against contingent contracts or of its proposed finding that $100.00 per hour was a reasonable charge for the accepted services. Russell Thomason, 35 ECAB 781 [1984].

BACK INJURIES OR CONDITIONS

REMAND FOR DEVELOPMENT

Case was not in posture for decision on the issue of whether appellant had disability after September 21, 1981 which was causally related to his July 1981 employment back and neck injury. The Board-certified surgeon to whom the employing establishment referred appellant made inappropriate comments concerning the center where appellant was being treated. The report of the specialist to whom the Office referred appellant was unclear on the issue of disability. The case was remanded for further development. Raymond L. Dixon, 35 ECAB 561 [1984].

The Office referred appellant and the case record to a Board-certified orthopedic surgeon for an impartial medical examination and opinion. However, there was no conflict in the medical opinion at that time requiring an impartial referral under section 8123(a) of the FECA. The resulting report which found no orthopedic pathology created a conflict with the opinion of a Board-certified surgeon, who diagnosed chronic lumbar myofasciitis with the possibility of a ruptured intervertebral disc causally related to the June 1975 employment injury. The Office subsequently received the report of an orthopedic surgeon, and hospital reports from St. Luke's hospital. The orthopedist diagnosed a herniated intervertebral disc at L5–S1 and performed a lumbar laminectomy and discectomy on March 29, 1983. He related appellant's back condition to the 1975 employment injury; however, his form report provided no rationale for his conclusion. The Office was requested to obtain clarification of this opinion on remand. Keith A. Knights, 35 ECAB 806 [1984].

TERMINATION OF COMPENSATION

The weight of the medical evidence, represented by the thorough opinion of a Board-certified orthopedic surgeon who served as an impartial specialist, failed to establish that appellant had any disability subsequent to April 20, 1981 causally related to her 1973 employment injury. He examined appellant, reviewed the case record and medical reports, and concluded that her current disabilities were not related to her 1973 employment injury; he stated her back sprain should have resolved within 6 to 12 months following injury and that current symptoms were the result of the natural progression of her underlying degenerative joint disease. While the reports of two doctors lent some support to appellant's claim, neither physician gave an adequate medical rationale for their conclusion affirming causal relation nor did they indicate employment factors causing disability. In situations where there exist opposing medical reports and the case is referred to an impartial specialist for the purpose of resolving a conflict, the opinion of such specialist, if well-rationalized and based upon a proper factual background, must be given special weight. Annie P. Erby, 35 ECAB 155 [1983].

The weight of the medical evidence established that appellant did not have any disability after March 24, 1982 causally related to her 1967 employment-related back injury. The Board further found appellant was entitled to compensation for employment-related loss of wage-earning capacity for March 29, 1982 through August 30, 1983, the date the Office met its burden of proof with the impartial specialist's supplemental report. The impartial specialist concluded that appellant's spondylisthesis was neither permanently or temporarily aggravated by her 1967 employment injury. As the impartial specialist selected to resolve the conflict in the medical evidence, his reports were entitled to special weight. Mildred Kaye, 35 ECAB 952 [1984].

The Board found that appellant's disability causally related to his April 1975 employment injury ended by January 28, 1982. The first Board-certified orthopedic surgeon noted that appellant had leg pain which was not in a dermatomal pattern, and found no positive objective clinical abnormalities on physical examination. Considering this absence of objective abnormalities and a normal electromyogram, he was unable to explain any restrictions on appellant's activities and concluded he could return to his regular work. Only the second orthopedist supported appellant's claim of disability beyond January 28, 1982 and he did not indicate that appellant's condition when he saw him in 1982 was causally related to his April 1975 employment injury. The Office properly terminated appellant's compensation based on the first Board-certified orthopedist's report, which was corroborated by the reports of a third orthopedist. These physicians' reports were consistent with other reports of record which found no objective evidence of disability. The medical evidence established that appellant's disability causally related to his April 21, 1975 employment injury ended by January 28, 1982. Jerald H. Miller, 35 ECAB 1024 [1984].

BURDEN OF PROOF

IN GENERAL

An award of compensation may not be based on surmise, conjecture, speculation, or on appellant's belief that his condition was caused by his employment. The mere fact that a condition manifests itself or is worsened during a period of employment does not raise an inference of causal relation between the two. Appellant has the burden of establishing by reliable, probative, and substantial evidence that his disability was causally related to specific employment incidents or to specified conditions of employment. To meet this burden he must submit rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability. Patrick L. Dallaire, 35 ECAB 174 [1983].

Appellant alleged on appeal that since the cause of the disease was not known, he should have been given "the benefit of the doubt" that it could have been caused by trauma. The Board noted that the fact that the etiology of the disease is unknown or obscure does not shift the burden of proof to disprove an employment relation. Neither does the absence of a known etiology for his condition relieve appellant of the burden of establishing causal relation. Patrick Wallace, 35 ECAB 226 [1983].

Appellant has the burden of establishing by the weight of the reliable, probative,and substantial evidence that his condition was caused or adversely affected by factors of his employment. An award of compensation may not be made on the basis of surmise, conjecture, or on an employee's unsupported belief of causal relation. As part of this burden, appellant must furnish reasoned medical evidence, based on a proper factual and medical history, which establishes a causal relationship between his condition and his employment injury. John M. Tornello, 35 ECAB 234 [1983].

A person who claims benefits under the FECA has the burden of establishing the essential elements of his claim, including the fact that he sustained an injury while in the performance of duty, and that he had disability as a result. Rex A. Lenk, 35 ECAB 253 [1983].

A compensation award may not be based upon speculation, surmise or conjecture; or stated differently, the award must be based upon evidence, and where an inference, deduction or conclusion is drawn, there must be evidence to support such inference, deduction or conclusion. The evidence required, however, is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical. It is not necessary that the evidence be so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist. Elise H. Daniel, 35 ECAB 359 [1983]; Charles G. Williams, 35 ECAB 614 [1984].

While the appellant has the burden of proof to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, it has the obligation to secure a supplemental report from the specialist where the original report requires clarification. When an impartial specialist's statement of clarification or elaboration is not forthcoming or if the doctor is unable to clarify or elaborate on his original report or if the doctor's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts, to a second impartial specialist for a rationalized medical opinion on the issues in question. Leonard W. Waggoner, 35 ECAB 461 [1983].

Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that the disability for which compensation is claimed is caused or aggravated by his employment. Henry Bond, 35 ECAB 512 [1984].

Appellant has the burden of establishing by reliable, probative and substantial evidence that the condition for which he seeks compensation is causally related to his employment.

As part of this burden he must present rationalized medical opinion evidence supporting an employment relationship. An award of compensation may not be based on sur- mise,conjecture, or speculation. Neither the fact that the condition became apparent during a period of employment, nor the belief of the employee that the condition was caused, precipitated, or aggravated by factors of his employment, is sufficient to establish causal relation. The fact that the etiology of a disease is unknown or obscure does not shift the burden of proof to the Office so as to require it to disprove an employment relation. Neither does the absence of a known etiology for his multiple sclerotic condition relieve appellant of the burden of establishing a causal relation by the weight of the evidence, which includes affirmative medical opinion based on the material facts with supporting rationale. Causal relation between the disabling disease and the employment must be established in each case by affirmative evidence. So long as the Office properly determines that the evidence fails to establish the requisite causal relation, its obligation under the FECA has been met. William J. Murray, 35 ECAB 606 [1984].

An award of compensation may not be based on surmise, conjecture or speculation. Appellant has the burden of establishing by the weight of reliable, probative and sub- stantial evidence that his condition was causally related to his employment. This burden includes the necessity of furnishing rationalized medical opinion evidence of a cause and effect relationship based upon a proper factual and medical background. Charles Gilderoy Wotring, 35 ECAB 658 [1984].

Appellant has the burden of establishing that she struck an object connected with her employment during the course of her idiopathic fall. Neither appellant, nor her coworkers could state whether appellant fell directly to the floor or struck an intervening object. Appellant's statement that she "would assume" she struck an object other than the floor because of the condition of her left eye and swelling of her left temple was speculative and did not establish that she struck an object connected with her employment during the course of her idiopathic fall. Josephine M. Callahan, 35 ECAB 709 [1984].

An award of compensation may not be based on surmise, conjecture, or speculation. The mere fact that a disease developed during or immediately after a period of employment does not raise a presumption or inference of causal relation between the two. Neither the fact that the disease became apparent during a period of employment, or the belief by appellant that the disease was caused or aggravated by employment conditions, is suffi- cient to establish causal relation. Romeo E. Pena, 35 ECAB 850 [1984].

Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that the disabling condition upon which his claim is predicated was causally related to his employment. When appellant was initially hospitalized in 1979 his condition was diagnosed as "right sixth cranial nerve palsy, etiology undetermined." The fact that the etiology of a disease is unknown or obscure does not shift the burden of proof to the Office so as to require it to disprove an employment relation. Neither does the absence of a known etiology for his cranial neuropathy relieve appellant of the burden of establishing a causal relation by the weight of the evidence, which includes affirmative medical opinion based on the material facts with supporting rationale. Causal relation between the disabling disease and the employment must be established in each case by affirmative evidence. Romeo E. Pena, 35 ECAB 850 [1984].

Where an employee is on a temporary duty assignment away from his regular place of employment, he is covered by the FECA 24 hours a day with respect to any injury that results from activities incidental to his temporary assignment. The fact that an employee was on a special mission or in travel status during the time a disabling condition manifested itself does not raise an inference that the condition was causally related to the incidents of the employment. Thus, if appellant's hearing loss had resulted from activities incidental to his employment the injury would have been compensable. However, according to the Board-certified otolaryngologist's interpretation of the history provided by appellant to the employing establishment hospital physician, his hearing loss appeared when he awoke from his sleep without any apparent relationship to the incidents of his employment; therefore, the condition cannot be regarded as employment-related. Stanley K. Takahaski, 35 ECAB 1064 [1984].

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment. As part of this burden he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation. Bruce E. Martin, 35 ECAB 1090 [1984].

An individual seeking compensation benefits has the burden of establishing the essential elements of his claim. Thus, appellant had the burden of establishing by the weight of the reliable, probative and substantial evidence that he sustained an injury in the performance of his duties, which disabled him for employment. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of an employee that the disease was caused or aggravated by employment conditions is sufficient to establish causal relation. Edward E. Olson, 35 ECAB 1099 [1984].

FECA does not require the showing of the occurrence of unusual exertion or stress in the employment as a prerequisite for compensability. The claim is compensable if it is established that the performance of regular duties did in fact precipitate or cause the myocardial infarction. John J. Gallagher, 35 ECAB 1128 [1984].

INFERENCES AND PRESUMPTIONS

Where an employee is on a temporary duty assignment away from his regular place of employment, he is covered by the FECA 24 hours a day with respect to any injury that results from activities incidental to his temporary assignment. The fact that an employee was on a special mission or in travel status during the time a disabling condition manifested itself does not raise an inference that the condition was causally related to the incidents of the employment. Thus, if appellant's hearing loss had resulted from activities incidental to his employment the injury would have been compensable. However, according to the Board-certified otolaryngologist's interpretation of the history provided by appellant to the employing establishment hospital physician, his hearing loss appeared when he awoke from his sleep without any apparent relationship to the incidents of his employment; therefore, the condition cannot be regarded as employment-related. Stanley K. Takahaski, 35 ECAB 1064 [1984].

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INVESTIGATION OR INQUIRY BY OFFICE

The Board found that on the date in question the truck appellant was parking was bumped from behind by another truck in the process of parking. At the time his truck was bumped appellant was standing on the running board in the process of leaving the cab. The evidence did not support that he fell or struck any objects as a result of the bumping incident or that his vehicle was pushed forward any measurable distance. However, the Board further found that the case was not in posture for decision on the issue of whether appellant's claimed disability was causally related to that incident. The statements by appellant, witnesses and the employing establishment establish that the truck appellant was parking was bumped from behind by another truck. While there is medical evidence in support of appellant's claim that he was disabled as a result of this incident, the evidence was insufficient to meet his burden of proof particularly since the facts upon which the claim was based were not clear. However, the evidence, including the bumping incident and appellant's statement to a physician, was sufficient to require further development by the Office. Robert F. Walker, 35 ECAB 172 [1983].

Proceedings under the FECA are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done. Isidore J. Gennino, 35 ECAB 442 [1983].

Case was not in posture for decision on the issue of whether appellant's disability due to chondrosarcoma was causally related by aggravation to employment factors. Once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner. Several medical reports prior to the August 27, 1981 referral to the Board-certified orthopedist all indicated a causal relationship between appellant's disability commencing April 17, 1981 and factors of his federal employment. However, the Office determined that their reports were insufficient to support a finding of causal relationship and concluded that further medical evidence was necessary. At this point, the Office should have referred appellant to a Board-certified oncologist, the type of specialist best able to evaluate appellant's chondrosarcoma and its possible relationship to factors of his federal employment instead of referring appellant to a Board-certified orthopedist. Isidore J. Gennino, 35 ECAB 442 [1983].

While the medical reports of record lacked sufficient rationale to discharge appellant's burden of proving by the weight of the reliable, substantial, and probative evidence that his headaches and emotional condition were causally related to his employment, they constituted sufficient evidence in support of appellant's claim to require further development of the record by the Office. Lewis E. Robinson, 35 ECAB 332 [1983].

The case was not in posture for decision on the issue of whether appellant's March 15, 1982 recurrence of disability from a left hip osteoarthritic condition was causally related to factors of his employment. While appellant's physician's reports lacked sufficient medical rationale and other detail to discharge appellant's burden of proving by the weight of reliable, probative and substantive evidence that appellant's disability was causally related to factors of his federal employment, this did not mean that they may be completely disregarded by the Office. It merely meant that their probative value was diminished. Appellant's physician's reports were sufficient to require further development of the record. The Office should prepare a new statement of accepted facts regarding appellant's employment duties and submit it, along with the case record, to a Board-certified orthopedic surgeon not previously connected with the case for examination of appellant and a rationalized medical opinion as to whether his disability beginning March 15, 1982 was related, by way of temporary or permanent aggravation, to factors of his employment. Joseph R. Guay, 35 ECAB 455 [1983].

While the appellant has the burden of proof to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, it has the obligation to secure a supplemental report from the specialist where the original report requires clarification. When an impartial specialist's statement of clarification or elaboration is not forthcoming or if the doctor is unable to clarify or elaborate on his original report or if the doctor's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts, to a second impartial specialist for a rationalized medical opinion on the issues in question. Leonard W. Waggoner, 35 ECAB 461 [1983].

The Board found that the 1983 employment incident occurred as alleged; the case was remanded for further development as to whether appellant's current right leg condition was causally related to such incident. The evidence adduced revealed that in 1982 appellant sustained a nonemployment injury to his right leg when he ruptured his plantaris muscle. He received treatment for this condition and was diagnosed as having resolving cellulitis of the right lower extremity. The April 6, 1983 medical reports indicated that appellant was treated on March 30, 1983 for swelling, pain and discoloration to the right leg. The doctor diagnosed a musculoligamentous tear and indicated possible thrombophlebitis of the extremity. He stated, without rationale, that this was related to the employment incident described by appellant. While this report was insufficient to establish that appellant's disability was causally related to the March 30,1983 employment incident, the report indicated that appellant could have sustained an aggravation of the preexisting rupture of his right leg plantaris muscle and was sufficient to require futher development of the medical evidence by the Office. Robert T. Shea, 35 ECAB 522 [1984].

The Board found that the Office erred by submitting the case to the referral physician without first determining whether the employee was exposed to the substances implicated by appellant's claim. The Board has held that "A failure to establish the facts of an employee's working conditions, before the [Office] submits a case to a medical expert, is error *per se* unless the facts are not in issue." Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

The Board found that the case was not in posture for decision. The Board-certified specialist in medical oncology to whom the Office referred the employee's case record, stated that "the only practical test" of whether the employee's death was causally related to his employment was whether epidemiologic studies showed an increased incidence of malignant lymphomas among workers performing similar jobs. He suggested that such information could be obtained from the National Cancer Institute. An Office medical adviser stated that such information should be requested. It was improper for the Office to reject appellant's claim without attempting to procure this information, which is in the possession of another government agency. The referral physician's conclusion that the employee's death was not causally related to his employment was based in part on an assumption that his exposure to carcinogens was not greater than the exposure of a person living in a modern city. A Board-certified internist supported appellant's claim, based on a history of prolonged exposure to solvents such as carbon tetrachloride and benzene. The Office's development of the evidence regarding the employee's exposure to solvents, especially carbon tetrachloride and benzene, was inadequate. Although the Office attempted, with limited success, to obtain information on such exposures from the employing establishment where the employee worked from 1965 to 1970, the Office made no effort to ascertain the employee's exposure to these substances in his federal employment from 1942 to 1965. During this latter period the employee worked for two federal employers at two positions other than that of electrician, his position at the employing establishment. The case was remanded to the Office, which should attempt to obtain epidemiologic studies on the incidence of malignant lymphomas among workers performing jobs similar to those the employee performed throughout his federal career. The Office should also attempt to obtain information on the employee's exposure to solvents, throughout his federal employment. The Office should then refer the augmented case record to an appropriate medical specialist for an opinion whether the employee's death was causally related to his employment. Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

The Board found that the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim, as the medical evidence failed to establish that appellant's hearing loss was not causally related to his exposure to noise in his employment. In its efforts to determine whether appellant's hearing loss, for which it had issued a schedule award, was causally related to his exposure to noise at work, the Office referred appellant to three Board-certified otolaryngologists. The Office's referral letter to all three otolaryngologists contained an inaccurate statement underestimating the period of time during which appellant was exposed to noise. In addition, the Office's referral letter to these three otolaryngologists stated that appelllant was exposed to aircraft flight line noise of up to 120 dBA, and that hearing protection was used during exposure. This statement did not make it clear that the exposure to 120 dBA was with the use of hearing protection, as the employing establishment indicated. In light of these discrepancies in the statements submitted to the otolaryngologists to whom it referred appellant and his case record, the

Office did not meet its responsibility to have a proper evaluation based on an accurate history and medical background. Gerald W. Keoppel, 35 ECAB 885 [1984].

MEDICAL TEXTS, PERIODICALS AND EXCERPTS

The Board noted that appellant submitted a newspaper clipping with his petition for reconsideration. The Board has held on numerous occasions that newspaper clippings, medical texts and excerpts of publication are of no evidentary value in establishing a claim as they are of general application and are not determinative as to whether specific conditions were the result of the employment. Gaetan F. Valenza, 35 ECAB 763 [1984].

MODIFICATION OF AWARD

Once the Office determines that an employee has disability causally related to his federal employment and pays compensation for such disability, it has the burden of proving that his disability has ceased. This burden of proof is not lessened by the fact that the Office later determines that it initially erred in accepting the claim and awarding compensation. The Office must show with rationalized factual and medical evidence that its initial acceptance of the claim was incorrect and that appellant's disability for the period in question was not causally related to his federal employment. Jimmie D. Brewer, 35 ECAB 197 [1983].

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation. Edward L. Havener, 35 ECAB 268 [1983].

It is well established that once the Office has accepted a claim and paid compensation for disability, it has the burden of justifying termination or modification of benefits. Under such circumstances, it must establish that: (a) its original determination was erroneous; or (b) that the employment-related disability has ceased. Thomas Meyers, 35 ECAB 381 [1983].

The Board found that the Office did not meet its burden of proof. In its memorandum summarizing the evidence, the Office recommended termination of benefits on the ground that the medical evidence failed to support causal relationship between appellant's disability beginning December 15, 1982 and the June 3, 1976 work injury. The implication was that appellant's employment-related aggravation ceased by December 15, 1982, the date of the Board-certified orthopedic surgeon's report; that doctor did not report that the employment-related aggravation of appellant's disability ceased by the date of his report. He did report that appellant had residuals which precluded him from engaging in his regular work activities; the Board noted that he concluded that these residuals resulted from an exacerbation of a condition which preexisted the June 3, 1976 employment injury and had resulted in a discectomy ten years prior to the injury. Thus, the Office may not terminate compensation on the theory of cessation of an employment-related aggravation. It appeared the Office was terminating appellant's compensation on the ground his condition was not employment-related which constituted a determination of an erroneous acceptance of his claim. Thomas Meyers, 35 ECAB 381 [1983].

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment. Hubert W. Pickens, 35 ECAB 298 [1983]; William J. Knight, Jr., 35 ECAB 650 [1984].

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where, as here, the Office later decided that it had erroneously accepted the claim. Mary Jean Thoman (Richard C. Thoman), 35 ECAB 682 [1984]; James E. Johnson, 35 ECAB 695 [1984]; Gerald W. Keoppel, 35 ECAB 885 [1984]; John C. Mattern, 35 ECAB 1140 [1984].

It is well-established that once the Office accepts a claim for compensation it has the burden of establishing that appellant is no longer totally disabled or that the present disability is no longer causally related to the employment in order to terminate compensation. Gaetan F. Valenza, 35 ECAB 763 [1984].

The Board noted that appellant received temporary total disability compensation until the effective date of his schedule award. The Board has stated that when a claimant is receiving disability compensation for the residuals of an employment injury up to the effective date of a schedule award, made with respect to the same injury, the Office has the burden of proving that after the expiration of the period of the award the employee no longer has disability for work. The Board noted that the Office incorrectly informed appellant in a letter that after the termination of his schedule award he had the burden to establish that his injury prevented him from performing his usual work or caused a loss of wage-earning capacity. The Office had the obligation to resume payment of compensation for temporary total disability from the date of the expiration of the schedule award until such time that it proves appellant is no longer totally disabled. Otto M. Haga, 35 ECAB 769 [1984].

Once the loss of wage-capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of justifying such modification of an award is upon the Office. George E. Roth, 35 ECAB 773 [1984].

The Board found that on December 19, 1980 an employment incident occurred, as originally found by the Office. Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation. This holds true where, as here, the Office later decides that it had erroneously accepted the claim. With respect to the issue of whether appellant sustained an injury in the performance of her federal employment on December 19, 1980, the Board noted that the Office failed to meet its burden of proof. In the present case the Office determined that appellant sustained an injury in the performance of duty on December 19, 1980 and paid for her compensation for approximately twenty months. At the time the Office decided to review its original acceptance of her claim in October 1982, the employing establishment had already controverted the claim submitted by appellant. On her claim form, and in subsequent statements, she alleged that an incident occurred on the employing establishment up escalator; shortly thereafter she felt pain in her low back and stomach, which she reported to her supervisor; she proceeded to receive medical treatment from the employing establishment nurse and from two doctors who provided histories of injury corresponding with the history of an incident and injury on the escalator on December 19, 1980. Under these circumstances presented by this case, the Office failed to establish that appellant did not sustain an injury in the performance of duty as alleged. Since the Board found that appellant sustained an injury in the performance of duty as alleged, the case will be remanded to the Office for further development of the issue of whether appellant's disability had ceased by July 28, 1982, the date her compensation was terminated. Vivien L. Minor, 35 ECAB 1081 [1984].

CANCER OR TUMORS

The medical evidence did not establish that appellant's disability due to Ewing's sarcoma was causally related to his employment injury. None of the submitted medical reports were supportive of his claim that his condition was causally related to his employment injury. The Office medical adviser negated causal relation noting the absence of any medical evidence in support of causal relation and stating there was no indication in the literature that Ewing's sarcoma is precipitated by trauma. Patrick Wallace, 35 ECAB 226 [1983].

Case was not in posture for decision on the issue of whether appellant's disability due to chondrosarcoma was causally related by aggravation to employment factors. Once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner. Several medical reports prior to the August 27, 1981 referral to the Board-certified orthopedist all indicated a causal relationship between appellant's disability commencing April 17, 1981 and factors of his federal employment. However, the Office determined that their reports were insufficient to support a finding of causal relationship and concluded that further medical evidence was necessary. At this point, the Office should have referred appellant to a Board-certified oncologist, the type of specialist best able to evaluate appellant's chondrosarcoma and its possible relationship to factors of his federal employment instead of referring appellant to a Board-certified orthopedist. Isidore J. Gennino, 35 ECAB 442 [1983].

The Board found that the case was not in posture for decision. The Board-certified specialist in medical oncology to whom the Office referred the employee's case record, stated that "the only practical test" of whether the employee's death was causally related to his employment was whether epidemiologic studies showed an increased incidence of malignant lymphomas among workers performing similar jobs. He suggested that such information could be obtained from the National Cancer Institute. An Office medical adviser stated that such information should be requested. It was improper for the Office to reject appellant's claim without attempting to procure this information, which is in the possession of another government agency. The referral physician's conclusion that the employee's death was not causally related to his employment was based in part on an assumption that his exposure to carcinogens was not greater than the exposure of a person living in a modern city. A Board-certified internist supported appellant's claim, based on a history of prolonged exposure to solvents such as carbon tetrachloride and benzene. The Office's development of the evidence regarding the employee's exposure to solvents, especially carbon tetrachloride and benzene, was inadequate. Although the Office attempted, with limited success, to obtain information on such exposures from the employing establishment where the employee worked from 1965 to 1970, the Office made no effort to ascertain the employee's exposure to these substances in his federal employment from 1942 to 1965. During this latter period the employee worked for two federal employers at two positions other than that of electrician, his position at the employing establishment. The case was remanded to the Office, which should attempt to obtain epidemiologic studies on the incidence of malignant lymphomas among workers performing jobs similar to those the employee performed throughout his federal career. The Office should also attempt to obtain information on the employee's exposure to solvents throughout his federal employment. The Office should then refer the augmented case record to an appropriate medical specialist for an opinion whether the employee's death was causally related to his employment. Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

The weight of the medical evidence failed to establish that appellant's disability after June 3, 1980 was not causally related to factors of his federal employment. The Office, as directed by the Board, requested the National Cancer Institute to provide an opinion regarding the issue of causal relationship. A Board-certified surgeon and the Chief of Surgery stated that he had reviewed appellant's chart and that he was not aware of any evidence that malignant melanoma was related to trauma. The Office then referred appellant with the case record and a statement of accepted facts to a Board-certified oncologist, who expressed the opinion that the malignant melanoma was not caused or materially aggravated by any chronic trauma to appellant's left thigh due to his employment duties. Richard L. Blacet, 35 ECAB 731 [1984].

CAUSAL RELATION

AGGRAVATION OF PREEXISTING CONDITION

It is a well-settled principle of workers' compensation law that where factors of employment cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where as in the present case, the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. James G. Venable, 35 ECAB 162 [1983].

Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where, as in the present case, the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition without any contribution by the employment. Maurice E. Anderson, 35 ECAB 277 [1983]; John W. MacDonald, 35 ECAB 430 [1983].

The Board in *James L. Hearn* held that, where employment factors cause only a temporary aggravation of an underlying condition, leaving no permanent residual, compensation is not payable for periods after the aggravation has ceased. This holds true even if the employee is found medically disqualified because of the effect which employment factors might have on the underlying condition. In those cases, the disqualification of the employee is due to the underlying condition without any contribution by the employment. Russell E. Kimball, 35 ECAB 310 [1983]; Laymon C. Christie, 35 ECAB 389 [1983].

AGGRAVATION OF PREEXISTING CONDITION OR DISEASE

The circumstances involved in the *Hearn* case are to be distinguished from those in the recent case of *Dennis L. O'Neill*. There the employment factors caused a permanent loss of hearing. The hearing loss was not of a type that entitled the employee to a schedule award under the Office's standardized procedures. However, there was medical evidence that the hearing loss was of such nature that further exposure to the employment factors would constitute grave dangers to appellant physically, and that therefore he no longer could continue in such employment. The Board found that if development of the medical evidence established that the employee's employment-related hearing condition prevented him from returning to his employment, he would be entitled to compensation for any resulting loss of wage-earning capacity. The important distinction between the *O'Neill* case and the *Hearn* case is that employment factors there, unlike here, caused a permanent impairment; that case was remanded to determine whether the impairment resulted in a loss of wage-earning capacity. In contrast, the Board found that the employment factors in the present case did not cause permanent residuals that adversely affected appelllant's wage-earning capacity. The adverse effect here was due solely to the employee's underlying physical condition. Laymon C. Christie, 35 ECAB 389 [1983].

The case was not in posture for decision due to a conflict of medical opinion concerning whether the December 5, 1978 employment injury caused a temporary or permanent aggravation of appellant's venous condition of the leg. The Office medical adviser who reviewed the case noted there was a conflict of medical opinion and stated that the venogram results supported one doctor's opinion that the effects of the employment injury were temporary. While the second doctor's apparent unawareness of the venogram results somewhat diminished the weight of his report, the report still had sufficient weight to create a conflict. On remand, the Office should refer appellant to an appropriate Board-certified impartial specialist for a rationalized opinion concerning whether the 1978 employment injury caused a temporary or permanent aggravation of appellant's underlying condition. If the specialist believes the employment injury caused only a temporary aggravation, he or she should state when the aggravation ceased. The specialist should address whether the employment injury caused a permanent aggravation of the underlying condition and whether there are permanent residuals of the employment injury, including an increased sensitivity to reinjury and reinfection, which prevent appellant from continuing in his usual employment. Wayne D. Hackney, 35 ECAB 718 [1984].

The weight of the medical evidence failed to establish that appellant sustained a permanent aggravation of his diabetic condition causally related to factors of his federal employment. The reports of appellant's attending Board-certified internist specializing in endocrinology, either did not address the issue of permanent aggravation, or failed to provide adequate medical rationale in support of their conclusions. An endocrinologist was similarly speculative in his report, therefore, his report was also of diminished probative value. A Board-certified family practitioner negated causal relationship between permanent aggravation of appellant's diabetic condition and factors of his federal employment. The reports of Board-certified specialists in internal medicine and endocrinology, respectively, and Office medical consultants, negated causal relation. In his well-reasoned report the internist reviewed the medical evidence and concluded that factors of appellant's federal employment had temporarily aggravated the control of his diabetic condition, and that such aggravation had ceased when he retired. Similarly, the endocrinologist's thorough report negated any employment-related permanent aggravation. Ernest N. Chernak, 35 ECAB 827 [1984].

The medical evidence established that appellant contracted an asbestos-related condition due to factors of his federal employment, but that he was not totally disabled therefrom. The Office failed, however, to consider any loss of wage-earning capacity which may have resulted from an asbestos-related condition, as a result of inability to continue working in an environment such as that of appellant's former position. The description of appellant's former position indicated that he would have sustained such exposure if he continued in that position. Thus, while the evidence showed that appellant was not totally disabled from work, it indicated that the residuals of his employment-related condition may have prevented him from continuing his former position. This case should be distinguished from one involving a temporary aggravation of a preexisting condition. In such a case, the underlying condition is not caused by employment factors; any aggravation of the condition by employment factors is compensable only as long as it lasts. No compensation benefits are payable after the aggravation ceases, even though the employee cannot return to his former position. However, where, as here, the condition is itself employment related, compensation benefits may be payable if the impairment prevents the employee from engaging in the kind of work he was doing when injured. Joseph C. Sanderson, 35 ECAB 864 [1984].

CONSEQUENTIAL INJURY

The basic rule respecting consequential injuries, as expressed by Larson, sections 13.00, 13.11, is that "when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct." The subsequent injury is compensable if it is the direct and natural result of compensable primary injury. Jimmie D. Brewer, 35 ECAB 197 [1983].

With regard to appellant's contention that his gastrointestinal condition was precipitated and aggravated by the referral physician's "hard-nosed line of questioning" and "condescending attitude," the Board noted that the basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. Gaetan F. Valenza, 35 ECAB 763 [1984].

The evidence failed to establish that appellant's gastrointestinal condition was causally related to his September 4, 1981 medical examination by a physician to which appellant was referred by the Office. The Office accepted appellant's condition and paid him temporary total disability compensation from 1972 to 1982. The Office referred appellant for a routine medical evaluation to determine whether or not he had employment-related residuals. Appellant alleged he was injured in the course of that September 4,1981 examination. The only medical evidence submitted in support of appellant's contention was the 1982 report from appellant's physician which merely reiterated appellant's contention that his gastrointestinal problems were related to his September 3,1981 examination; the doctor did not address the issue of causal relation and did not provide a reasoned medical opinion in support of appellant's claim. Appellant had not established that his gastrointestinal problems were related to his medical examination for a pulmonary condition on September 4, 1981. Gaetan F. Valenza, 35 ECAB 763 [1984].

The case was not in posture for decision on the issue of whether appellant sustained a displacement of a prosthesis in her left ear as a result of an employment-related injury on April 11, 1975 which necessitated surgery. Appellant's attending otologist/neuro-otologist consistently maintained that appellant struck her head on April 11, 1975 necessitating surgery in 1981 to replace the prosthesis. The initial denial of the claim was based on the premise that appellant did not strike her head. On reconsideration, the Office accepted that appellant struck her head but denied modification of the claim because aggravation of her ear condition was not established. On remand, the Office was instructed to modify its statement of accepted facts to reflect the fact that in addition to multiple contusions, appellant struck her head when she fell on April 11, 1975, and to develop the case further to determine whether the blow to appellant's head displaced her prosthesis which necessitated surgery and loss of time from work. Anna M. Polizzi, 35 ECAB 783 [1984].

Case was not in posture for decision. Appellant attributed his myocardial infarction to "aggravation" caused by the nurse and physician at the health unit. The case was remanded for the Office to make a finding on whether the examination caused appellant's disability. Edward Louis Hoffman, 35 ECAB 1158 [1984].

PROOF REQUIRED (See also Burden of proof, in general)

A compensation award may not be based upon speculation, surmise or conjecture; or stated differently, the award must be based upon evidence, and where an inference, deduction or conclusion is drawn, there must be evidence to support such inference, deduction or conclusion. The evidence required, however, is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical. It is not necessary that the evidence be so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist. Elise H. Daniel, 35 ECAB 359 [1983].

CERVICAL CONDITIONS

The Board found that appellant's cervical condition was not causally related to his federal employment. There was no evidence in the case record establishing that appellant's cervical condition was related to his fall at work in 1973. Neither the doctor who detected the cervical defect in a myelogram of May 7, 1975 nor the doctor who performed the anterior diskectomy and fusion at the C-5,6 interspace stated that appellant's cervical condition was causally related to his federal employment. Jimmie D. Brewer, 35 ECAB 197 [1983].

The case was not in posture for decision with respect to whether appellant had an employment-related emotional condition. The Board found that appellant's employment-related disability due to cervical injury had ceased. Based on the history and medical records, the impartial specialist opined that appellant sustained a cervical spine tissue strain in 1975 and 1977; however, he found no residual physical evidence of such at the time of his examination. He further opined that appellant had no physical disability at that time that would prevent him from performing the type of work he was able to perform prior to the accidents. Accordingly, the Board found that appellant had no physical disability after October 12, 1981 causally related to his employment injuries, as evidenced in the report of the impartial specialist. However, while the impartial specialist's opinion that appellant's complaints may be due to functional causes had no probative value, his recommendation for another psychiatric opinion, because he was the Office chosen impartial specialist, should have been carried out by the Office. William J. Knight, Jr., 35 ECAB 650 [1984].

CHIROPRACTORS (See also medical opinions, qualified physicians)

The case was not in posture for decision on the issue of whether appellant was entitled to payment for chiropratic services after May 16, 1980. Appellant's attending chiropractor indicated in his November 24, 1980 report that x-rays taken on August 19, 1975 and August 15, 1980 revealed a subluxation of L3, L4 and L5. In addition a Board-certified chiropractic roentgenologist reviewed the x-rays and stated that "there is a left lateral flexion subluxation of L5 and L4 . . ." These x-rays were subsequently evaluated by a

Board-certified radiologist, who concluded that they revealed "no evidence of subluxation." A Board-certified orthopedic surgeon also reviewed the x-rays of appellant's spine and concluded that "specifically there is no subluxation." Accordingly, there was a conflict in the evidence as to whether there was a subluxation. To resolve this conflict, the Office should refer the x-rays, the case record and a statement of accepted facts to a Board-certified radiologist for a complete review. The radiologist should be requested to provide a rationalized medical opinion whether the x-rays reveal a subluxation of appellant's spine. After such further development as it may deem necessary, the Office should issue a *de novo* decision. Charles Delbert Ray, 35 ECAB 449 [1983].

The Board found that the Office properly denied appellant reimbursement for unauthorized chiropractic treatment. The Office is required by 5 U.S.C. 8103 to provide all medical care necessary as a result of an employment injury. It is further provided that this care shall be furnished by or on the order of physicians designated or approved by the Office. In the absence of an emergency, an employee may not recover for the cost of medical care obtained without prior approval. There was nothing in the case record to indicate that the Office authorized treatment. Susan M. Herman, 35 ECAB 669 [1984].

Section 8101(2) of the FECA provides that a chiropractor is a "physician . . . only to the extent that [his] reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . ." Susan M. Herman, 35 ECAB 669 [1984].

With respect to the issue of whether appellant's alleged December 23, 1980 recurrence was causally related to her July 13, 1979 injury, the Board found that she had not established that the recurrence was so related. The only evidence in this case concerning the recurrence was the reports of the two chiropractors. A Board-certified radiologist and a Board-certified orthopedic surgeon did not find any spinal subluxation. The radiologist concluded in his July 13, 1979 x-ray report that appellant's lumbosacral spine was normal. The Board-certified orthopedic surgeon stated that x-rays failed to reveal any bony abnormality. In addition, the report of the April 1979 x-rays stated there was only a slight straightening of the lumbar curvature with no fracture, contrary to the statement of the chiropractor. The Office medical adviser who evaluated the case record opined it was reasonable to conclude that appellant did not have a subluxation as indicated by the chiropractors. The weight of the medical evidence was represented by these three physicians' reports. Therefore, the opinions of the chiropractors under the circumstances present did not constitute competent medical evidence to support a claim for compensation. Susan M. Herman, 35 ECAB 669 [1984].

The Office's refusal to reopen the case for further merit review was proper. On a previous appeal the Board affirmed the Office's denial of appellant's claim that her carpal tunnel syndrome was causally related to her 1982 employment injury. On reconsideration appellant submitted the duty status statement of an employing establishment nurse which indicated she should not lift over 15 pounds with her left arm until July 7, 1982. A nurse is not a "physician" within the meaning of section 8101 (2) of the FECA, and this statement was therefore of no probative value with respect to the issue on reconsideration. Appellant submitted a report from a chiropractor, which stated it was "conceivable and probable" that appellant's condition was "precipitated and/or exacerbated by trauma at work." Under section 8101(2) of the Act, chiropractors are considered physicians "only to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . ." As the condition was not a subluxation, his report was of no probative value. The other medical report submitted did not address the relevant issue of causal relationship. Betty G. Myrick, 35 ECAB 922 [1984].

The Board noted that the reports of two chiropractors were not sufficient to require the Office to reopen the case. Under the FECA chiropractors are included in the definition of "physician" only insofar as "their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . ." 5 U.S.C. section 8101(2). No such demonstration of a subluxation was made in this case. Jacob Samaan, 35 ECAB 1050 [1984].

The Board found that the Office properly refused to pay medical benefits for chiropractor services after the date that appellant and the chiropractors were informed that payment would not be authorized. A Board-certified radiologist reported that dorsal x-rays taken on January 1981 showed normal alignment with no other injury present. A Board-certified radiologist of professorial rank reported in an August 1981 report that lumbosacral x-rays showed no abnomalities of alignment with the vertebral bodies intact and the disc spaces maintained. He concluded that the lumbar spine was normal. A Board-certified neurologist of professorial rank diagnosed lumbosacral spasm. A chiropractor diagnosed a subluxation of the dorsal spine. A second chiropractor diagnosed a subluxation of the dorsal and lumbar spine. Both chiropractors and a chiropractic roentgenologist contended that the January 1981 and August 1981 x-rays showed subluxations. They contended that chiropractors were more qualified to diagnose a subluxation than a radiologist. These x-rays, however, were taken and interpreted by Board-certified radiologists. Their interpretation of their own x-rays are entitled to greater weight that the interpretation given by the chiropractors who subsequently reviewed the x-rays. The weight of the medical evidence as represented by two radiologists and a neurologist established that appellant did not have a subluxation. Christine L. Kielb, 35 ECAB 1060 [1984].

The Board granted the Office's motion to remand. The Board requested the Office to file a memorandum on the issue of how to define a "subluxation" in light of the legislative history of the 1974 amendments to the FECA. That history indicated that claims for chiropractic services under the FECA should be treated similarly to those under the medicare provisions of the Social Security Act. *The Medicare Carriers Manual* defined "subluxation" as "an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays." On August 5, 1984 the Director of the Office filed a motion requesting that the Board set aside the September 28, 1983 decision of the Office and remand the case for further development. The Director stated that the appropriate definition of "subluxation" is to be found in the *Medicare Carriers Manual*. He further stated that a subluxation must be a spinal subluxation and that questionable interpretations of x-rays should be resolved by a Board-certified radiologist. The Director stated that on remand the case record should be referred to a Board-certified radiologist to determine whether appellant has a spinal subluxation in accordance with the *Medicare Carriers Manual* definition. Following any further development deemed necessary the Office should then, according to the Director, issue a *de novo* decision. Edward M. Kaers, 35 ECAB 1191 [1984].

Case was not in posture for decision. Conflicting x-ray reports leading to conflicting opinions, on the issue of subluxation, required the referral of appellant's x-rays for review by a Board-certified radiologist for resolution of the conflict. The Board noted that in the case of *Edward M. Kaers* the Director of the Office filed a motion to remand the case on the ground that the Office accepted the definition of "subluxation" as that found in the *Medicare Carriers Manual* and that questionable x-ray interpretations of spinal subluxations should be resolved by a Board-certified radiologist using the *Medicare Carriers Manual* definition. In the instant case, the Office should request that the selected impartial radiologist provide an opinion on whether appellant has a spinal subluxation in accordance with the *Medicare Carriers Manual* definition. Following any further development deemed necessary by the Office, a *de novo* decision should be issued to protect appellant's appeal rights. James S. Quinn, 35 ECAB 1192 [1984].

CLAIMS

FORM AND SCOPE

Although the claim form filed by appellant stated the date of injury as March 11, 1983, the subsequent statement submitted by him was, under the circumstances, sufficient to clarify that he intended to state that as the date of an alleged "reaggravation," and that the initial injury allegedly occurred on or about November 24, 1982. The Board noted that it would have been preferable for appellant to have filed a new claim form, alleging November 24, 1982 as the date of injury and March 12, 1983 as the date disability began. However, in view of the statements subsequently submitted and the indication that appellant had some confusion about the filing of a claim form, it would be appropriate to consider the claim as alleging an injury occurring on or about November 24, 1982. This case is analogous to those in which the Board has found that claims were properly filed, even though the official claim forms were not used, when the claimants had submitted informal statements together setting forth the essential elements of a claim. James R. Fletcher, 35 ECAB 525 [1984].

The Board found that appellant's claim for continuation of pay was barred by the time limitation provision of 5 U.S.C. section 8118. In *Robert H. Moews*, the Board addressed the issue of whether a "claim" was timely filed under 5 U.S.C. section 8122 which at that time barred an employee from receiving compensation for disability if a "claim" was not filed within five years. The Board stated: "* * * When a form CA-1 is filed, the employee is fully protected in respect to time limitation because the form contains words of claim meeting the statutory requirements. In the event the employee fails to give notice, or gives written notice without words of claim, or relies upon actual knowledge of the injury on the part of the employing establishment, in order not to forfeit his rights to disability benefits he must present *written* claim within the statutory five-year period, either by filing the form prescribed by the Bureau or by filing any paper containing words which reasonably may be construed or accepted as a claim. Notice without words of claim cannot, by any permissible construction, toll the running of the statutory period for filing written claim for disability benefits. * * *" Although appellant completed or assisted in the completion of a number of documents concerning her injury on the date of injury or very soon after its occurrence, none of them contained any "words of claim" so as to constitute a "claim" within the meaning of section 8118. The CA-1 form was the first form appellant submitted containing such words of claim. As it was filed well after the 30-day period set forth in section 8122(a)(2), it was insufficient to entitle her to continuation of pay. Sylvia P. Blackwell, 35 ECAB 811 [1984]

CLAIMS, FRAUD (See Forfeiture under section 8106(b)).

COMPENSATION (See also disability and FECA, construction of)

Larson, *The Law of Workmen's Compensation*, section 12.20 and section 58.21 (1982). "Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition [in this case osteoarthritis], the entire disability is compensable, and . . . no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death." Larson, section 59.22. Raymond E. Gwynn, 35 ECAB 247 [1983].

It is well-established that, in determining the amount of a schedule award for a member of the body that sustained an employment related permanent impairment, preexisting impairments of the body are to be included. As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him." Raymond E. Gwynn, 35 ECAB 247 [1983].

Section 8102(a) of the FECA sets forth the bases upon which an employee is eligible for compensation benefits. The section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty * * *." The word "disability" is used in several sections of the Act. With the exception of certain sections, where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." This meaning, for brevity, is expressed as "disability for work." George J. Kemble, 35 ECAB 370 [1983].

The Board found that the Office improperly found that it could suspend appellant's compensation until he cooperates with vocational rehabilitation effort. In its April 15, 1983 order suspending compensation, the Office recognized that section 8113 allows it to reduce future benefits based on probable earning capacity when there has been a failure to undergo vocational rehabilitation without good cause. However, the Office erroneously concluded that this also was a basis for suspension. The Board modified the Office's order to delete the failure to undergo vocational rehabilitation as a proper basis for suspension. Ernie Chavez, 35 ECAB 479 [1983].

Section 8118 of FECA authorizes continuation of pay to an employee who has filed a timely claim for wage loss due to traumatic injury "for a period not to exceed 45 days" and "under accounting procedures and such other regulations as the Secretary [of Labor] may require." Pursuant to this section of the Act, the Secretary has promulgated regulations governing the applicability of continuation of pay for a recurrence of disability which state in part: "* * * (b) If the employee so elects [after the recurrence of disability], the offical superior shall again continue regular pay, providing the 45 calendar days were not all 'used' during the initial period of disability. This is applicable, however, only during a six month period beginning from the date the employee first returned to work following the initial disability. If a recurrence happens after the six months have expired, the employing agency should not continue regular pay, although some of the 45 days may remain 'unused'. In such instances, the employee is entitled only to compensation payable by the Office. (c) If the 45 day entitlement period has been exhausted, or six months have expired since the employee first returned to work, the employing agency is not required to continue regular pay. The Office shall be responsible for initiating payment of compensation. In such instance, the employee shall file claim for any wage loss on the appropriate Form CA-7 or CA-8." Melba Elaine Ford, 35 ECAB 924 [1984].

The Board found that appellant was not entitled to compensation for time he spent outside his normal duty hours traveling to and from the Northwest Pain Clinic. Appellant's regular work week was from Monday to Friday. The travel time for which he claimed compensation occurred on a Saturday and a Sunday. The Office paid appellant compensation for temporary total disability for 40 hours for each week he was in the Northwest Pain Clinic, and also paid for his transportation, lodging, and meals while he was there. Under these circumstances appellant's travel time outside his regular workweek for which he claimed compensation cannot be considered an expense incident to the securing of medical services, as no expense was incurred. The Office properly rejected his claim. Jeffrey R. Davis, 35 ECAB 950 [1984].

COMPUTATION OF PAY

IN GENERAL

Monthly pay for compensation purposes is defined at 5 U.S.C. 8101(4) as (1) the pay at time of injury; (2) the pay at the time disability begins; or (3) the pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. Elizabeth F. Keough (Jeremiah Keough), 35 ECAB 347 [1983].

In FECA Program Memorandum No. 268, dated December 16, 1980, the Office stated: "The definition does not require that the pay rate be earned in federal employment. If the individual is working in private industry at the time disability begins . . . nonfederal pay may be used in determining the pay rate for compensation purposes." Elizabeth F. Keough (Jeremiah Keough), 35 ECAB 347 [1983].

In the case of occupational disease, as in this case, the date of injury for purposes of computing compensation is the date of the last exposure to the implicated employment factors. Here, the date of injury was January 18, 1963. With respect to the time when disability began, it is noted that the employee retired on civil service disability in 1963 because he was found permanently fit for limited duty, with the limitation "no work in eye hazardous areas or on unprotected elevated platforms." However, this was not the condition accepted by the Office as causally related to the employee's employment and this would not be the date when employment-related disability began. The employee returned to work in private industry in May 1969 and worked until May 1978 at a pay rate of $3.40 per hour. The Office medical adviser, who reviewed the case record, stated the employee's total disability began October 20, 1978. However, there was evidence in the case record which indicated that the employee was under medical treatment as early as June 1978 for carcinoma, the accepted employment condition. On remand, the Office should further develop the case record to determine when the employee became disabled as a result of "squamous cell carcinoma of the lung with metastases," the condition accepted by the Office as causally related to his federal employment. It should take into consideration its Program Memorandum No. 268 in determining the employee's rate of pay for purpose of computing appellant's survivor benefits. Elizabeth F. Keough (Jeremiah Keough), 35 ECAB 347 [1983].

The Board found that the Office's decision correctly determined appellant's net four-week compensation but incorrectly stated the gross 4 week compensation rate. Although this may be harmless error since the correct net 4 week compensation was found, the Office should ensure on remand that the correct amount is being paid. Fred Stingl, 35 ECAB 1197 [1984].

The applicable section, section 8114, of the FECA states: "(d) Average annual earnings are determined as follows: (1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay —(A) was fixed, the average annual earnings are the annual rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week. (2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection. (3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment, and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury." Pasqual Torna, 35 ECAB 1110 [1984].

The Board noted that Congress, in enacting the 1949 amendments to the FECA stated that the Act was similar to the New York workmen's compensation law, which has been interpreted as allowing earnings from concurrent employments to be combined in determining the pay rate for compensation purposes only if the concurrent employments were related. Following the precedents of the New York courts and of this Board, and the majority rule in other jurisdictions, earnings from dissimilar private employment cannot be considered in computing appellant's pay rate for purposes of compensation. Pasqual Torna, 35 ECAB 1110 [1984].

Federal (FECA) Procedure Manual, Chapter 2-900, Computation of Compensation states: "(4) Consideration may be given only to earnings in employment which is the same as, or similar to, the work the employee was doing when injured. No consideration may be given to earnings in dissimilar employment. For this reason the CE [claims examiner] should be sure to ascertain the nature of the employment in respect to the employee's earnings and take into account only those earned in work which is the same or similar to the work performed on the date of the injury." Pasqual Torna, 35 ECAB 1110 [1984].

AVERAGE ANNUAL EARNINGS

The applicable section, section 8114, of the FECA states: "(d) Average annual earnings are determined as follows: (1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay —(A) was fixed, the average annual earnings are the annual rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week. (2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection. (3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment, and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury." Pasqual Torna, 35 ECAB 1110 [1984].

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OVERTIME/PREMIUM PAY

The schedule awards provision of the FECA provides for compensation to employees sustaining permanent impairment from loss, or loss of use, of specified members of the body. The Act specifies the amount of compensation to be paid for particular impairments; the award for total (100 percent) loss of monaural hearing is 52 weeks of compensation. Less than total loss is compensated at a proportionate rate, so that for a 23 percent monaural hearing loss the award is 11.96 weeks, or 23 percent of 52 weeks. The Act requires the compensation to be based on an employee's "monthly pay" which, in a case such as this, is "the monthly pay at the time of injury." The weekly compensation in a

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case such as this is determined by the employee's monthly rate of pay on the date of injury. Where the injury was sustained over a period of time, as in this case, that date is the date of last exposure to the employment factors causing the injury. Here, the record showed the injury was sustained over a five-year period, ending on June 9, 1979. Appellant's weekly compensation under the award was based on his rate of pay on that date. Overtime pay is not included in determining appellant's weekly pay rate, but his premium pay was included in the calculation. The Board found that the evidence showed that June 9, 1979 was appellant's date of last exposure and that the Office was correct in setting the appellant's rate of compensation under the award based on his salary on that date. The period of award is to commence with the date of maximum improvement. Jack R. Lindgren, 35 ECAB 676 [1984].

REFERENCE PERIOD

The Board found that the proper rate of pay was used by the Office in calculating appellant's compensation for the period of March 18, 1977 to May 19, 1982. Section 8101(4) of the FECA provides three alternatives for determining the rate of pay to use in calculating compensation; the pay rate in effect at the time of injury, the pay rate in effect at the time disability begins, or the pay rate "at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment . . ., whichever is greater." The Office properly selected the pay rate in effect on March 18, 1977 ($7.47 per hour) when appellant had a recurrence of disability for work. There was no evidence that appellant's pay rate should have been higher for the period in question. Jimmie D. Brewer, 35 ECAB 197 [1983].

The Board found that the Office properly calculated appellant's four-week compensation rate as $929.44. Section 8101(4) of the FECA specifies that where there is no recurrence of disability, the compensation awarded should be computed on the basis of the employee's pay at the time of injury or at the time disability begins, which in this case is the same. The Board has held that there is no authority in the Act for basing a claimant's compensation benefits on a pay increase or recurrence of disability. Here, the pay rate at the time of injury and the date disability began, October 29, 1983, was $11.56 per hour. Appellant was not entitled to have his compensation rate based upon the November 14, 1982 pay increase to $12.02 per hour, which became effective after the beginning of his disability. The Office properly applied this principle, as well as the principles of the *Shadrick* decision, in computing appellant's compensation rate. Richard E. Travers, 35 ECAB 538 [1984].

The final necessary determination before granting an award is the rate of compensation at which the weekly award should be set. The weekly compensation in a case such as this is determined by the employee's monthly rate of pay on the date of injury. Here the record shows that the injury was sustained in the July 21, 1977 explosion. Appellant's weekly compensation under the award was based on his rate of pay on that date. The Board found that the evidence established that July 21, 1977 was the date of injury and that the Office was correct in setting appellant's rate of compensation under the award based on his salary on that date. James Lewis, 35 ECAB 627 [1984].

The schedule awards provision of the FECA provides for compensation to employees sustaining permanent impairment from loss, or loss of use, of specified member of the body. The Act specifies the amount of compensation to be paid for particular impairments; the award for total (100 percent) loss of monaural hearing is 52 weeks of compensation. Less than total loss is compensated at a proportionate rate, so that for a 23 percent monaural hearing loss the award is 11.96 weeks, or 23 percent of 52 weeks. The Act requires the compensation to be based on an employee's "monthly pay" which, in a case such as this, is "the monthly pay at the time of injury." The weekly compensation in a case such as this is determined by the employee's monthly rate of pay on the date of injury. Where the injury was sustained over a period of time, as in this case, that date is the date of last exposure to the employment factors causing the injury. Here, the record showed the injury was sustained over a five-year period, ending on June 9, 1979. Appellant's weekly compensation under the award was based on his rate of pay on that date. Overtime pay is not included in determining appellant's weekly pay rate, but his premium pay was included in the calculation. The Board found that the evidence showed that June 9, 1979 was appellant's date of last exposure and that the Office was correct in setting the appellant's rate of compensation under the award based on his salary on that date. The period of award is to commence with the date of maximum improvement. Jack R. Lindgren, 35 ECAB 676 [1984].

The Board in *Clarence D. Glenn* held that in all situations under the FECA including those involving a schedule award, compensation is to be based on the pay rate as determined under 5 U.S.C. section 8101(4), the pay rate at the time of the injury, or the pay rate at the time disability begins or the pay rate at the time compensable disability recurs if recurrence begins more than 6 months after the employee resumes regular full-time employment, which ever is greater. Disability, as defined in the *Glenn* case, means incapacity to work because of the employment injury. In the instant case the Office, in determining the amount of compensation payable under the schedule award to which appellant became entitled on January 16, 1981, properly used the pay rate in effect on September 24, 1980. His pay rate on that date, the date commencing a period of disability for work, was the highest rate which satisfied the terms of section 8101(4) as of January 16, 1981, when he became entitled to an award. Appellant's contention that his pay rate on January 16, 1981, the date of maximum improvement, should have been used was without merit. Kenneth Deerman, 35 ECAB 799 [1984].

CONTINUATION OF PAY

In general

The Office properly denied continuation of pay for the period in question. Appellant first returned to work after the February 1982 injury on March 2, 1982, and her absence from work commencing October 7, 1982 due to a recurrence of disability was therefore outside the six-month period following her initial return to work. Accordingly, under the applicable provisions of the Secretary's regulations, appellant was not entitled to continuation of pay for her absence after the October 7, 1982 recurrence. Melba Elaine Ford, 35 ECAB 924 [1984].

Section 8118 of FECA authorizes continuation of pay to an employee who has filed a timely claim for wage loss due to traumatic injury "for a period not to exceed 45 days" and "under accounting procedures and such other regulations as the Secretary [of Labor] may require." Pursuant to this section of the Act, the Secretary has promulgated regulations governing the applicability of continuation of pay for a recurrence of disability which state in part: "* * * (b) If the employee so elects [after the recurrence of disability], the official superior shall again continue regular pay, providing the 45 calendar days were not all 'used' during the initial period of disability. This is applicable, however, only during a six month period beginning from the date the employee first returned to work following the initial disability. If a recurrence happens after the six months have expired, the employing agency should not continue regular pay, although some of the 45 days may remain 'unused'. In such instances, the employee is entitled only to compensation payable by the Office. (c) If the 45 day entitlement period has been exhausted, or six months have expired since the employee first returned to work, the employing agency is not required to continue regular pay. The Office shall be responsible for initiating payment of compensation. In such instance, the employee shall file claim for any wage loss on the appropriate Form CA-7 or CA-8." Melba Elaine Ford, 35 ECAB 924 [1984].

Section 8118(b)(3) of the FECA provides for continuation of pay "under accounting procedures and such other regulations as the Secretary may require." Section 10.202(a) of the Office's regulations sets forth nine specific instances of when "the employing agency may, on the basis of the information submitted by the employee, or secured on investigation, controvert a claim and terminate an employee's [continuation of] pay." One of those instances is set out in section 10.202(a)(3) as being when "the employee is neither a citizen nor resident of the United States or Canada (i.e., a foreign national employed outside of the United States or Canada)." While section 10.202(a) states only that the employing establishment "may" controvert continuation of pay, section 10.202(b) of the regulations indicates that controversion in the nine enumerated instances is not optional, but mandatory. Section 10.202(b) states that "In all other cases, the employing agency may controvert an employee's right to continuation of pay, however, such employee's regular pay shall not be interrupted during the 45-day period unless the controversion is sustained by the Office and until the employing agency is so notified." That language, permitting controversion "in all other cases," implies that in those situations specified in section 10.202(a), there is no such choice for the employing establishment but to controvert continuation of pay. The Federal Procedure Manual, Chapter 2-500, which addresses continuation of pay supports this conclusion by stating that "The employing agency will . . . controvert a claim and terminate an employee's pay only if . . . the employee is neither a citizen nor a resident of the United States, Canada, or the Canal Zone (i.e., a foreign national employed outside the United States, Canada, or the Canal Zone.)" Section 8137 of the Act addresses the payment of compensation to noncitizens or nonresidents of either the United States or Canada. Section 8137(b) states that "Compensation paid under this subsection is instead of all other compensation from the United States for the same injury or death, and a payment made under this subsection is deemed compensation under this subchapter and is satisfaction of all liability of the United States in respect to the particular injury or death." The Federal Procedure Manual states that "persons who are noncitizens and nonresidents of the United States or Canada, and who are injured while working outside the continental United States or Canada, come under the provisions of 5 U.S.C. 8137. They are excluded from COP [continuation of pay]." Zohra Ben Ali, 35 ECAB 1156 [1984].

TIME LIMITATION

The Board found that appellant's claim for continuation of pay was barred by the 30-day time limitation provision for filing under the Act. Subsequent to the Office's decision, appellant submitted a letter stating that she did not file form CA-1 within 30 days of the incident because it was not until after that time that her physician informed her that the difficulty with her left knee resulted from the January 21, 1982 employment incident and not due to her past history of phlebitis as she was previously told. In denying appellant's application for review, the Office stated that appellant's explanation for failure to file a claim for continuation of pay within 30 days of the injury did not meet the criteria for waiver of the 30 day period because appellant "was aware or should have been aware that Notice of Injury must be filed within 30 days of the date of injury." The Board noted that the Office's reasoning for denial of appellant's application for review was erroneous although its conclusion was correct. In that regard, the Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay. There was, therefore, no provision in the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury. The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag*. As appellant filed form CA-1, notice of traumatic injury and claim for continuation of pay/compensation more than 30 days after the January 21, 1982 injury, her claim for continuation of pay was barred by the applicable time limitation provision. Therefore, the Office did not abuse its discretion in its refusal to reopen appellant's case for further consideration of the merits of the claim. Patricia J. Kelsesky, 35 ECAB 549 [1984].

Section 8118 of the FECA provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title." The latter section provides that the time limitation is "within 30 days." The context of the section makes clear that this means within 30 days of injury. Sylvia P. Blackwell, 35 ECAB 811 [1984]; Patricia J. Kelsesky, 35 ECAB 549 [1984]; Michael R. Hrynchuk, 35 ECAB 1094 [1984].

The Board found that appellant's claim for continuation of pay was barred by the time limitation provisions of 5 U.S.C. section 8118. In *Robert H. Moews*, the Board addressed the issue of whether a "claim" was timely filed under 5 U.S.C. section 8122 which at that time barred an employee from receiving compensation for disability if a "claim" was not filed within five years. The Board stated: "* * * When a form CA-1 is filed, the employee is fully protected in respect to time limitation because the form contains words of claim meeting the statutory requirements. In the event the employee fails to give notice, or gives written notice without words of claim, or relies upon actual knowledge of the injury on the part of the employing establishment, in order not to forfeit his rights to disability benefits he must present *written* claim within the statutory five-year period, either by filing the form prescribed by the Bureau or by filing any paper containing words which reasonably may be construed or accepted as a claim. Notice without words of claim cannot, by any permissible construction, toll the running of the statutory period for filing written claim for disability benefits. * * *" Although appellant completed or assisted in the completion of a number of documents concerning her injury on the date of injury or very soon after its occurrence, none of them contained any "words of claim" so as to constitute a "claim" within the meaning of section 8118. The CA-1 form was the first form appellant submitted containing such words of claim. As it was filed well after the 30-day period set forth in section 8122(a)(2), it was insufficient to entitle her to continuation of pay. Sylvia P. Blackwell, 35 ECAB 811 [1984].

Appellant's claim for continuation of pay was barred by the 30-day time limitation provision for filing under the FECA. With respect to the contention that appellant delayed in filing his claim because of his unawareness of the severity of his condition at the time and therefore he had no basis to file a claim, the Board has held that unawareness of the seriousness of an injury is no excuse for waiving applicable time limitation provisions. Further, the Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay. There is, therefore, no provision in the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury. The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag*. Thus, since appellant filed form CA-1 notice of traumatic injury and claim for continuation of pay/compensation more than 30 days after the injury, his claim for continuation of pay is barred by the applicable time limitation provision. Michael R. Hrynchuk, 35 ECAB 1094 [1984].

DEATH BENEFITS

A conflict in medical evidence necessitating referral to an impartial specialist existed on the issue of whether the employee's death was due to his 1969 myocardial infarction. Two Board-certified cardiologists of professorial rank extensively discussed the process by which they thought that the employee's death was related to his accepted 1969 myocardial infarction. A third Board-certified cardiologist of professorial rank concluded that the employee's death was due solely to the underlying coronary artery disease and not the 1969 myocardial infarction. The case was remanded for resolution of the conflict in medical evidence. Esther Morginsky (Solomon Gross), 35 ECAB 540 [1984].

The evidence failed to establish that the employee's death due to cardiac arrest was causally related to his employment. The weight of the medical evidence was represented by the report of the only Board-certified specialist in cardiovascular disease represented in the record. The Office referred the employee's case record for resolution of a conflict in opinion on the issue of causal relation. Upon review of that record, he concluded "that there is no association between [the employee's] atherosclerotic picture or his demise to his former employment." As a Board-certified and impartial specialist, that opinion was to be accorded special weight. Margaret Rose (Stanley A. Rose), 35 ECAB 514 [1984].

The Board found that the case was not in posture for decision. The Board-certified specialist in medical oncology to whom the Office referred the employee's case record, stated that "the only practical test" of whether the employee's death was causally related to his employment was whether epidemiologic studies showed an increased incidence of malignant lymphomas among workers performing similar jobs. He suggested that such information could be obtained from the National Cancer Institute. An Office medical adviser stated that such information should be requested. It was improper for the Office to reject appellant's claim without attempting to procure this information, which is in the possession of another government agency. The referral physician's conclusion that the employee's death was not causally related to his employment was based in part on an assumption that his exposure to carcinogens was not greater than the exposure of a person living in a modern city. A Board-certified internist supported appellant's claim based on a history of prolonged exposure to solvents such as carbon tetrachloride and benzene. The Office's development of the evidence regarding the employee's exposure to solvents, especially carbon tetrachloride and benezene, was inadequate. Although the Office attempted, with limited success, to obtain information on such exposures from the employing establishment where the employee worked from 1965 to 1970, the Office made no effort to ascertain the employee's exposure to these substances in his federal employment from 1942 to 1965. During this latter period the employee worked for two federal employers at two positions other than that of electrician, his position at the employing establishment. The case was remanded to the Office, which should attempt to obtain epidemiologic studies on the incidence of malignant lymphomas among workers performing jobs similar to those the employee performed throughout his federal career. The Office should also attempt to obtain information on the employee's exposure to solvents throughout his federal employment. The Office should then refer the augmented case record to an appropriate medical specialist for an opinion whether the employee's death was causally related to his employment. Eleanor E. Dringus (Stephens J. Dringus), 35 ECAB 530 [1984].

An overpayment in the amount of $1,159.53 existed in this case. Under section 8101(17) of the FECA (to which the death benefits provision, section 8133, refers to the definition of a student), the status of "student" is accorded only to those under 23 years of age. The daughter of appellant and the deceased employee became 23 years of age on January 29, 1980, after which she was no longer entitled to the "student" exemption from termination of death benefits upon becoming 18 years of age. The Office continued to pay appellant compensation on behalf of the son and the daughter until December 1, 1980 at the rate of 55 percent of the deceased employee's monthly pay, instead of the 40 percent to which the son was entitled from January 29, 1980 to December 1, 1980 pursuant to section 8133 of the Act, set forth above. The Office's calculations show that the amount of the overpayment was correctly computed at $1,519.53. Ursula B. Wirth (guardian), 35 ECAB 557 [1984].

The Board found that the Office failed to meet its burden of establishing that it had erroneously accepted employee's death in 1973 as employment-related. Based upon uncontroverted medical evidence from the Office's medical director, the Office determined on June 23, 1975 that the employee's January 10, 1973 death was employment related; it awarded appellant death benefits for over ten years until it rescinded this determination on June 30, 1983. In reopening the case, the Office sought the opinion of the first Office medical adviser. He supported the claim, stating that although stress did not cause heart disease, he believed that in this instance employment stress precipitated the fatal myocardial infarction. The Office then obtained the opinion of a Board-certified cardiologist of professorial rank. However, he did not address the central issue of whether employment stress precipitated the fatal myocardial infarction. He opined that there was no relationship between the occupation and "the heart disease that . . . ultimately killed him." In so stating, he seemed to be expressing the opinion, shared by the first medical adviser, that employment stress did not cause the employee's heart condition but did not address the crucial issue of whether employment stress, superimposed on the underlying heart condition, precipitated the fatal myocardial infarction. The second Office medical adviser apparently interpreted the cardiologist's report as referring only to the cause of the heart disease. After reviewing the record, the second Office medical adviser commented that he concurred and that there was "no scientific evidence that stress causes coronary artery disease." As he did not address this central issue, his opinion did not support the Office in terminating appellant's death benefits. The Office then referred the case record to a Board-certified cardiologist of professorial rank. Although he concurred with the opinions of the first Office medical adviser and the cardiologist that employment stress did not cause the employee's heart disease, he was the only physician to express the opinion that this stress did not precipitate the fatal event. His opinion was insufficient to establish that the employee's death did not result from factors of his employment because his sole rationale was that the myocardial infarction occurred in the middle of the night. Mary Jean Thoman (Richard C. Thoman), 35 ECAB 682 [1984].

The Board found that the employee's fatal accident did not occur in the performance of duty. The employee was proceeding home after completion of his work shift. The fatal injury did not occur on the employment premises. His status at that time was that of a "fixed premises" employee with fixed hours of work who was returning home from work. He was therefore subject to the "going and coming" rule generally applicable to such employees, and his death was not compensable. Lelita M. Gomez (Irieno C. Gomez), 35 ECAB 814 [1984].

DEPENDENTS

The Board found that appellant failed to establish that she is the widow of the deceased employee as she does not come within that class of beneficiaries as defined by section 8109. The state laws of Hawaii do not recognize common law marriages. Since she is not the "widow" of the employee she is not entitled to the unpaid portion of his schedule award. The Board further found that only those classes of persons specifically named in section 8109(a)(3)(D) of the Act are eligible for compensation due under a schedule award and unpaid at the time of the employee's death. When Congress made provision for a schedule of compensation for the total or partial loss of a member or function of the body in 1949, it made clear that in the absence of any surviving specified beneficiaries the unpaid schedule award would lapse. Should there be no such beneficiaries or should they die before receiving full payment, any balance remaining could be used to defray the employee's burial expenses. Any further balance not so applied would lapse. The disposition of unpaid schedule awards is provided for in a manner similar to that in New York Law and Longshoremen's Act. Mary Bee McCabe, 35 ECAB 218 [1983].

Section 8109 of the FECA provides that portions of schedule awards unpaid at the death of an employee are payable to the children, widow or widower, or parents in a specified order of precedence. The term "widow" is defined to mean "the wife living with or dependent for support on the decedent at the time of his death, or living apart for reasonable cause or because of his desertion." Mary Bee McCabe, 35 ECAB 218 [1983].

It is well-established that questions affecting relationship, such as the validity of marriage or divorce, are determined by the statutory and decisional domestic relations law of the jurisdiction where the alleged marriage took place. In the present case, the laws of Hawaii are applicable. It is noted that the Hawaiian law does not recognize common law marriages. Hawaii statutory section 572-1(7) provides: "It shall be in no case lawful for any persons to marry in the state without a license for that purpose duly obtained from the agent appointed to grant marriage licenses." Mary Bee McCabe, 35 ECAB 218 [1983].

5 U.S.C. section 8133 provides in pertinent part: "(a) If death results from an injury sustained in the performance of duty, the United States shall pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule: *** (4) To the parents, if there is no widow, widower, or child, as follows: (A) 25 percent if one parent was wholly dependent on the employee at the time of death and the other was not dependent to any extent; (B) 20 percent to each if both were wholly dependent; or (C) a proportionate amount in the discretion of the Secretary of Labor if one or both were partly dependent." Gustina Nicholas (Patricia Nicholas), 35 ECAB 291 [1983]; Ted and Hazel Carson, 35 ECAB 423 [1983].

In *Agnes M. Chekel*, the Board stated: "In order to meet the test of dependency, it is necessary to show that the parent claiming as a dependent looked to and relied upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living. It is not necessary to show dependency to a substantial extent." Ted and Hazel Carson, 35 ECAB 423 [1983]; Santos Bonilla Orsini, 35 ECAB 1121 [1984].

In constructing the term "dependent" the Board has defined it as meaning one who looks to, and relies upon, support and maintenance in respect to necessities consistent with the dependent's position in life, which are supplied by another. The test of dependency, in general, it is not whether the claimant is capable of supporting herself without the assistance of the one upon whom she is dependent, but whether she in fact relies upon the support given by another. The fact that a dependent may be capable of self support does not change dependency status, as the question to be determined is whether the person claiming the benefit was, in fact, dependent upon the deceased. The question of whether a parent is dependent upon a child is a question of fact and it is not necessary to show that dependency shall be to a substantial extent. Gustina Nicholas (Patricia Nicholas), 35 ECAB 291 [1983].

The Board, in the *Ballard* decision, established the following formula: "To establish the minimum parental compensation entitlement, the adjudicator should first determine the percentage that the decedent's contribution, during the accepted predeath time interval, bears to the total moneys the parent received from all sources during the same period of time. Multiply the resulting percentage by the 25 percent and the result obtained is the payable percentage of dependency." Gustina Nicholas (Patricia Nicholas), 35 ECAB 291 [1983].

The Board found that appellant established by the reliable, probative and substantial evidence of record that she did look to and rely upon the contributions of the deceased employee in helping her to maintain her customary standard of living, and was partly dependent within the meaning of the Act upon her deceased daughter for support at the time of her death. Gustina Nicholas (Patricia Nicholas), 35 ECAB 291 [1983].

The case was remanded to the Office to afford appellants the opportunity to submit documentary evidence to support their claim of dependency. The Office hearing representative correctly found that appellants provided no documentation to support their allegation that the deceased employee made regular monetary contributions to them for the payment of utility bills. Appellants did not introduce any documentary evidence, such as cancelled check receipts of the deceased employee, bank deposit receipts of appellants, or witness statements of local merchants, friends or family members attesting to the fact that the deceased employee made regular contributions to appellants. However, there was the testimony of appellant, who stated that the deceased employee did in fact make the alleged monetary contributions to appellants for utility payments, home maintenance, household items, money and groceries. Ted and Hazel Carson, 35 ECAB 423 [1983].

The Board found that the appellants failed to submit evidence supporting their claim that they as parents of the decedent [employee] were partially dependent upon him. On remand after their first appeal, appellants, by their attorney, submitted copies of decedent's cancelled checks which were made out to his parents in varying amounts of money over the period of time of December 1979 to October 1980. The total amount of support the decedent provided to his parents over this 11 month period of time was shown by this evidence to have been $248.92. Also submitted by appellants were affidavits attesting that the decedent purchased groceries and appliances for his parents and contributed to the support and maintenance of their family home. The key phrase in the test for dependency is whether the employee provided the "means of maintaining or helping to maintain a customary standard of living." The evidence submitted by appellants does not meet this test of dependency. Although the affidavits tended to show that the decedent financially assisted his parents in certain respects, the affidavits did not show that the decedent's support helped appellants maintain their "customary standard of living." Further, the copies of the cancelled checks did not assist appellants in meeting this test. Ted and Hazel Carson, 35 ECAB 948 [1984].

The Board found that appellant was not without fault in creating the overpayment. The Office's 1976 letter to appellant stated "In no event may compensation be paid beyond the end of the semester or enrollment period after he reaches the age of 23 or has completed four years of education beyond the high school level." While this sentence, as pointed out by appellant, contains the disjunctive "or", the plain meaning of the sentence is that no compensation may be paid if either of the stated conditions occurs. The Board found that appellant was aware, or reasonably should have been aware, that the daughter was not entitled to compensation after her 23rd birthday on January 29, 1980. Appellant therefore accepted a payment which she knew, or should have been expected to know, was incorrect and is not without fault in creating the overpayment. Ursula B. Wirth (guardian), 35 ECAB 557 [1984].

An overpayment in the amount of $1,519.53 existed in this case. Under section 8101(17) of the FECA (to which the death benefits provision, section 8133, refers to the definition of a student), the status of "student" is accorded only to those under 23 years of age. The daughter of appellant and the deceased employee became 23 years of age on January 29, 1980, after which she was no longer entitled to the "student" exemption from termination of death benefits upon becoming 18 years of age. The Office continued to pay appellant compensation on behalf of the son and the daughter until December 1, 1980 at the rate of 55 percent of the deceased employee's monthly pay, instead of the 40 percent to which the son was entitled from January 29, 1980 to December 1, 1980 pursuant to section 8133 of the Act, set forth above. The Office's calculations show that the amount of the overpayment was correctly computed at $1,519.53. Ursula B. Wirth (guardian), 35 ECAB 557 [1984].

Appellant failed to submit evidence supporting his claim that he, as parent of the deceased employee, was partially dependent on him within the meaning of FECA. Appellant submitted evidence that the employee contributed money on three occasions and he claimed employee made $40.00 bimonthly contributions. However, the test for dependency is whether the employee provided the "means of maintaining or helping to maintain a customary standard of living." The evidence submitted by appellant did not meet this test of dependency. Although his statements tended to show that the decedent financially assisted his parent in certain respects, his statements did not show that the decedent's support helped appellant maintain his "customary standard of living." Santos Bonilla Orsini, 35 ECAB 1121 [1984].

DIABETES

The weight of the medical evidence failed to establish that appellant sustained a permanent aggravation of his diabetic condition causally related to factors of his federal employment. The reports of appellant's attending Board-certified internist specializing in endocrinology either did not address the issue of permanent aggravation, or failed to provide adequate medical rationale in support of their conclusions. An endocrinologist was similarly speculative in his report, therefore, his report was also of diminished probative value. A Board-certified family practitioner negated causal relationship between permanent aggravation of appellant's diabetic condition and factors of his federal employment. The reports of Board-certified specialists in internal medicine and endocrinology, respectively, and Office medical consultants, negated causal relation. In his well-reasoned report the internist reviewed the medical evidence and concluded that factors of appellant's federal employment had temporarily aggravated the control of his diabetic condition, and that such aggravation had ceased when he retired. Similarly, the endocrinologist's thorough report negated causally related permanent aggravation. Ernest N. Chernak, 35 ECAB 827 [1984].

DISABILITY (See also compensation and FECA, construction of)

Larson, *The Law of Workmen's Compensation*, section 12.20 and section 58.21 (1982). "Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition [in this case osteoarthritis], the entire disability is compensable, and . . . no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death." Larson, section 59.22. Raymond E. Gwynn, 35 ECAB 247 [1983].

Section 8102(a) of the FECA sets forth the bases upon which an employee is eligible for compensation benefits. The section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty ***." The word "disability" is used in several sections of the Act. With the exception of certain sections, where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." This meaning, for brevity, is expressed as "disability for work." George J. Kemble, 35 ECAB 370 [1983].

The Board found that appellant was currently temporarily totally disabled and was entitled to compensation for an occupational-related lung condition. However, it was unclear from the evidence of record when the period of temporary total disability began. The Board found that because of appellant's lung condition, which the Office accepted as employment related, he is currently "disabled for work" or incapable, because of this condition, "to earn the wages which [he] was receiving at the time of such injury." Based on the Board's interpretation of the term "disability" therefore, appellant is entitled under 5 U.S.C. section 8102(a) to compensation. This was true despite the Office's finding that appellant had no loss of wages because he had retired voluntarily and therefore was not entitled to compensation. In view of the Office's acceptance of an employment-related occupational lung condition, which its Office medical adviser agreed resulted in total disability, the provisions of eligibility for compensation, and the definition of the term "disability," the Office's finding of ineligibility for compensation was inconsistent. It is unclear from the record when appellant's period of temporary total disability began. Once this date is determined, following any further action as the Office deems necessary, payment of compensation for appropriate periods of disability should be made. George J. Kemble, 35 ECAB 370 [1983].

In general the term "disability" under the FECA means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." Applying this definition to the present case, appellant was not disabled during the period beginning when he returned to work for the employing establishment on that date and thereafter earned no less then he had before his employment injuries. Billy G. Sinor, 35 ECAB 419 [1983].

With regard to appellant's contention that he is considered totally disabled under Civil Service retirement provisions, it is pointed out that the Civil Service Retirement Act defines "disabled" as "totally disabled . . . for useful and efficient service in the grade or class of position last occupied by the employee . . . " and has no application under the FECA. Under the latter statute, even though an employee is unable to perform the duties of the position he held when injured, he is not totally disabled if he has the capacity to perform the duties of another position for which he is qualified. A determination made for disability retirement is not determinative of the extent of physical impairment or loss of wage-earning capacity for compensation purposes under the FECA. Billy G. Sinor, 35 ECAB 419 [1983].

In general the term "disability" under the FECA means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." Applying this defintion to the present case, it is apparent that appellant was not disabled within the meaning of the Act before January 1980 or after November 1981 as he earned no less than he had before his injury. Gene Collins, 35 ECAB 544 [1984].

In denying compensation subsequent to September 26, 1979 the Office relied upon a June 4, 1982 report (based upon an examination of that date) from a Board-certified surgeon. However, he readdressed appellant's condition only as of the date of his examination. The Office medical adviser who reviewed the report concluded that appellant was fit-for-duty "as of the date of examination." The Office thus failed to properly address the issue of whether appellant had any disability subsequent to December 12, 1979 causally related to her employment injuries. The Office should therefore refer appellant together with the case record and a statement of accepted facts either back to the Board-certified surgeon or to an appropriate Board-certified specialist to determine whether appellant had any disability subsequent to December 12, 1979 causally related to either her May 11 or November 26, 1978 employment injuries. Adela Hernandez-Piris, 35 ECAB 839 [1984].

The Board found that the refusal of the Office to reopen the case for further consideration on its merits did not constitute an abuse of discretion. With respect to appellant's contention that he was totally disabled under the Social Security Act provisions, the Board noted that 42 U.S.C. section 423(d), for the purposes of the Social Security Act, defines disability as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . " That disability may be due to any cause. That provision has no application to appellant's entitlement to compensation under the FECA where appellant must establish a causal relationship between his disability commencing July 7, 1979 and his employment injury before he would be entitled to benefits. Victor M. Garcia, 35 ECAB 995 [1984].

ELECTION OF BENEFITS FROM OTHER AGENCIES (Section 8116).

The Office properly determined appellant was not entitled to dual benefits under FECA and the Civil Service Retirement Act. Under the provisions of 5 U.S.C. 8116(a) appellant is prohibited from receiving compensation, other than during the period of a schedule award, and payments under Civil Service retirement concurrently. Appellant was so advised by letter and was further advised that at the end of the schedule award he could again elect to receive compensation from the Office. However, appellant was restored to the Office's automatic rolls upon expiration of the schedule award prior to any such election. Under these circumstances, it was proper for the Office to discontinue payment of compensation benefits until such time as appellant has made his election. The Board found that appellant was not in the position to make an informed election and the amount of the overpayment resulting from any prohibited concurrent payments could not be determined until such time as his wage-earning capacity and its effective date, subsequent to the schedule award, was determined. Anthony Oliveira, 35 ECAB 990 [1984].

EMOTIONAL CONDITIONS

EVIDENCE, MEDICAL OPINIONS

The Board found appellant's emotional condition was not causally related to his federal employment. There was no medical evidence in the record establishing that appellant's emotional condition and resultant disability were caused by factors of his federal employment. One physician did indicate that the disability was a result of "stress of employment" but the doctor did not provide a rationalized opinion supporting his statement. As such, appellant's claim for compensation for the period May 1 through May 22, 1972 was not supported by probative medical evidence. Jimmie D. Brewer, 35 ECAB 197 [1983].

The Board found that the evidence did not show that appellant had a disabling psychiatric condition causally related to his employment. A clinical psychologist concluded that appellant probably received secondary gain from his symptoms, and that his diagnosis was hysterical neurosis, conversion type. A Board-certified psychiatrist stated in a November 16, 1979 report that emotional factors and secondary gain were responsible for the prolongation and extension of appellant's complaints. When asked for an opinion whether appellant had a disabling psychiatric condition, he noted appellant's secondary gain reaction which allowed appellant to derive a primary social advantage from his injury, and concluded that appellant did not exhibit a disabling psychiatric condition causally related to his employment or to his April 21, 1975 employment injury. Jerald H. Miller, 35 ECAB 1024 [1984].

The case record contained no substantive well-rationalized medical evidence in support of appellant's claim that his emotional condition was causally related to factors of his federal employment. A Board-certified psychiatrist opined in the detailed 1978 report that appellant had an "impulse disorder" which appeared to be related to the dissolution of his marriage. He opined two years later that if the allegations of threats made by appellant against others had been untrue, then appellant had no significant psychiatric problem "beyond stress due to the problems with his supervisors and the prior problems he had in adjusting to his divorce." This statement was not sufficient to establish that any emotional condition was causally related to appellant's federal employment. A clinical psychologist's opinion that factors of employment aggravated an emotional condition had little probative value because that opinion failed to include any medical rationale in support of causal relationship. Bruce E. Martin, 35 ECAB 1090 [1984].

INJURY IN PERFORMANCE OF DUTY

Case was not in posture for decision. There was medical evidence in the record in support of appellant's claim of a causal relationship between his disability and his federal employment in the form of reports from a psychiatric resident and a Board-certified psychiatrist. On the other hand, there was no medical evidence in the record to dispute the findings of the two physicians. The case was not evaluated by an Office medical adviser, nor was it referred to a medical specialist. The Office should direct appellant to specify in writing those job factors and employment conditions which he alleges were stressful and contributed to his condition. Appellant should describe specific events, dates, and the parties involved within his allegations, and the employing establishment should be requested to comment on his statement. The Office should then prepare a statement of accepted facts and transmit it with the case record to a Board-certified specialist with a request to evaluate the evidence and provide a rationalized opinion on the issue of whether appellant's emotional condition is causally related to factors of his federal employment as described in the statement of accepted facts and if so, the duration of such relationship. Lewis E. Robinson, 35 ECAB 332 [1983].

In *Cutler* the Board stated as follows: "Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment." Rita L. Power, 35 ECAB 403 [1983].

In contrast, the Board has held that a disabling condition resulting from an employee's feeling of job in security *per se* is not sufficient to constitute "a personal injury sustained while in the performance of duty" within the meaning of . . . the FECA. Likewise, assuming that appellant was unhappy doing inside work, desired a different job, brooded over the failure to give him the kind of work he desired for which the establishment considered him unsuitable, and as a result of such brooding appellant became emotionally disturbed, causing an outbreak of dermatitis; this does not establish "a personal injury sustained while in the performance of duty" within the meaning of . . . the FECA. The above cases demonstrate the distinctions that govern situations where an employee has a disabling emotional condition having some kind of causal relationship to the employment. Where the disability results from his emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular evironment or to hold a particular position. Rita L. Power, 35 ECAB 403 [1983].

The Board found that the case was not in posture for decision. The April 27, 1983 memorandum from the claims examiner indicated that the bases for the Office's decision were that appellant's allegations were untrue and that even were they true any disability resulting therefrom would not come within the coverage of the Federal Employees' Compensation Act. In making this second point the claims examiner alluded to the Board's decision in *Lillian Cutler*. Appellant alleged that her emotional condition was caused by harassment and discrimination directed at her at work as a result of her ending a personal relationship with her superior at work. As instances of this harassment and discrimination appellant alleged that her immediate supervisor continually alluded to the relationship, that she was reassigned to another position, that her immediate supervisor and superior at the employing establishment blocked her promotion and that she was sent for a fitness for duty examination. The Board has previously held that the requirement to undergo a fitness for duty examination comes within the assigned duties covered by the Act. If the evidence establishes that the reassignment and the alleged verbal abuse contributed to the development of appellant's emotional condition, they too would come under the coverage of the Act. Appellant's allegations and the only medical evidence of record, represented by the report of a psychiatrist, indicated that her emotional condition did not result from her frustration at not being permitted to attain a particular position at work but resulted from what she perceived as harassment and discrimination against her, of which her not getting a promotion constituted only a part. The Office did not sufficiently develop the record for the purpose of determining the truth of appellant's allegations. The Office did not provide any reasoning for its conclusion that appellant did not suffer any harassment or discrimination at work. It apparently relied upon the refutations from appellant's superior, immediate supervisor and the postmaster, as well as the employing establishment's own investigation. However, there was no copy in the record of the results of this investigation and the Office made no effort to independently verify the truth of appellant's allegations of harassment and discrimination. It did not, for instance, request statements from any of appellant's co-workers. The Office should make detailed findings of fact with respect to appellant's allegations regarding her working conditions. In making such findings the Office should attempt to obtain statements from appellant's co-workers. If available, it should also take into account the findings of any decision arising out of appellant's Equal Employment Opportunity complaint and her civil action in Federal District Court. Any reliance on the employing establishment's investigation of the case should be supported by a copy of those findings. Should appellant's allegations be found to contain merit, the Office should refer a statement of accepted facts together with the case record to a Board-certified psychiatrist for his opinion on whether appellant's emotional condition was causally related to any factors of her employment and, if so, the duration of any such relation. Rita L. Power, 35 ECAB 403 [1983].

The case was not in posture for decision on the issue of whether appellant's emotional condition was causally related to employment factors. The Board noted that some of the alleged causes of appellant's emotional condition are properly considered factors of employment under the *Lillian Cutler* analysis and some are not. Exposure to noise and bright lights at work is clearly a factor of employment under that analysis, as it invokes conditions of employment encountered in the performance of day-to-day duties. The fear of losing one's job or being mugged while commuting is not a factor of employment under *Lillian Cutler*, as that is an emotional reaction that "can be truly described as self-generated and as not arising out of or in the course of employment." The claims examiner's memorandum dated August 9, 1983, upon which the August 17, 1983 compensation order was based, appeared to accept the treating physician's August 25, 1982 report as probative of certain factors it stated caused appellant's emotional condition, such as the fear of being terminated and the fear of being mugged while commuting. Both the memorandum and the compensation order also accepted that changes in appellant's work environment included an increase in noise and bright lights. The physician stated there was "increased stress due to the use of sorting machines associated with fluorescent light and noise." However, it was not clear from the second compensation order that the Office rejected causal relationship between appellant's emotional condition and the increase in noise and bright lights. The case was therefore remanded for further development. Following remand, an Office medical adviser should review the case record, and after such further development as is needed, the Office should issue a *de novo* compensation order that determines whether there is a causal relationship between appellant's emotional condition and any of the alleged factors of employment, including the increase in noise and bright lights, specified by appellant or any of the psychiatrists treating him, and, if so, for how long a period. The Office's decision should also determine which, if any, of such causes of appellant's condition are properly considered factors of employment pursuant to the principles developed in *Lillian Cutler* and subsequent cases of the Board. Peter Sammarco, 35 ECAB 631 [1984].

As the Board pointed out in the case of *Lillian Cutler*, "workers, compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment." There the Board discussed at length the principles applicable to various circumstances involving disabling emotional reactions by employees to factors in the employment. While in many such situations, the disability is regarded as due to an injury arising out of and in the course of the employment, others are not so regarded. An example of an employment-related injury is "[W]here an employee experiences emotional stress in carrying out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment." On the other hand, the disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. Georgia F. Kennedy, 35 ECAB 151 [1984].

Situations enumerated by appellant which would be deemed conditions of employment as enunciated in *Cutler* are alleged verbal harassment and altercations with her supervisors, the imposition of unreasonable deadlines, an unusually heavy workload, and public scoldings. The factors alleged by appellant which would not be compensable under the principles enumerated in *Cutler* would be distress over not being promoted, transferred, or allowed to enter certain programs. Georgia F. Kennedy, 35 ECAB 151 [1984].

Case was not in posture for decision on the issue of whether appellant's emotional condition was causally related to or aggravated by employment factors. Appellant submitted several medical reports of a psychiatrist who stated that appellant's emotional condition was aggravated by her relationship with her supervisors. However, his reports did not specify whether this aggravation was permanent or temporary and, if temporary, the duration of the period of aggravation. On the other hand, medical reports of a Board-certified psychiatrist and a Board-certified psychiatrist of professorial rank and an Office consultant seemed to negate any causal relationship between appellant's employment and her emotional condition. Georgia F. Kennedy, 35 ECAB 151 [1984].

The Office should send the case record, along with a statement of accepted facts, which would indicate those accepted factors which would be deemed employment factors as outlined in *Cutler* and those which would not be, to an impartial medical specialist with a request to evaluate the evidence and provide a rationalized opinion on the issue of whether appellant's disability commencing February 10, 1981 was causally related to factors of her employment. If causally related, the specialist should determine whether the causal relationship was temporary or permanent and, if temporary, the date it ceased. If the specialist feels that further examination of appellant would be useful in such a determination, he should be authorized to perform such examination. Georgia F. Kennedy, 35 ECAB 151 [1984].

REMAND FOR DEVELOPMENT

The Board found the case was not in posture for decision. The only question before the Board was whether the employment-related aggravation of appellant's emotional condition had ceased by September 1, 1979. In terminating compensation, the Office relied on the opinion of a Board-certified psychiatrist and neurologist and impartial specialist whose original 1982 report was based on an inaccurate statement of facts. The Board noted the statement of the Office medical adviser addressed to the impartial specialist that "if claimant changed jobs of his own choosing for personal considerations it becomes more difficult to cite the job as the cause of a subsequent condition or aggravation of a preexisting state." There is no basis in the FECA, the applicable regulations or Board precedent for such a statement. Determination of legal standards in regard to medical questions presented by a case are outside the scope of expertise of the medical adviser or any other physician involved in a case. The Board also noted that appellant asserts on appeal that during the period September 1979 until October 1980 he was treated by psychiatrists, was on continuing medication and was hospitalized twice. The case will be remanded for the Office to obtain with appellant's assistance his medical records for this period. The Office should then prepare a detailed, accurate statement of accepted facts which includes findings of facts concerning the factors of federal employment and concerning appellant's apparently intermittent nongovernmental employment during the period beginning September 1979. The Office should then refer the statement of accepted facts to the abovementioned specialist with a copy of his previous reports and request a supplemental rationalized opinion addressing when the temporary aggravation of appellant's emotional condition ceased. The Office should then issue a *de novo* decision. Richard A. Sroka, 35 ECAB 209 [1983].

Case was not in posture for decision. There was medical evidence in the record in support of appellant's claim of a causal relationship between his disability and his federal employment in the form of reports from a psychiatric resident and a Board-certified psychiatrist. On the other hand, there was no medical evidence in the record to dispute the findings of the two physicians. The case was not evaluated by an Office medical adviser, nor was it referred to a medical specialist. The Office should direct appellant to specify in writing those job factors and employment conditions which he alleges were stressful and contributed to his condition. Appellant should describe specific events, dates, and the parties involved within his allegations, and the employing establishment should be requested to comment on his statement. The Office should then prepare a statement of accepted facts and transmit it with the case record to a Board-certified specialist with a request to evaluate the evidence and provide a rationalized opinion on the issue of whether appellant's emotional condition is causally related to factors of his federal employment as described in the statement of accepted facts and if so, the duration of such relationship. Lewis E. Robinson, 35 ECAB 332 [1983].

The case was not in posture for decision on the issue of whether appellant's emotional condition was causally related to employment factors. The Board noted that some of the alleged causes of appellant's emotional condition are properly considered factors of employment under the *Lillian Cutler* analysis and some are not. Exposure to noise and bright lights at work is clearly a factor of employment under that analysis, as it invokes conditions of employment encountered in the performance of day-to-day duties. The fear of losing one's job or being mugged while commuting is not a factor of employment under *Lillian Cutler*, and that is an emotional reaction that "can be truly described as self-generated and as not arising out of or in the course of employment." The claims examiner's memorandum dated August 9, 1983, upon which the August 17, 1983 compensation order was based, appeared to accept the treating physician's August 25, 1982 report as probative of certain factors it stated caused appellant's emotional condition, such as the fear of being terminated and the fear of being mugged while commuting. Both the memorandum and the compensation order also accepted that changes in appellant's work environment included an increase in noise and bright lights. The physician stated there was "increased stress due to the use of sorting machines associated with fluorescent lights and noise." However, it was not clear from the second compensation order that the Office rejected causal relationship between appellant's emotional condition and the increase in noise and bright lights. The case was therefore remanded for further development. Following remand, an Office medical adviser should review the case record, and after such further development as is needed, the Office should issue a *de novo* compensation order that determines whether there is a causal relationship between appellant's emotional condition and any of the alleged factors of employment, including the increase in noise and bright lights, specified by appellant or any of the psychiatrists treating him, and, if so, for how long a period. The Office's decision should also determine which, if any, of such causes of appellant's condition are properly considered factors of employment pursuant to the principles developed in *Lillian Cutler* and subsequent cases of the Board. Peter Sammarco, 35 ECAB 631 [1984].

The case was not in posture for decision with respect to whether appellant had an employment-related emotional condition. The Board found that appellant's employment- related disability due to cervical injury had ceased. Based on the history and medical records, the impartial specialist opined that appellant sustained a cervical spine tissue strain in 1975 and 1977; however, he found no residual physical evidence of such at the time of his examination. He further opined that appellant had no physical evidence of such at the time of his examination. He further opined that appellant had no physical disability at that time that would prevent him from performing the type of work he was able to perform prior to the accidents. The doctor was aware of a Board-certified psy- chiatrist's previous evaluation and opinion that appellant did not have an emotional prob- lem; however, he believed that appellant's complaints may have been due to functional causes, and strongly suggested another psychiatric opinion. Under these circumstances, the Board found that the report of an impartial specialist constituted the weight of the medical evidence. Accordingly, the Board found that appellant had no physical disability after October 12, 1981 casually related to his employment injuries, as evidenced in the report of impartial specialist. However, while the impartial specialist's opinion that ap- pellant's complaints may be due to functional causes has no probative value, his recom- mendation for another psychiatric opinion, because he was the Office chosen impartial specialist, should have been carried out by the Office. William J. Knight, Jr., 35 ECAB 650 [1984].

The case was not in posture for decision on the issue of appellant's emotional condition and its relationship to her employment injury. The record demonstrated a conflict in the medical opinion evidence between the reports of a Board-certified psychiatrist, and a psychiatrist and Board-certified orthopedic surgeon. Although the case record was referred for resolution of the dispute, the referral physcian was an Office medical consultant, and he cannot serve as an impartial specialist to resolve the conflict. Vivian Hall, 35 ECAB 930 [1984].

Case was not in posture for decision on the issue of whether appellant's emotional condition was causally related to or aggravated by employment factors. Appellant submitted several medical reports of a psychiatrist who stated that appellant's emotional condition was aggravated by her relationship with her supervisors. However, his reports did not specify whether this aggravation was permanent or temporary and, if temporary, the duration of the period of aggravation. On the other hand, medical reports of a Board-certified psychiatrist and a Board-certified psychiatrist of professorial rank and an Office consultant, seemed to negate any causal relationship between appellant's employment and her emotional condition. The Office should send the case record, along with a statement of accepted facts, which would indicate those accepted factors which would be deemed employment factors as outlined in *Cutler* and those which would not be, to an impartial medical specialist with a request to evaluate the evidence and provde a rationalized opinion on the issue of whether appellant's disability commencing February 10, 1981 was causally related to factors of her employment. If causally related, the specialist should determine whether the causal relationship was temporary or permanent and, if temporary, the date it ceased. If the specialist feels that further examination of appellant would be useful in such a determination, he should be authorized to perform such examination. Georgia F. Kennedy, 35 ECAB 151 [1984].

ENCEPHALITIS

The evidence did not establish that appellant's viral encephalitis was causally related to factors of employment. The Board-certified neurologist to whom the Office referred appellant and the case record, explained in detail why he considered appellant's viral encephalitis unrelated to the encephalitis of the patient from whom appellant alleged he contracted the disease. Although a Board-certified internist stated that appellant's illness was caused by his exposure to infectious disease at work, his opinion was based on a history, given to him by appellant, of exposure to patients with viral encephalitis. As the neurologist explained, the patient identified as having encephalitis with whom appellant had contact, had encephalitis caused by bacterium, while appellant's encephalitis was the result of a viral illness. Patrick L. Dallaire, 35 ECAB 174 [1983].

EXPOSURE

ASBESTOS (See also pulmonary or respiratory conditions, asbestos-related)

According to the Federal (FECA) Procedure Manual: "When an employee has suffered a work-related injury which results in permanent residuals there may be disability for work when medical evidence establishes that further exposure to the implicated employment conditions would endanger the employee's health, although the residuals of the injury taken alone might not be disabling. Since exposure to asbestos dust generally results in permanent and irreversible changes in the pulmonary system, in those cases where a diagnosis of asbestos-related disease occurs without disabling pulmonary impairment, or without disability due to associated symptomatolgy, medical evidence may be submitted which indicates that continued employment in a certain job (or certain work environment) is contraindicated. That is, a treating physician may find an individual 'disabled' for continued normal employment because his job requires (or may place him in an environment which includes) continued exposure to asbestos dust.*** If continued exposure at any level is contraindicated by medical evidence and if the employing agency cannot certify that the normal employment will take place in an environment that conforms to such level, the claimant will be entitled to compensation for loss of wage-earning capacity if reassignment to a safe work environment results in reduced wages or if no such work is available." Joseph C. Sanderson, 35 ECAB 864 [1984].

The case was not in posture for decision on the issue of whether appellant had a permanent impairment of his lungs due to asbestos exposure at work. In rejecting appellant's claim, the Office did not follow the procedures it has established for evaluating claims for asbestosis. The Federal (FECA) Procedure Manual states: "If the claimant submits a report of recent medical evaluation from a personal physician at the time of filing (or prior to our referral), the report should be carefully evaluated to determine its completeness according to the requirements of OWCP medical guidelines. If the report indicates asbestos-related disease but is deficient according to OWCP requirements, the claimant should be referred, as described above, at OWCP expense." The Office did not carefully evaluate a general surgeon's October 1, 1981 report to determine its completeness according to the requirements of the Office's medical guidelines. No Office medical adviser or consultant reviewed this report, and the Office's March 21, 1984 compensation order contains an erroneous finding that this report indicated appellant has no evidence of pleural or parenchymal asbestosis. The report, in fact, states that x-rays showed no evidence of pleural or parenchymal asbestosis, but that appellant had at least a Class 2 pulmonary impairment which was causally related to his exposure to asbestos. A. Z. Edwards, 35 ECAB 1114 [1984].

CHEMICALS, GASES, FUMES

The Board found that as of May 30, 1980, the date appellant stopped work, the medical evidence established that his working environment produced a temporary aggravation of his blood carboxyhemoglobin level. An internist and appellant's attending physician hospitalized appellant from June 3 to 6 and June 17 to 27, 1980 with abdominal discomfort, headaches and a carbon monoxide blood level of 12 percent. The doctor indicated that while appellant had a preexisting elevated level of carbon monoxide in his blood due to his cigarette smoking, appellant's level was higher than that expected with cigarette smoking alone. He reported that appellant's blood level dropped after being off the job to a value of 10.5 percent on June 19, 1980. He concluded that appellant's exposure to carbon monoxide at work produced his symptoms. The Board certified-neurologist who examined appellant stated that carboxyhemoglobin levels of less than ten percent usually produce no clinical effects and concluded that appellant's headaches were triggered by his carbon monoxide employment exposure. He noted that appellant's headache syndrome was a temporary neurological sequela secondary to the carbon monoxide exposure. He anticipated no permanent residuals. James G. Venable, 35 ECAB 162 [1983].

The weight of the medical evidence established that as of the date in 1980 that an internist reported appellant's blood carbon monoxide level was eight percent, the temporary aggravation of appellant's condition had ceased, leaving no permanent residuals.

In 1983, appellant was examined by a Board-certified specialist in pulmonary diseases who found appellant's resting carboxyhemoglobin level to be 7.8 percent which, he noted, was significant due to the fact that appellant no longer worked in a high risk exposure area. He concluded that appellant's high resting level of blood carbon monoxide was due to his tobacco consumption. He examined the case record and stated that although appellant's carboxyhemoglobin level was temporarily elevated during the period of his employment, "this should be a transient type phenomenon and when the patient is removed from the environment there should be no long term sequela." For this reason appellant is entitled to appropriate compensation from the date his disability began to the date the internist reported appellant's blood concentration of carbon monoxide returned to its resting level. The medical reports did not show that appellant had any permanent residuals after his exposure to carbon monoxide at work had ceased and his blood concentration returned to the value reported as normal in light of his tobacco consumption. James G. Venable, 35 ECAB 162 [1983].

The Board found that the case was not in posture for decision. The Board noted that appellant's claim was based on his belief that his symptoms were caused by his exposure to lead and cadmium while in the performance of his federal duties. An osteopath diagnosed chronic lead and cadmium poisoning; three neurologists who later examined appellant did not agree, suggesting appellant suffered a post-infectious condition. The Office was instructed to prepare a statement of accepted facts, submitting it and the case record to a Board-certified medical specialist for a rationalized opinion regarding the issue of whether appellant's post-infectious condition was causally related to his employment injury. William S. Johnson, 35 ECAB 240 [1983].

The case was not in posture for decision on whether appellant had any disability or permanent impairment due to a pulmonary condition which he alleged was causally related to exposure to hazardous materials and toxic fumes. The reports of two Board-certified internists specializing in pulmonary diseases seemed to support the conclusion that residuals from appellant's employment-related pulmonary condition prevented him from continuing his federal employment as a plastic worker, the basis for payment of compensation according to *O'Neill*. A third Board-certified internist specializing in pulmonary disease arrived at a contrary conclusion consistent with *Hearn*, stating that exposure to irritant chemicals and fumes was capable of creating a temporary aggravation which would have ceased when appellant ceased his employment. The Office should refer appellant together with the case record and a statement of accepted facts to a Board-certified pulmonary specialist for a fully reasoned opinion on whether appellant had a disabling pulmonary condition subsequent to March 3, 1978 that was either caused or permanently aggravated by his exposure to toxic substances at work. The specialist should also be asked to give his opinion as to whether appellant has any pulmonary impairment, that is, a permanent loss of use of either lung. The Office should then evaluate the specialist's report for the purpose of determining whether appellant is entitled to compensation for a loss of wage-earning capacity in light of the principles set forth in the above-mentioned cases of *Hearn* and *O'Neill*. If causal relationship, by means of direct causation or permanent aggravation, is indicated the Office should determine appellant's entitlement to a schedule award by applying the tables in the *AMA Guides*. Maurice E. Anderson, 35 ECAB 277 [1983].

The Board found that the Office erred by submitting the case to the referral physician without first determining whether the employee was exposed to the substances implicated by appellant's claim. The Board has held that "A failure to establish the facts of an employee's working conditions, before the [Office] submits a case to a medical expert, is error *per se* unless the facts are not in issue." Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

The Board found that the case was not in posture for decision. The Board-certified specialist in medical oncology to whom the Office referred the employee's case record, stated that "the only practical test" of whether the employee's death was causally related to his employment was whether epidemiologic studies showed an increased incidence of malignant lymphomas among workers performing similar jobs. He suggested that such information could be obtained from the National Cancer Institute. An Office medical adviser stated that such information should be requested. It was improper for the Office to reject appellant's claim without attempting to procure this information, which is in the possession of another government agency. The referral physician's conclusion that the employee's death was not causally related to his employment was based in part on an assumption that his exposure to carcinogens was not greater than the exposure of a person living in a modern city. A Board-certified internist supported appellant's claim, based on a history of prolonged exposure to solvents such as carbon tetrachloride and benzene. The Office's development of the evidence regarding the employee's exposure to solvents, especially carbon tetrachloride and benzene, was inadequate. Although the Office attempted, with limited success, to obtain information on such exposures from the employing establishment where the employee worked from 1965 to 1970, the Office made no effort to ascertain the employee's exposure to these substances in his federal employment from 1942 to 1965. During this latter period the employee worked for two federal employers at two positions other than that of electrician, his position at the employing establishment. The case was remanded to the Office, which should attempt to obtain epidemiologic studies on the incidence of malignant lymphomas among workers performing jobs similar to those the employee performed throughout his federal career. The Office should also attempt to obtain information on the employee's exposure to solvents, throughout his federal employment. The Office should then refer the augmented case record to an appropriate medical specialist for an opinion whether the employee's death was causally related to his employment. Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

The medical evidence did not establish that appellant had a permanent impairment of his lungs causally related to his employment. This obstructive pulmonary disease was not shown to be causally related to or permanently aggravated by appellant's exposure to airborne contaminants in his employment. The only support for such a relationship was the statement of a Board-certified internist that appellant's obstructive pulmonary disease may be related to his occupational exposure as well as to smoking. This statement was equivocal and did not establish casual relation, especially in light of a Board-certified pulmonary specialist's statement that it was "overwhelmingly most likely" that appellant's chronic obstructive pulmonary disease was related to his history of smoking. Gene Collins, 35 ECAB 544 [1984].

The Board found that further development was necessary on the issue of whether appellant's exposure to airborne contaminants at work caused periods of employment-related disability from January 1980 to November 1981 when appellant worked for the employing establishment at a lower pay rate and at a lower grade than he had previously enjoyed. Appellant attributed this reduction in his pay rate during this period to his restriction by the employing establishment from performing all the duties of his position due to his pulmonary condition. If it is shown that his restriction was due to an employment-related condition, he would have an employment-related loss of wage-earning capacity during the period. The reasons for his reduction in pay rate during this period were not revealed in the case record, although it does show that appellant was transferred in January 1980 due to the ending of the Minuteman missile silo upgrading project and that during this period he was restricted by the employing establishment, based on medical evidence available at that time, from working in areas where he would be exposed to certain airborne contaminants. On remand the Office should determine, through contact with the employing establishment, the reason for appellant's reduced pay rate during the period from January 1980 to November 1981. Gene Collins, 35 ECAB 544 [1984].

The weight of the medical evidence failed to establish that appellant had any disability causally related to exposure to toxic chemical fumes at work. The weight of the medical evidence was represented by the well-rationalized reports of a Board-certified specialist in toxicology and preventive medicine, a Board-certified gastroenterologist, and a Board-certified psychiatrist of professorial rank, with whom the Office medical adviser concurred. These doctors concluded that appellant's only organically based condition was hepatitis, which they felt was probably contracted by appellant through the experimental blood transfusions he received. Only a Board-certified surgeon supported causal relation; however, his reports were based on a history of "massive exposure" to chemicals, which history was not substantiated by the employing establishment. Furthermore, although he is a Board-certified specialist, his specialties (surgery and thoracic surgery) did not render him particularly qualified to render an opinion. Carl E. Hendrickson, 35 ECAB 593 [1984].

The weight of the medical evidence failed to establish that appellant's condition was causally related to his employment. Appellant claimed that he had sustained central nervous system damage as a result of exposure to 14 chemical substances at work from 1976 to 1980. Although a Board-certified specialist in occupational medicine stated there was a possible relationship between appellant's condition and his work, the doctor admitted that such a hypothesis was impossible to prove. On the other hand, a Board-certified neurologist, in a well-rationalized report, after examining appellant and the entire case record, negated causal relationship and opined that appellant's symptoms were most likely viral. Additionally, another Board-certified neurologist negated causal relationship. Romeo E. Pena, 35 ECAB 850 [1984].

The case was not in posture for decision on the issue of whether appellant's disability due to anemia and a gastrointestinal condition was causally related to exposure to PCB in the course of his federal employment. Under the circumstances of this case, the Office should further develop the medical evidence. The augmented case record and appellant should be referred to a specialist for examination and an opinion on whether appellant's conditions are causally related to his employment-related PCB exposure. He should be advised that consultation with other specialists, including toxicologists, is authorized if he deems such consultation appropriate. William J. Tidmore, 35 ECAB 1039 [1984].

Cold

Medical evidence failed to establish appellant's throat condition was causally related to employment factors. Appellant submitted a statement describing the cold environment at work that he alleged caused his throat condition. He also submitted statements of coworkers substantiating the cold environment at work. The regional director of the employing establishment also indicated that appellant's office had had problems with cold temperatures. The only medical evidence submitted in support of the claim was the 1983 report of a Board-certified internist and nephrologist. This report diagnosed a condition of viral tonsillitis and repeated appellant's complaints about the temperature at work, but did not contain an opinion on causal relationship. An Office medical consultant reviewed the record and stated that appellant's tonsillitis was caused by "an infection with alpha strep which can strike anyone regardless of climate." The evidence was therefore insufficient to meet appellant's burden of proof. Henry Bond, 35 ECAB 512 [1984].

Disease

The evidence did not establish that appellant's viral encephalitis was causally related to factors of his employment. The Board-certified neurologist to whom the Office referred appellant and the case record, explained in detail why he considered appellant's viral encephalitis unrelated to the encephalitis of the patient from whom appellant alleged he contracted the disease. Although a Board-certified internist stated that appellant's illness was caused by his exposure to infectious disease at work, his opinion was based on a history, given to him by appellant, of exposure to patients with viral encephalitis. As the neurologist explained, the patient identified as having encephalitis with whom appellant had contact, had encephalitis caused by a bacterium, while appellant's encephalitis was the result of a viral illness. Patrick L. Dallaire, 35 ECAB 174 [1983].

Lead

The evidence established that appellant's condition of polyneuropathy was causally related to his exposure to lead in the course of his federal employment. Environmental samples at the firing range revealed appellant was exposed to hazardous levels of lead. The medical evidence supported appellant's claim. A Board-certified neurologist and a Board-certified internist supported causal relation. A second Board-certified neurologist stated that he could not conclusively establish the etiology of the condition but noted appellant's exposure at the time he became symptomatic and his subsequent improvement when exposure had ceased. In view of appellant's exposure, the medical evidence supporting the claim and the second neurologist's opinion as to the futility of further testing, the Board found appellant met his burden of proof. Charles G. Williams, 35 ECAB 614 [1984].

NOISE

The Board found that the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim, as the medical evidence failed to establish that appellant's hearing loss is not causally related to his exposure to noise in his employment. In its efforts to determine whether appellant's hearing loss, for which it had issued a schedule award, was causally related to his exposure to noise at work, the Office referred appellant to three Board-certified otolaryngologists. The Office's referral letter to all three otolaryngologists contained an inaccurate statement underestimating the period of time during which appellant was exposed to noise. In addition, the Office's referral letter to these three otolaryngologists stated that appellant was exposed to aircraft flight line noise of up to to 120 dBA, and that hearing protection was used during exposure. This statement did not make it clear that the exposure to 120 dBA was with the use of hearing protection, as the employing establishment indicated. In light of these discrepancies in the statements submitted to the otolaryngologists to whom it referred appellant and his case record, the Office did not meet its responsibility to have a proper evaluation based on an accurate history and medical background. Gerald W. Keoppel, 35 ECAB 885 [1984].

SMOKE

The medical evidence established that appellant's reaction to cigarette smoke was only a temporary aggravation which ceased when he left work. One doctor explained in his two reports that appellant's respiratory symptoms were "precipitated by exposure to cigarette smoke." He stated further that appellant should "be allowed to work in a smoke-free environment." A second doctor explained that appellant's exposure to irritants such as cigarette smoke "will not affect him unduly or should not cause permanent problems." There was no medical evidence that the underlying sensitivity to cigarette smoke was caused by appellant's employment or that further exposure would cause permanent damage. The medical evidence only showed that appellant had a temporary aggravation of his condition that ended when he stopped work. Russell E. Kimball, 35 ECAB 310 [1983].

EYE CONDITIONS

There appeared to be a conflict in the medical evidence regarding appellant's loss of vision in the left eye. An Office medical adviser reviewed the case record and opined that appellant's loss of vision in the left eye was not causally related to his federal employment but rather was due to an embolism from an arteriosclerotic plaque in one of his carotid arteries. On the other hand, a Board-certified ophthalmologist stated that hypertension can directly cause occular problems similar to those experienced by appellant. This opinion constituted sufficient evidence to require further development by the Office. Wiley L. Wall, 35 ECAB 413 [1983].

FECA, CONSTRUCTION OF (See also compensation and disability)

The Board found that appellant failed to establish that she is the widow of the deceased employee as she does not come within that class of beneficiaries as defined by section 8109. The state laws of Hawaii do not recognize common law marriages. Since she is not the "widow" of the employee she is not entitled to the unpaid portion of his schedule award. The Board further found that only those classes of persons specifically named in section 8109(a)(3)(D) of the Act are eligible for compensation due under a schedule award and unpaid at the time of the employee's death. When Congress made provision for a schedule of compensation for the total or partial loss of a member or function of the body in 1949, it made clear that in the absence of any surviving specified beneficiaries the unpaid schedule award would lapse. Should there be no such beneficiaries or should they die before receiving full payment, any balance remaining could be used to defray the employee's burial expenses. Any further balance not so applied would lapse. The disposition of unpaid schedule awards is provided for in a manner similar to that in New York Law and Longshoremen's Act. Mary Bee McCabe, 35 ECAB 218 [1983].

Section 8102(a) of the FECA sets forth the bases upon which an employee is eligible for compensation benefits. The section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty ***." The word "disability" is used in several sections of the Act. With the exception of certain sections, where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." This meaning, for brevity, is expressed as "disability for work." George J. Kemble, 35 ECAB 370 [1983].

The Board found that appellant was currently temporarily totally disabled and was entitled to compensation for an occupational-related lung condition. However, it was unclear from the evidence of record when the period of temporary total disability began. The Board found that because of appellant's lung condition, which the Office accepted as employment related, he is currently "disabled for work" or incapable, because of this condition, "to earn the wages which [he] was receiving at the time of such injury." Based on the Board's interpretation of the term "disability" therefore, appellant is entitled under 5 U.S.C. section 8102(a) to compensation. This was true despite the Office's finding that appellant had no loss of wages because he had retired voluntarily and therefore was not entitled to compensation. In view of the Office's acceptance of an employment-related occupational lung condition, which its Office medical adviser agreed resulted in total disability, the provisions of eligibility for compensation, and the definition of the term "disability," the Office's finding of ineligibility for compensation was inconsistent. It is unclear from the record when appellant's period of temporary total disability began. Once this date is determined, following any further action as the Office deems necessary, payment of compensation for appropriate periods of disability should be made. George J. Kemble, 35 ECAB 370 [1983].

The Board found that the Office improperly suspended appellant's compensation "until he cooperates with a vocational rehabilitation effort." In its April 15, 1983 order suspending compensation, the Office recognized that section 8113 allows it to reduce future benefits based on probable earning capacity when there has been a failure to undergo vocational rehabilitation without good cause. However, the Office erroneously concluded that this also was a basis for suspension. The Board modified the Office's order to delete the failure to undergo vocational rehabilitation as a proper basis for suspension. Ernie Chavez, 35 ECAB 479 [1983].

Section 8118 of FECA authorizes continuation of pay to an employee who has filed a timely claim for wage loss due to traumatic injury "for a period not to exceed 45 days" and "under accounting procedures and such other regulations as the Secretary [of Labor] may require." Pursuant to this section of the Act, the Secretary has promulgated regulations governing the applicability of continuation of pay for a recurrence of disability which state in part: " *** (b) If the employee so elects [after the recurrence of disability], the official superior shall again continue regular pay, providing the 45 calendar days were not all 'used' during the initial period of disability. This is applicable, however, only during a six month period beginning from the date the employee first returned to work following the initial disability. If a recurrence happens after the six months have expired, the employing agency should not continue regular pay, although some of the 45 days may remain 'unused.' In such instances, the employee is entitled only to compensation payable by the Office. (c) If the 45 day entitlement period has been exhausted, or six months have expired since the employee first returned to work, the employing agency is not required to continue regular pay. The Office shall be responsible for initiating payment of compensation. In such instance, the employee shall file claim for any wage loss on the appropriate Form CA-7 or CA-8." Melba Elaine Ford, 35 ECAB 924 [1984].

FORFEITURE UNDER SECTION 8106(b) (Formerly under claims, fraud)

Section 8106(b) of the FECA in pertinent part, states as follows: "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. *** An employee who—(1) fails to make an affidavit or report when required; or (2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section." Marcus Franklin Gill, 35 ECAB 505 [1984]; Thomas H. Capps, 35 ECAB 801 [1984]; David Martin, 35 ECAB 1144 [1984].

The Board found that the Office properly determined that appellant had forfeited his right to compensation for the period of March 27, 1977 to April 20, 1981 under section 8106(b)(2) of the FECA. The Office made two requests to appellant dated May 19 and June 26, 1981 for a detailed employment history covering the period August 19, 1976 to date. In a statement dated July 13, 1981 he informed the Office that from 1978 to 1980, working for Bill Heil Chrysler, he earned a total of $7,700 and that in 1980, working for Jordan Ford he earned $560. The earnings set forth in the itemized statement from the Social Security Administration were not consistent with appellant's statement. The Social Security Administration statement revealed that from Bill Heil Chrysler alone from 1978 to 1980 appellant earned $11,542.29. It also revealed that in those same years, 1978-1980, working for four other companies, he earned a total of $10,160.47. Appellant attempted to explain this discrepancy, stating that it represented the difference between his gross earnings, which were reported in the Social Security statement and his net earnings, which he reported to the Office. This does not explain appellant's failure to inform the Office of his earnings from four other companies from 1978 to 1980. Since the Office requested an earnings statement from appellant for the period of March 27, 1977 to April 20, 1981 and since appellant knowingly omitted a part of his earnings during that period the Office was correct in declaring a forfeiture for the entire period. The statute provides that the forfeiture shall be "with respect to any period for which the affidavit or report was required." Marcus Franklin Gill, Jr., 35 ECAB 505 [1984].

The Board requested that the Director of the Office submit a legal memorandum in this case. The Board indicated that appellant testified that he shared in the profits of operating a farm with his sons. Appellant indicated that his sons performed the physical labor while he provided advice and financial support and arranged for the sales of crops. The Board noted that in *Vernon Booth* the Board held that income consisting of profits from a business which constituted a return on investment could not be considered as earnings even if the profits were augmented by a claimant's personal attention to business. The Director of the Office, in response, filed a motion to remand on December 15, 1983. The Director stated that the evidence was insufficient to establish that appellant knowingly understated his earnings. He also stated that decision of the Office in this case was inconsistent with the Board's decision in *Booth*. He indicated that appellant's "earnings" since his employment injury were in the nature of a return on investment, profits from management and business acumen and were not "earnings" within the meaning of 5 U.S.C. section 8106(b). The Director therefore requested that the case be remanded. He indicated that, on remand, the Office would void the overpayment decision and issue a *de novo* decision on all aspects of the case. The Board granted the motion. Haran H. Golden, 35 ECAB 1180 [1984].

The Board found that appellant's compensation was subject to forfeiture from the date (third quarter of 1979) he began working. The Office had informed him in March 1977 that he had to report his employment earnings. Therefore his compensation was subject to forfeiture beginning on the date he began working; information in the case record was not specific as to date. Further development was necessary to determine that date. Thomas H. Capps, 35 ECAB 801 [1984].

The Board found that appellant was subject to the forfeiture provisions of section 8106(b) of the FECA for the period April 15, 1977 to April 26, 1979, because of his failure to report earnings as required under the section. The Office specifically advised appellant to notify the Office immediately upon return to work and to return any compensation received after that time. Appellant did return to work but did not communicate this fact to the Office. In July 1978, the Office wrote appellant requesting a report within 30 days on "all employment during the past 12 months and return signed release of information forms to the IRS and Social Security Administration." Appellant did not respond. The record showed the Office did not receive appellant's response to this request until May 11, 1979 after the Office issued its May 8, 1979 notice of suspension. Appellant failed to comply with the reporting provisions of section 8106(b) of the Act. Dale I. Williams, 35 ECAB 964 [1984].

The Board found that the Office properly determined that appellant knowingly failed to report earnings from self-employment during the period January 1, 1976 to April 11, 1981 and that pursuant to the provisions of 8106(b), he is subject to the forfeiture provisions. First, concerning the operation of section 8106(b) appellant was advised by the Office of the requirement that he report any earnings from employment or self-employment. If self-employed, such earnings would not be based on profit or loss but on what it would cost to have someone else do the same work. According to the investigative memorandum, appellant organized and played in a band beginning in November 1974 and had earnings until the band dissolved in October 1981. During this period he did not file a report with the Office regarding those earnings; on the contrary, he filed reports representing that he had no employment and no earnings. His argument that he had no earnings and therefore nothing to report to the Office because his expenses exceeded the amount of his income has not been accepted by the Board as a reasonable justification for the failure to report employment or earnings to the Office as required. David Martin, 35 ECAB 1144 [1984].

The Board further found that the case was not in posture for decision on the amount of the forfeiture and the collection of such amount. The Board noted that the case was remanded by the Office to its district office for further development. However, the August 10, 1982 letter informing appellant of a $80,487.89 forfeiture did not explain how the Office determined its latest computation and therefore did not afford appellant an opportunity to comment on whether it was accurate. In view of the fact that the amount of the forfeiture had been revised and recomputed on several occasions appellant should be afforded a detailed decision on how the amount was computed and be apprised of the overpayment procedures of Bulletin 80-35 prior to any recoupment action. David Martin, 35 ECAB 1144 [1984].

GASTROINTESTINAL CONDITIONS

With regard to appellant's contention that his gastrointestinal condition was precipitated and aggravated by the referral physican's "hard-nosed line of questioning" and "condescending attitude," the Board noted that the basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. Gaetan F. Valenza, 35 ECAB 763 [1984].

The evidence failed to establish that appellant's gastrointestinal condition was causally related to his September 4, 1981 medical examination by a physician to which appellant was referred by the Office. The Office accepted appellant's condition and paid him temporary total disability compensation from 1972 to 1982. The Office referred appellant for a routine medical evaluation to determine whether or not he had employment-related residuals. Appellant alleges he was injured in the course of that September 4, 1981 examination. The only medical evidence submitted in support of appellant's contention was the 1982 report from appellant's physician which merely reiterated appellant's contention that his gastrointestinal problems were related to his September 3, 1981 examination; the doctor did not address the issue of causal relation and did not provide a reasoned medical opinion in support of appellant's claim. Appellant had not established that his gastrointestinal problems were related to his medical examination for a pulmonary condition on September 4, 1981. Gaetan F. Valenza, 35 ECAB 763 [1984].

HAND INJURIES

The Board found that the Office improperly terminated appellant's compensation effective May 19, 1983 and improperly declared an overpayment for the period March 26 through May 18, 1983. The March 25, 1983 duty status report from a Board-certified orthopedic surgeon, upon which the Office relied to terminate appellant's compensation and to declare an overpayment, did not indicate that appellant could return to work as a carpenter, the job he held when injured, it concluded that appellant could perform light duty work. He also stated that appellant could cause further injury by not wearing gloves. However, he did not state, as the Office contended, that appellant could return to work as a carpenter with no restrictions other than wearing gloves. The medical evidence therefore indicated that appellant was still partially disabled. Herbert L. Baker, 35 ECAB 944 [1984].

HEAD INJURIES

The case was not in posture for decision on the issue of whether appellant sustained a displacement of a prosthesis in her left ear as a result of an employment-related injury on April 11, 1975 which necessitated surgery. Appellant's attending otologist/neuro-otologist consistently maintained that appellant struck her head on April 11, 1975 necessitating surgery in 1981 to replace the prosthesis. The initial denial of the claim was based on the premise that appellant did not strike her head. On reconsideration, the Office accepted that appellant struck her head but denied modification of the claim because aggravation of her ear condition was not established. On remand, the Office was instructed to modify its statement of accepted facts to reflect the fact that in addition to multiple contusions, appellant struck her head when she fell on April 11, 1975 and to develop the case further to determine whether the blow to appellant's head displaced her prosthesis which necessitated surgery and loss of time from work. Anna M. Polizzi, 35 ECAB 783 [1984].

HEARING LOSS (See also schedule awards, hearing loss)

The Board found that the Office acted properly in denying appellant's request to be sent for further audiological testing. The Office referred appellant to a Board-certified otolaryngologist to determine the extent of his hearing loss; he was sent for audiological evaluation on three occasions, with the last referral being accompanied by notification of the provisions of section 8123 of the Act. Appellant can end the suspension of his right to compensation at any time by submitting evidence that the obstruction has ceased, for example, by submission of an audiological evaluation by an otolaryngologist which includes a reliable audiogram. The record contained no evidence that the obstruction had ceased. Bernard O. Mills, 35 ECAB 273 [1983].

The Office evaluates industrial hearing loss in accordance with the standards of the National Institute for Occupational Safety and Health, using the frequencies of 1,000, 2,000, and 3,000 cycles per second. These standards are found in Chapter 6 of *Occupational Exposure to Noise*. Using these and other standards adopted by the Office and approved by the Board, the hearing loss in either ear must exceed an average at these frequencies of 25 decibels when the audiogram is based on an ISO-ANSI calibration, as was the case here, in order for there to be a compensable loss under the Federal Employees' Compensation Act. The first 25 decibels are discounted as having no significance with respect to the ability to hear everyday speech under everyday conditions. Edgar Dillon, 35 ECAB 336 [1983].

The Board found that the Office properly applied its standardized procedures to the

September 14, 1982 audiogram, and that under these standards appellant did not have a ratable loss of hearing. The evidence established that appellant had a hearing loss, but not sufficiently large to be ratable for the purpose of entitlement to compensation under the FECA. Edgar Dillon, 35 ECAB 336 [1983].

The case was not in posture for decision on the issue of whether appellant's hearing loss was causally related to employment factors. The statement of accepted facts provided to the referral physician contained inaccurate information concerning appellant's previous work history, particularly the dates of his military service. The Office incorrectly made findings of fact that the referral physician stated that appellant's hearing loss was due to his previous employment. The Office medical adviser who reviewed the case failed to address a medical report which was submitted subsequent to the referral examination; he also incorrectly stated appellant's period of federal employment, and concluded (where the report was not clear) that the referral physician believed appellant had a preexisting hearing loss. The referral physician relied in part on appellant's use of earmuffs or earplugs in negating causal relation. The Board noted that appellant stated that prior to 1976 he used earmuffs only in particularly noisy work. The Office was instructed to prepare an accurate statement of accepted facts and refer appellant with such statement and the medical evidence of record to a Board-certified otolaryngologist for complete otologic evaluation, audiometric testing and an opinion on causal relationship. Tony J. Fosko, 35 ECAB 644 [1984].

The Board found that the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim, as the medical evidence failed to establish that appellant's hearing loss was not causally related to his exposure to noise in his employment. In its efforts to determine whether appellant's hearing loss, for which it had issued a schedule award, was causally related to his exposure to noise at work, the Office referred appellant to three Board-certified otolaryngologists. The Office's referral letter to all three otolaryngologists contained an inaccurate statement underestimating the period of time during which appellant was exposed to noise. In addition, the Office's referral letter to these three otolaryngologists stated that appellant was exposed to aircraft flight line noise of up to 120 dBA, and that hearing protection was used during exposure. This statement did not make it clear that the exposure to 120dBA was with the use of hearing protection, as the employing establishment indicated. In light of these discrepancies in the statements submitted to the otolaryngologists to whom it referred appellant and his case record, the Office did not meet its responsibility to have a proper evaluation based on an accurate history and medical background. Gerald W. Keoppel, 35 ECAB 885 [1984].

The Board found that appellant failed to meet his burden of proof in establishing that his sudden neurosensory hearing loss was causally related to factors of his federal employment. The only medical evidence in the case record submitted by appellant was employing establishment hospital notes. However, the hospital notes signed by a physician whose name is not given did not address the issue of causal relationship. A Board-certified otolaryngologist and an Office medical consultant was of the opinion that appellant's sudden neurosensory hearing loss was not causally related to his federal employment. He stated that the hospital notes indicated a history of appellant awakening in the morning with the hearing loss. Stanley K. Takahaski, 35 ECAB 1064 [1984].

HEART CONDITIONS

Aggravation

The case was not in posture for decision on the issue of whether appellant's employment-related heart condition ceased by the date the Office terminated his compensation. First, the questions which accompanied the statement of accepted facts and on which the Board-certified cardiologist based his opinion appear to be leading in that they requested him to state his diagnosis relative to "preexistent and unrelated" conditions to the injury sustained on March 1, 1966. In addition, the Office asked the specialist to determine "when aggravated disability ceased," implying that it had ceased. Also, it did not first determine whether the coronary incident sustained on March 1, 1966 was a myocardial infarction or an episode of angina pectoris. The Board also noted that the report to the Office was dated April 9, 1982 even though the Multistage Treadmill Exercise Tests did not take place until April 14, 1982. It would appear therefrom that the impartial specialist based his opinion in this matter on his examination of appellant and prior to the time when all test procedures were completed. He did not address the treadmill exercise test results. For these reasons, the case must be remanded to the Office for further development, including referral to a Board-certified specialist. Stanislaw M. Lech, 35 ECAB 857 [1984].

EVIDENCE, MEDICAL OPINIONS

The Board found the case was not in posture for decision. Appellant submitted the reports of a Board-certified cardiologist who was his attending physician and a Board-certified internist in support of his contention that his heart condition was causally related to employment factors. The cardiologist stated that a causal relationship existed between appellant's duties as a fireman which exposed him to smoke, chemicals and pollutants and the development of coronary artery disease which he said was accelerated by the physical stress of the occupation. The internist also supported causal relationship, stating that the prolonged stress of appellant's employment accelerated his arteriosclerosis, precipitating his myocardial infarction, angina and disability. The Board noted that the medical report and clarification obtained from the Board-certified cardiologist to whom the Office referred appellant was speculative and not sufficient to resolve the issue of whether appellant's heart condition was caused or aggravated by employment factors or whether any employment condition was a permanent or temporary residual and the period of disability. The Office was instructed to further develop the record, in accordance with its responsibility to develop the evidence when it secures an opinion from an impartial specialist. Leonard W. Waggoner, 35 ECAB 461 [1983].

The evidence failed to establish that the employee's death due to cardiac arrest was causally related to his employment. The weight of the medical evidence was represented by the report of the only Board-certified specialist in cardiovascular disease represented in the record. The Office referred the employee's case record for resolution of a conflict in opinion on the issue of causal relation. Upon review of that record, he concluded "that there is no association between [the employee's] atherosclerotic picture or his demise to his former employment." As a Board-certified and impartial specialist, that opinion was to be accorded special weight. Margaret Rose (Stanley A. Rose), 35 ECAB 514 [1984].

The weight of the medical evidence established that appellant's disability beginning June 22, 1980 due to arteriosclerotic heart disease was causally related to factors of his employment. The Office found a conflict in the medical evidence between an internist and an Office medical adviser who was a nephrologist on whether appellant's disability was causally related to his employment stress. The Office, therefore, referred appellant to a Board-certified cardiologist of professorial rank who concluded that appellant's employment aggravated his hypertension which caused a permanent aggravation of his cerebral and coronary arteriosclerosis. An Office medical adviser reviewed the report and disagreed with that opinion. The Office initially attempted to refer appellant to a second Board-certified cardiologist of professorial rank. However, after appellant objected, the Office properly requested clarification from the first specialist. The first specialist in a well-rationalized report, reaffirmed his earlier conclusion that appellant's condition was causally related to his employment. This report represented the weight of the medical evidence. John W. Slonaker, 35 ECAB 997 [1984].

PHYSICAL OR EMOTIONAL STRESSES AND STRAINS

On remand, the Office should further develop the case record to determine whether appellant was involved in any employment-related stressful situations which aggravated his hypertension and/or precipitated, accelerated, aggravated, or proximately caused an acute anterior myocardial infarction on March 19, 1982, which was less than two weeks after appellant returned to light duty following an over four month absence from work due to an accepted condition of employment-related aggravation of hypertension due to emotional stress. If the Office finds there was a temporary aggravation, it should determine when the aggravation ceased. Wiley L. Wall, 35 ECAB 413 [1983].

The Board found the case was not in posture for decision. Appellant submitted the reports of a Board-certified cardiologist who was his attending physician and a Board-certified internist in support of his contention that his heart condition was causally related to employment factors. The cardiologist stated that a causal relationship existed between appellant's duties as a fireman which exposed him to smoke, chemicals and pollutants and the development of coronary artery disease whch he said was accelerated by the physical stress of the occupation. The internist also supported causal relationship, stating that the prolonged stress of appellant's employment accelerated his arteriosclerosis, precipitating his myocardial infarction, angina and disability. The Board noted that the medical report and clarification obtained from the Board-certified cardiologist to whom the Office referred appellant was speculative and not sufficient to resolve the issue of whether appellant's heart condition was caused or aggravated by employment factors or whether any employment condition was a permanent or temporary residual and the period of disability. The Office was instructed to further develop the record, in accordance with its responsibility to develop the evidence when it secures an opinion from an impartial specialist. Leonard W. Waggoner, 35 ECAB 461 [1983].

The Board found that the Office failed to meet its burden of establishing that the employee's death did not result from his employment. Based upon uncontroverted medical evidence from the Office's medical director, the Office determined on June 23, 1975 that the employee's January 10, 1973 death was employment related; it awarded appellant death benefits for over ten years until it rescinded this determination on June 30, 1983. In reopening the case, the Office sought the opinion of the first Office medical adviser. He supported the claim stating that although stress did not cause heart disease, he believed that in this instance employment stress precipitated the fatal myocardial infarction. The Office then obtained the opinion of a Board-certified cardiologist of professorial rank. However, he did not address the central issue of whether employment stress precipitated the fatal myocardial infarction. He opined that there was no relationship between the occupation and "the heart disease that . . . ultimately killed him." In so stating, he seemed to be expressing the opinion, shared by the first medical adviser, that employment stress did not cause the employee's heart condition but did not address the crucial issue of whether employment stress, superimposed on the underlying heart condition, precipitated the fatal myocardial infarction. The second Office medical adviser apparently interpreted the cardiologist's report as referring only to the cause of the heart disease. After reviewing the record, the second Office medical adviser commented that he concurred and that there was "no scientific evidence that stress causes coronary artery disease." As he did not address this central issue, his opinion did not support the Office in terminating appellant's death benefits. The Office then referred the case record to a Board-certified cardiologist of professorial rank. Although he concurred with the opinions of the first Office medical adviser and the first cardiologist that employment stress did not cause the employees's heart disease, he was the only physician to express the opinion that this stress did not precipitate the fatal event. His opinion was insufficient to establish that the employee's death did not result from factors of his employment because his sole rationale was that the myocardial infarction occurred in the middle of the night. Mary Jean Thoman (Richard C. Thoman), 35 ECAB 682 [1984].

The Office failed to meet its burden of establishing that it erroneously accepted appellant's myocardial infarction as employment related. The Office had accepted appellant's claim and paid compensation from 1974 to 1982. The doctor on whose report the termination of compensation was based stated that appellant was at home when the myocardial infarction had occurred and that nothing unusual had happened at work that day. The Office in its statement of accepted facts did not address the issue of whether appellant was subjected to pressure and stress during the course of his work day despite the fact that the claim was apparently accepted based on this premise. Moreover, the doctor did not address the question of whether pressure and stress during the course of a work day can precipitate a myocardial infarction in an individual such as appellant with a similar degree of atherosclerotic heart disease. In addition, the rationale offered by the Office medical

The weight of the medical evidence established that appellant's disability beginning June 22, 1980 due to arteriosclerotic heart disease was causally related to factors of his employment. The Office found a conflict in the medical evidence between an internist and an Office medical adviser who was a nephrologist on whether appellant's disability was causally related to his employment stress. The Office, therefore, referred appellant to a Board-certified cardiologist of professorial rank who concluded that appellant's employment aggravated his hypertension which caused a permanent aggravation of his cerebral and coronary arteriosclerosis. An Office medical adviser reviewed the report and disagreed with that opinion. The Office initially attempted to refer appellant to a second Board-certified cardiologist of professorial rank. However, after appellant objected, the Office properly requested clarification from the first specialist. The first specialist in a well-rationalized report, reaffirmed his earlier conclusion that appellant's condition was causally related to his employment. This report represented the weight of the medical evidence. John W. Slonaker, 35 ECAB 997 [1984].

FECA does not require the showing of the occurrence of unusual exertion or stress in the employment as a prerequisite for compensability. The claim is compensable if it is established that the performance of regular duties did in fact precipitate or cause the myocardial infarction. John J. Gallagher, 35 ECAB 1128 [1984].

Case was not in posture for decision. The impartial specialist selected to resolve the conflict in medical evidence reported that he could find no unusual stress to conclude stress aggravated or precipitated appellant's myocardial infarction. In light of the fact that the FECA does not require the showing of unusual stress, the impartial specialist should be requested to clarify his opinion by answering the following questions: (1) whether appellant's August 18, 1981 myocardial infarction was causally related to the stress of his job duties; (2) if so, whether the residuals of that myocardial infarction have any adverse effect on appellant's ability to work; and (3) whether appellant's underlying cardiac condition was related by causation or aggravation, to his federal employment. The Board further noted that in light of the significance placed on appellant's activities prior to his myocardial infarction on August 18, 1981, the statement of accepted facts should contain a more detailed description. John J. Gallagher, 35 ECAB 1128 [1984].

REMAND FOR DEVELOPMENT

The Board found that the case was not in posture for decision on the issue of whether appellant sustained any disability after August 13, 1981 causally related to his February 1979 employment-related myocardial infarction. The January 24, 1983 report of a Board-certified cardiologist established that as a result of the October 1974 employment-related infarction, appellant sustained a permanent impairment of his ventricular function, i.e. ventricular muscle. The cardiologist stated that as a result of the permanent damage to the ventricular muscle, appellant would have "the reduced ability of the myocardium to meet future stress and his significant coronary artery disease." An Office medical consultant described the permanent residual, loss of ventricular function, as follows: "There is an area of the left ventricle which does not contract which represents a dead, scarred area of the left ventricle, a consequence of the infarction. This does not appear to be a disabling factor although theoretically it could be. It appears that the disabling factor at this time is angina pectoris and that Mr. Christie does not exercise to the point of developing symptoms which could be explained on the basis of damage to his left ventricle from the 1974 infarction." In light of the principles enunciated in the *Hearn* and *O'Neill* cases, the Office should have determined whether as a result of the employment-related, permanent loss of ventricular function together with the preexisting coronary artery disease, appellant could perform the duties of a teacher supervisor, the position he held when he sustained the employment injury. On remand, the Office should take note of appellant's work restrictions described in the January 24, 1983 medical report and then determine whether appellant's employment-related, permanent loss of ventricular function and his preexisting coronary artery disease prevented him from performing the duties of a teacher supervisor. If appellant is prevented from returning to his former employment, the Office should make a determination with respect to appellant's wage-earning capacity. Laymon C. Christie, 35 ECAB 389 [1983].

On remand, the Office should further develop the case record to determine whether appellant was involved in any employment-related stressful situations which aggravated his hypertension and/or precipitated, accelerated, aggravated, or proximately caused an acute anterior myocardial infarction on March 19, 1982, which was less than two weeks after appellant returned to light duty following an over four month absence from work due to an accepted condition of employment-related aggravation of hypertension due to emotional stress. If the Office finds there was a temporary aggravation, it should determine when the aggravation ceased. Wiley L. Wall, 35 ECAB 413 [1983].

The Board found the case was not in posture for decision. Appellant submitted the reports of a Board-certified cardiologist who was his attending physician and a Board-certified internist in support of his contention that his heart condition was causally related to employment factors. The cardiologist stated that a causal relationship existed between appellant's duties as a fireman which exposed him to smoke, chemicals and pollutants and the development of coronary artery disease which he said was accelerated by the physical stress of the occupation. The internist also supported causal relationship, stating that the prolonged stress of appellant's employment accelerated his arteriosclerosis, precipitating his myocardial infarction, angina and disability. The Board noted that the medical report and clarification obtained from the Board-certified cardiologist to whom the Office referred appellant was speculative and not sufficient to resolve the issue of whether appellant's heart condition was caused or aggravated by employment factors or whether any employment condition was a permanent or temporary residual and the period of disability. The Office was instructed to further develop the record, in accordance with its responsibility to develop the evidence when it secures an opinion from an impartial specialist. Leonard W. Waggoner, 35 ECAB 461 [1983].

A conflict in medical evidence necessitating referral to an impartial specialist existed on the issue of whether the employee's death was due to his 1969 myocardial infarction. Two Board-certified cardiologists of professorial rank extensively discussed the process by which they thought that the employee's death was related to his accepted 1969 myocardial infarction. A third Board-certified cardiologist of professorial rank concluded that the employee's death was due solely to the underlying coronary artery disease and not the 1969 myocardial infarction. The case was remanded for resolution of the conflict in medical evidence. Esther Morginsky (Solomon Gross), 35 ECAB 540 [1984].

The Office did not meet its burden of proof in finding that appellant's employment-related disability had ceased by February 9, 1982. The Office based its decision to terminate appellant's compensation on the report of a Board-certified cardiologist who concluded that the December 27, 1966 employment-related aggravation of appellant's preexisting arteriosclerotic heart disease "ceased when his myocardial infarct healed some two or three months after the onset of the myocardial infarction." However, he did not provide any medical rationale supporting his conclusion that appellant's heart condition was only temporarily aggravated by his employment activities, and did not specifically address whether the December 27, 1966 myocardial infarction (accepted by the Office as employment related) left any permanent employment-related residuals (such as death of heart tissue). Leo Cohen, 35 ECAB 926 [1984].

Case was not in posture for decision. The impartial specialist selected to resolve the conflict in medical evidence reported that he could find no unusual stress to conclude stress aggravated or precipitated appellant's myocardial infarction. In light of the fact that the FECA does not require the showing of unusual stress, the impartial specialist should be requested to clarify his opinion by answering the following questions: (1) whether appellant's August 18, 1981 myocardial infarction was causally related to the stress of his job duties; (2) is so, whether the residuals of that myocardial infarction have any adverse effect on appellant's ability to work; and (3) whether appellant's underlying cardiac condition was related by causation or aggravation, to his federal employment. The Board further noted that in light of the significance placed on appellant's activities prior to his myocardial infarction on August 18, 1981, the statement of accepted facts should contain a more detailed description. John J. Gallagher, 35 ECAB 1128 [1984].

Case was not in posture for decision on whether appellant's myocardial infarction and subsequent disability were causally related to his employment. On a previous appeal, the Board set aside the Office's initial recission of the claim. Following remand, the Office referred appellant, along with the case record and a statement of accepted facts, to a Board-certified cardiologist of professorial rank. In a report prepared with another cardiologist, he reviewed appellant's medical history and discussed his findings. The report stated that it was "possible" that appellant's continuing to work on March 2, 1973 while experiencing chest pain "temporarily aggravated the underlying condition of coronary artery disease and myocardial ischemia," but that it was "unlikely" appellant's work caused "the onset of symptoms and/or the actual infarction." The report stated that myocardial infarctions are "generally caused" by the development of blood clots in already diseased blood vessels, and opined that it was "unlikely" that employment caused the blood clot or the underlying disease in appellant's case. The report further stated: "Once the occlusion of the coronary vessel evolved, [appellant's] continuing to work might have affected the actual amount of muscle damage that ensued." The Board found that further development was required because the above-mentioned report did not adequately address the issue of what role if any, appellant's physical exertion on March 2, 1973 played in the myocardial infarction and in his subsequent disability. Further, their conclusions regarding the effect of his exertion on that date in causing a temporary or permanent aggravation of his condition appeared to be inconsistent. The Board also noted that the report did not support their conclusions with adequate rationale or explanation. John C. Mattern, 35 ECAB 1140 [1984].

Case was not in posture for decision. Appellant attributed his myocardial infarction to "aggravation" caused by the nurse and physician at the health unit. The Office did not make a finding based on the *Schulz* decision as to whether the physical examination caused appellant's disability. The case was therefore remanded for the purpose of having a finding made on this question. Edward Louis Hoffman, 35 ECAB 1158 [1984].

TERMINATION OF COMPENSATION

The Office failed to meet its burden of establishing that it erroneously accepted appellant's myocardial infarction as employment related. The Office had accepted appellant's claim and paid compensation from 1974 to 1982. The doctor on whose report the termination of compensation was based stated that appellant was at home when the myocardial infarction had occurred and that nothing unusual had happened at work that day. The Office in its statement of accepted facts did not address the issue of whether appellant was subjected to pressure and stress during the course of his work day despite the fact that the claim was apparently accepted based on this premise. Moreover, the doctor did not address the question of whether pressure and stress during the course of a work day can precipitate a myocardial infarction in an individual such as appellant with a similar degree of atherosclerotic heart disease. In addition, the rationale offered by the Office medical adviser erroneously suggested that an at-home injury is *per se* noncompensable. Due to these deficiencies, the Office failed to meet its burden of proof. Patrick Costello, 35 ECAB 712 [1984].

HERNIA

The Board found that appellant's hernia condition was not causally related to his federal employment. A Board-certified surgeon submitted reports, dated October 24, 1978 and April 13, 1981, which tended to support appellant's claim that his bilateral hernia condition was causally related to the employment incident of October 10, 1975. However, his April 13, 1981 report which addresses the issue of causal relationship merely speculated with respect to the etiology of appellant's bilateral hernia condition. As such, these reports can be afforded little probative value and were not sufficient to establish causal relationship. Therefore, appellant's allegation that he sustained a hernia condition at work on October 10, 1975 could not be sustained. Jimmie D. Brewer, 35 ECAB 197 [1983].

HYPERTENSION

On remand, the Office should further develop the case record to determine whether appellant was involved in any employment-related stressful situations which aggravated his hypertension and/or precipitated, accelerated, aggravated, or proximately caused an acute anterior myocardial infarction on March 19, 1982, which was less than two weeks after appellant returned to light duty following an over four month absence from work due to an accepted condition of employment-related aggravation of hypertension due to emotional stress. If the Office finds there was a temporary aggravation, it should determine when the aggravation ceased. Wiley L. Wall, 35 ECAB 413 [1983].

The weight of the medical evidence established that appellant's disability beginning June 22, 1980 due to arteriosclerotic heart disease was causally related to factors of his employment. The Office found a conflict in the medical evidence between an internist and an Office medical adviser who was a nephrologist on whether appellant's disability was causally related to his employment stress. The Office, therefore, referred appellant to a Board-certified cardiologist of professorial rank who concluded that appellant's employment aggravated his hypertension which caused a permanent aggravation of his cerebral and coronary arteriosclerosis. An Office medical adviser reviewed the report and disagreed with that opinion. The Office initially attempted to refer appellant to a second Board-certified cardiologist of professorial rank. However, after appellant objected, the Office properly requested clarification from the first specialist. The first specialist in a well-rationalized report, reaffirmed his earlier conclusion that appellant's condition was causally related to his employment. This report represented the weight of the medical evidence. John W. Slonaker, 35 ECAB 997 [1984].

IDIOPATHIC FALLS

In *Gertrude E. Evans* and *Martha G. List* the Board stated that an injury resulting from an idiopathic fall is not within the coverage of the Act. The Board defined an idiopathic fall as a fall ". . . where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment . . ." The Board indicated that such an injury was not compensable because it did not arise out of a risk connected with the employment. The Board, however, went on to point out that the mere fact that the cause of a particular fall cannot be ascertained, or the reason why it occurred cannot be explained, does not establish that it was due to an idiopathic condition. The Board indicated that this followed the general rule that an injury occurring on the industrial premises during working hours is compensable unless the injury is established to be within an exception to the general rule. In *List*, the Board held that if the record does not establish that the particular fall was due to an idiopathic condition, it must be considered as merely an unexplained fall, one which is distinguishable from a fall in which it is definitely proved that a physical condition preexisted the fall and caused the fall. Albert E. Hermann, Jr., 35 ECAB 167 [1983].

In *Evans*, the Board pointed out that the legal analysis of the case does not end with the determination that appellant's injury was caused by an idiopathic fall. Although a fall is idiopathic, an injury resulting from it is compensable if some job circumstance or working condition intervenes in contributing to the incident or injury. The Board cited as examples situations in which an employee, instead of falling directly to the floor, strikes a part of his body against a wall, a piece of equipment, furniture, machinery or some similar object. Albert E. Hermann, Jr., 35 ECAB 167 [1983].

The case was not in posture for decision. The Office did not identify the evidence or give rationale for its conclusion that appellant's fall was idiopathic. One physician indicated that the etiology of appellant's fall was undetermined. He and appellant stated that appellant did not have a similar fall prior to the day of injury. The evidence was unclear as to whether the fall was caused by a physical, nonoccupational condition. The case must be remanded for further development on the issue of whether appellant's fall on March 20, 1982 was an idiopathic fall or an unexplained fall. Should the Office on remand conclude that the fall was idiopathic, the claim cannot be rejected solely on that basis. Appellant testified that in his fall he hit a railing, a storm door and a set of steps. The Office should consider appellant's contention and determine whether any of these objects may be considered factors of employment. On remand, the Office should further develop the case record to determine whether appellant hit any objects in his fall before striking the immediate supporting surface which may have caused or contributed to his injury. The Office should prepare a statement of accepted facts, including definitions of an idiopathic fall and an unexplained fall and a determination of whether appellant, in his fall, hit any intervening objects. The Office should then submit the statement to the examining physicians for an opinion on the cause of appellant's fall and injury. If they should determine that appellant's fall was idiopathic, these physicians should be asked whether his injury was caused or worsened by striking an object found by the Office to be a factor of the employment. Albert E. Hermann, Jr., 35 ECAB 167 [1983].

It is a well-settled principle of workers' compensation law, and the Board has so held, that an injury resulting from an idiopathic fall—where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment—is not within the coverage of the FECA. Such an injury does not arise out of risk connected with the employment and it, therefore, is not compensable. Fay Leiter (Simon Zuckerman), 35 ECAB 176 [1983]; Josephine M. Callahan, 35 ECAB 709 [1984]; MacArthur Crenshaw, 35 ECAB 1073 [1984]; Edmond J. Marcinkiewicz, 35 ECAB 1076 [1984].

However, as the Board has made equally clear, the fact that the cause of a particular fall cannot be ascertained, or that the reason it occurred cannot be explained, does not establish that it was due to an idiopathic condition. This follows from the general rule that an injury occurring on the industrial premises during working hours is compensable unless the injury is established to be within an exception to such general rule. Fay Leiter (Simon Zuckerman), 35 ECAB 176 [1983].

It is well-settled, and the Board has recognized on numerous occasions, that although a fall is idiopathic, an injury or death resulting from it is compensable if "some job circumstance or working condition intervenes in contributing to the incident or injury; for example, the employee falls onto, into, or from an instrumentality of the employment", or where, instead of falling directly to the floor on which he has been standing, the employee strikes a part of his body against a wall, a piece of equipment, furniture, or machinery, or some like object. MacArthur Crenshaw, 35 ECAB 1073 [1984]; Edmund J. Marcinkiewicz, 35 ECAB 1076 [1984].

The evidence established that the employee's 1969 fall was due to an idiopathic condition. The question of the cause of the fall was a medical one. A Board-certified neurologist's report established that the employee's fall was due to a seizure; his conclusion was based on and consistent with the other medical evidence in the record. The reports of other doctors had less weight because they did not show an awareness of the witnesses' account of the incident. Fay Leiter (Simon Zuckerman), 35 ECAB 176 [1983].

The Board found that appellant's April 8, 1983 fall at work was not sustained in the performance of duty. The evidence of record established that appellant's fall was idiopathic in nature, without intervention by any factor of employment, and therefore is not compensable. A specialist, Board-certified in internal medicine, hematology and medical oncology, opined after obtaining a neurological consultation and reviewing radiological tests that the etiology of appellant's episode of transient unconsciousness was "not entirely determined," that based on the abnormal CT scan it was possibly a stroke or seizure, but that left cerebral metastasis could not be ruled out entirely. The Office medical adviser who reviewed all the evidence of record, opined that the April 8, 1983 episode was due to a stroke or seizure, and that it and the resulting fall were not due to any factors of employment. Josephine M. Callahan, 35 ECAB 709 [1984].

Appellant has the burden of establishing that she struck an object connected with her employment during the course of her idiopathic fall. Neither appellant, nor her coworkers could state whether appellant fell directly to the floor or struck an intervening object. Appellant's statement that she "would assume" she struck an object other than the floor because of the condition of her left eye and swelling of her left temple was speculative and did not establish that she struck an object connected with her employment during the course of her idiopathic fall. Josephine M. Callahan, 35 ECAB 709 [1984].

The evidence established that the employee's falls were idiopathic in nature and did not constitute an injury within the meaning of FECA. The medical evidence established that appellant had an epileptic condition and a history of seizures commencing three years prior to the 1981 incident. A Board-certified orthopedic surgeon's report made it clear that the May 1981 episode was attributable to an abnormal physical condition. Appellant contended that he struck the baseboard of the employing establishment wall during his second seizure on May 21, 1981. Appellant has the burden of establishing his allegation that he struck an object connected with the employment during the course of his idiopathic collapse. The weight of the evidence was represented by the signed statements of the two nurses on duty at the time in question who indicated that they caught and lowered appellant to the floor to keep him from injuring himself. As appellant testified at the hearing, he "blanked out" at the time of the seizure and did not regain consciousness until after the seizure had ended. A statement of record indicated that appellant fell to the floor but did not state that appellant's head had hit an intervening object. MacArthur Crenshaw, 35 ECAB 1073 [1984].

The Board found that the evidence established that the employee's fall was idiopathic in nature and did not constitute an injury within the meaning of the FECA. Appellant had the burden of establishing that he struck an object connected with the employment during the course of his idiopathic collapse. The evidence indicated that appellant lost consciousness while speaking with fellow employees and fell directly to the floor. There was no evidence indicating that he struck any object, other than the floor, during the course of his fall at work on the date in question. Edmund J. Marcinkiewicz, 35 ECAB 1076 [1984].

INJURY, FACT OF

In general

As the Board has stated, an alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action. He has the burden of establishing the occurrence of the alleged injury at the time, place, and in the manner alleged. Rex A. Lenk, 35 ECAB 253 [1983]; Joshua Fink, 35 ECAB 822 [1984].

While the burden is on a claimant to establish that he sustained an injury at the time, place, and in the manner alleged, his statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by substantial evidence. Corroboration by an eyewitness or other evidence is not necessary when the claimant's statements are consistent with the surrounding facts and circumstances and his subsequent course of action. James R. Fletcher, 35 ECAB 525 [1984]; Stephen E. Fraser, 35 ECAB 760 [1984].

A person who claims benefits under the FECA has the burden of establishing the essential elements of his claim, including the fact that he sustained an injury while in the performance of duty, and that he had disability as a result. Although an injury does not have to be confirmed by eyewitnesses, the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. He has the burden of establishing the occurrence of the alleged injury at the time, place, and in the manner alleged by a preponderance of the reliable, probative, and substantial evidence. An employee has not met this burden where there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Joseph A. Fournier, 35 ECAB 1175 [1984].

Evidence, credibility of

The Board found that the employment incident of moving a bench occurred as alleged. The Board further found that the case was not in posture for decision with respect to the issue of whether appellant's disability was causally related to the employment incident. The record established that appellant sought medical attention soon after experiencing pain, and that when he was first examined by a Board-certified family practitioner he complained of pain in the left hip, leg, groin, and testicle, and that doctor found tenderness in the left iliac crest. After the finding of a herniated disc by a Board-certified neurosurgeon, the family practitioner stated in his 1982 report that appellant's "presenting symptoms" on the date in question were "entirely consistent with an early disc injury," and that it is "entirely possible" that a disc injury occurred if appellant participated in moving the 300-pound bench. A Board-certified neurologist and an Office medical consultant also stated that moving the bench "could account" for the discogenic disease, and that it should be determined whether appellant "actively" participated in moving the bench and whether he experienced any symptoms at the time. The claims examiner's memorandum stated that it was "clear" that appellant helped move the bench. Therefore, under the circumstances, the case record should be further developed to determine whether appellant's disability was causally related to the incident of helping move the bench. Reginald J. Adams, 35 ECAB 139 [1983].

The Board found that on the date in question the truck appellant was parking was bumped from behind by another truck in the process of parking. At the time his truck was bumped appellant was standing on the running board in the process of leaving the cab. The evidence did not support that he fell or struck any objects as a result of the bumping incident or that his vehicle was pushed forward any measurable distance. However, the Board further found that the case was not in posture for decision on the issue of whether appellant's claimed disability was causally related to that incident. The statements by appellant, witnesses and the employing establishment establish that the truck appellant was parking was bumped from behind by another truck. While there is medical evidence in support of appellant's claim that he was disabled as a result of this incident, the evidence was insufficient to meet his burden of proof particularly since the facts upon which it was based were not clear. However, the evidence, including the bumping incident and appellant's statement to a physician, was sufficient to require further development by the Office. Robert F. Walker, 35 ECAB 172 [1983].

The Board found that, under the circumstances of this case, appellant had discharged his burden of proof establishing that he sustained an employment related injury on April 11, 1982, as alleged, and that he was totally disabled as a result of that injury from April 11, 1982 until May 13, 1982. Immediately following the alleged injury, appellant informed his supervisor that he had injured his back. He explained that he had bent over and when he straightened his back "went out." Another employee took appellant to the hospital where he was given emergency treatment and instructed to remain off duty and seek follow-up care from a doctor who subsequently hospitalized him for physical therapy. His condition was diagnosed as "acute low back strain" which the medical evidence showed caused total disability until May 13, 1982. The history of the injury as reported on the medical reports was consistent with the statements reported to appellant's supervisor and on the notice of injury. All medical reports indicated that appellant's condition was causally related to the history given of the employment incident. Rex A. Lenk, 35 ECAB 253 [1983].

The Board found that appellant's claim filed on April 16, 1983 and his letter submitted July 18, 1983 constituted the filing of a claim for an injury on or about November 24, 1982 with disability commencing on March 12, 1983. The Board further found that an employment incident of picking up a mail sack and feeling pain in the lower back occurred on or about November 24, 1982. The reports of two doctors and the employing establishment physician who examined appellant were consistent with a history of appellant injuring his back while lifting a mail sack on or about November 24, 1982. Although the claim form on its face was inconsistent with an injury having occurred on that date, the clarifying statement of appellant submitted on July 18, 1983 and the June 17, 1983 statement of a coworker, compensated for any inconsistency. James R. Fletcher, 35 ECAB 525 [1984].

The Board found that the evidence established that on July 13, 1983 appellant tripped and fell over pavement in front of the employing establishment's entrance, as alleged. In the instant case, there were no such inconsistencies in the evidence of record as to cast serious doubt upon the validity of the claim. Appellant had maintained that he injured his back on July 13, 1983 as a result of tripping and falling on pavement located "outside of employees' entrance." Appellant's statement, the contemporaneous medical evidence of record and even the safety specialist's statement reveal that appellant tripped and fell over pavement in front of the employing establishment's entrance on July 13, 1983, as alleged. The case was remanded to the Office for a determination of whether appellant's injury occurred in performance of duty. Stephen E. Fraser, 35 ECAB 760 [1984].

The Board found that appellant failed to establish that he sustained an employment-related injury in August 1982. Appellant failed to state a specific date on which the alleged incident occurred. Although he reported the history of the alleged incident to his attending physician, appellant did not seek medical treatment until approximately seven months later, and did not file a claim for compensation until approximately eight months after the alleged incident. Appellant alleged that he reported the incident to the First Officer and the captain; however, he has not produced statements to corroborate his story. The only statement on file from his supervisor indicated that he had no knowledge of appellant injuring his back. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment in connection therewith may, if otherwise unexplained, cast sufficient doubt on a claimant's statements concerning the injury as to outweigh the evidentiary value of such statements in determining whether the claimant has established a *prima facie* case. Statements made by appellant in this case in explanation of his delay in filing official notice of injury and his failure to obtain medical treatment were not corroborated by those individuals who, according to appellant's own testimony, should be in a position to so corroborate. Joshua Fink, 35 ECAB 822 [1984].

The Board found that on December 19, 1980 an employment incident occurred, as originally found by the Office. Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation. This holds true where, as here, the Office later decides that it had erroneously accepted the claim. With respect to the issue of whether appellant sustained an injury in the performance of her federal employment on December 19, 1980, the Board noted that the Office failed to meet its burden of proof. In the present case the Office determined that appellant sustained an injury in the performance of duty on December 19, 1980 and paid compensation for approximately twenty months. At the time the Office decided to review its original acceptance of her claim in October 1982, the employing establishment had already controverted the claim submitted by appellant. On her claim form, and in subsequent statements, she alleged that an incident occurred on the employing establishment up escalator; shortly thereafter she felt pain in her low back and stomach, which she reported to her supervisor; she proceeded to receive medical treatment from the employing establishment nurse and from two doctors who provided histories of injury corresponding with the history of an incident and injury on the escalator on December 19, 1980. Under these circumstances presented by this case, the Office failed to establish that appellant did not sustain an injury in the performance of duty as alleged. Since the Board found that appellant sustained an injury in the performance of duty as alleged, the case will be remanded to the Office for further development of the issue of whether appellant's disability had ceased by July 28, 1982, the date her compensation was terminated. Vivien L. Minor, 35 ECAB 1081 [1984].

The evidence failed to establish appellant's injury occurred as alleged. Appellant's assertion that he injured himself after collecting mail from two collection boxes located outside of the Blue Cross Building at 25 Acorn Street on August 9, 1982 was not supported by the evidence of record. Both appellant and the employing establishment agreed that the Blue Cross Building at 25 Acorn Street was on the route assigned to appellant on August 9, 1982; that on that day the Blue Cross Building was closed because it was a state holiday; and that as a result, appellant did not have access to any collection mail normally placed in trays inside the building. Moreover, investigation by the employing establishment revealed that there are not any collection boxes located outside the Blue Cross Building at 25 Acorn Street, as appellant claimed, but rather that the nearest outdoor collection box is located two blocks away at 33 Acorn Street. Appellant's claim was further undermined by the inconsistencies in the record with regard to the manner in which the injury occurred. Additional doubt was cast upon appellant's claim by the lapse of time between the date the injury allegedly occurred and the date that appellant first sought medical treatment for it. Appellant was allegedly injured on August 9, 1982, but he continued to work without apparent difficulty until August 26, 1982 when he sought medical treatment for the first time. The first notification of the injury to the employing establishment substantiated by the record was not made until August 26, 1982, the date appellant completed the claim form. In view of the inconsistencies in the evidence with respect to the place and manner in which the injury allegedly occurred, together with the delayed filing of the claim and the absence of any persuasive medical evidence of causal relationship, appellant has failed to meet his burden of proving that he sustained an injury in the peformance of duty. Joseph A. Fournier, 35 ECAB 1175 [1984].

LAW ENFORCEMENT OFFICERS (Section 8191)

The Board found that the evidence did not establish that appellant was engaged in the apprehension or attempted apprehension of a federal offender at the time of his injury so as to bring him under section 8191. At the time of his injury, appellant was engaged in a local police matter, investigation of a possible traffic violation. It was only information later developed by the police department that the person arrested by appellant was determined to be a possible federal offender. In similar situations, the Board has held that later discovery of a federal crime or potential federal crime arising out of local activity during which a police officer was injured does not in itself bring the injury within the scope of section 8191. Rocco A. Ranaudo, 35 ECAB 689 [1984].

There was no evidence of record which established that at the time of injury appellant was engaged in the apprehension of a person "who at that time was sought by a law enforcement authority of the United States for the commission of a crime against the United States" as set forth by section 8191(1)(B). The January 4, 1982 statement from the INS did not acknowledge that that agency knew as of January 10, 1977 that the person arrested by appellant on October 1, 1978, was in violation of federal law. Rocco A. Ranaudo, 35 ECAB 689 [1984].

The Board found that even applying a liberal interpretation of the term "performance of duty" to the facts in this case resulted in the conclusion that appellant was not in the performance of his duties as a uniformed offier of the Secret Service at the time of his self-inflicted head wound. Without reaching the issue of the propriety of application of Office Program Memoradum 270, the Board found that applying the standards of Program Memorandum 219 to the facts of appellant's case resulted in the finding that while appellant may have been eligible for benefits as a law enforcement officer under section 8191 he was not in the performance of his official duties as a law enforcement officer at the time of his self-inflicted gunshot wound. Even under the most liberal interpretation, the act of deliberately placing oneself in the situation of self-inflicting a gunshot wound would be such a deviation from the performance of duty as to remove the action from the coverage of the Act. Mark A. Cognetti, 35 ECAB 734 [1984].

The Board granted the motion to remand. The Director stated that appellant "may be entitled to benefits," and that "[i]t should be determined with specificity whether the individual whom appellant was attempting to apprehend was in the process of committing a Federal crime." The Director further stated that "[t]he facts indicate that appellant was attempting to apprehend an individual for possessing and discharging a firearm," and stated that if it is determined that the individual's possession or discharge of the weapon was in violation of Federal law, it would not be necessary that appellant knew at the time that a Federal crime had been committed. The Director stated that the Office would issue a *de novo* decision following further development of the case. Joseph F. McVeigh, 35 ECAB 1183 [1984].

Under the FECA an individual seeking compensation benefits has the burden of establishing the essential elements of his claim. Accordingly, in the present case, appellant has the burden of establishing that his injury occurred under the circumstances enumerated in section 8191 of the Act, the section pertaining to compensation benefits for local law enforcement officers under certain conditions. Lewis J. Angelone, 35 ECAB 747 [1984].

The Board found that appellant had failed to sustain his burden of proof in establishing that his injury occurred under circumstances which would be compensable under section 8191 of FECA. There was no evidence in the case record to suggest that the three youths whom appellant was chasing at the time of his injury were being sought by federal authorities for the commission of a crime against the United States (5 U.S.C. section 8191(1)(B)), or were being sought as material witnessess in a criminal proceeding instituted by the United States (5 U.S.C. 8191(1)(C)), or that appellant was at the time of his injury engaged "in protecting or guarding a person held for the commission of a crime" (5 U.S.C. section 8191(2)). Accordingly, the only remaining questions are whether appellant was engaged in "the apprehension or attempted apprehension of any person for the commission of a crime against the United States" (5 U.S.C. section 8191(1)(A)) or whether appellant was engaged in "the unlawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States" (5 U.S.C. section 8191(3)). With respect to the possible application of section 8191(1)(A), there is no evidence in the case record that the three youths in question had committed a federal crime. Accordingly, the evidence failed to establish that appellant was engaged in "the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States." Lewis J. Angelone, 35 ECAB 747 [1984].

Because there was no evidence of any tangible threat to Postal Service property (no substantial evidence of any potential federal crime), it is not necessary for the Board to decide at this time whether the subjective intent of an individual police officer to prevent a federal crime could ever be sufficient, in and of itself, to bring the officer under the coverage of 5 U.S.C. section 8191(3). Lewis J. Angelone, 35 ECAB 747 [1984].

Section 8191(3) of the FECA provides in pertinent part:"[A]n eligible officer is any person who is determined by the Secretary of Labor in his discretion to have been on any given occasion—*** (3) a law enforcement officer and to have been engaged on that occasion in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States; and to have been on that occasion not an employee as defined in section 8101(1), and to have sustained on that occasion a personal injury for which the United States would be required under subchapter I of this chapter to pay compensation if he had been on that occasion such an employee engaged in the performance of his duty. *** " Stephen Spiro, 35 ECAB 1118 [1984].

The legislative intent of section 8191 was expressed by Senator Yarbrough, one of the sponsors of this portion of the legislation enacted as section 8191, who stated in part: "A clear-cut case deserving benefits is presented when an officer is attempting to prevent a crime but may not be in the process of actually apprehending a person for the commission of a crime against the United States.

"He moves in to stop a crime before it is committed. For instance, a city policeman may be standing outside a national bank and may attempt to prevent the entrance of a man holding a revolver. If the policeman is then injured, does his case fall within the scope of the bill? I believe it should be clearly stated. *** It applies to the policeman shot down when he tries to halt a man starting into a bank with a pistol and tries to prevent what looks like a crime, rather than waiting and trying to apprehend the criminal after a crime. *** It seems to me, . . . that the prevention of Federal crimes should be recognized as being of as great benefit to society as the apprehension of the criminal after the crime." Stephen Spiro, 35 ECAB 1118 [1984].

Appellant was injured after inspecting a bank's premises in response to a faulty bank alarm. There was no evidence in the record that a crime had actually been committed, or that someone was preparing to commit a crime, or that a crime was in progress at the time of injury. There was no evidence that anyone, other than appellant, his coworker/partner and the maintenance engineer, were on the premises at the time of appellant's injury. Therefore, in keeping with the context of section 8191(3) and the legislative intent behind the enactment of this section, appellant did not sustain a personal injury while engaging in the act of lawful prevention of or the lawful attempted prevention of a crime against the United States, and therefore he is not an "eligible officer" under 5 U.S.C. section 8191(3). Thus, section 8191 does not apply to this injury. Stephen Spiro, 35 ECAB 1118 [1984].

LEG CONDITIONS

The case was not in posture for decision due to a conflict of medical opinion concerning whether the December 5, 1978 employment injury caused a temporary or permanent aggravation of appellant's venous condition of the leg. The Office medical adviser who reviewed the case noted there was a conflict of medical opinion and stated that the venogram results supported one doctor's opinion that the effects of the employment injury were temporary. While the second doctor's apparent unawareness of the venogram results somewhat diminished the weight of his report, the report still had sufficient weight to create a conflict. On remand, the Office should refer appellant to an appropriate Board-certified impartial specialist for a rationalized opinion concerning whether the 1978 employment injury caused a temporary or permanent aggravation of appellant's underlying condition. If the specialist believes the employment injury caused only a temporary aggravation, he or she should state when the aggravation ceased. The specialist should address whether the employment injury caused a permanent aggravation of the underlying condition and whether there are permanent residuals of the employment injury, including an increased sensitivity to reinjury and reinfection, which prevent appellant from continuing in his usual employment. Wayne D. Hackney, 35 ECAB 718 [1984].

"MAILBOX" RULE

It is presumed that a letter mailed to an individual in the ordinary course of business was received. Edward Thomas Johnston, 35 ECAB 910 [1984].

MEDICAL EXAMINATION

IN GENERAL

An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. Bernard O. Mills, 35 ECAB 273 [1983]; William G. Saviolidis, 35 ECAB 283 [1983]; Kalman Abramowitz, 35 ECAB 552 [1984].

Section 8123 of the FECA authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary. Subsection (d) of section 8123 states that: "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." Bernard O. Mills, 35 ECAB 273 [1983].

OBSTRUCTION OF

The Board found that the Office acted properly in denying appellant's request to be sent for futher audiological testing. The Office referred appellant to a Board-certified otolaryngologist to determine the extent of his hearing loss; he was sent for audiological evaluation on three occasions, with the last referral being accompanied by notification of the provisions of section 8123 of the Act. Appellant can end the suspension of his right to compensation at any time by submitting evidence that the obstruction has ceased, for example, by submission of an audiological evaluation by an otolaryngologist which includes a reliable audiogram. The record contained no evidence that the obstruction had ceased. Bernard O. Mills, 35 ECAB 273 [1983].

The Board found that the Office properly suspended appellant's right to compensation pursuant to section 8123(d) of the Act. Because of a conflict in the medical evidence, the Office twice referred appellant to a Board-certified orthopedic surgeon. Both of these referral letters notified appellant of the consequences of obstructing the examination and quoted section 8123(d) of the Act. Appellant did not keep his appointments and failed to supply an adequate explanation for his actions. (There was evidence in the case record that appellant had resided in Germany and conflicting evidence as to when he returned to the U.S.). Appellant did not respond to numerous requests by the Office for information as to his physical whereabouts for the purpose of rescheduling the impartial examination. Under these circumstances, the Office's action in suspending appellant's right to compensation was entirely correct. Thomas H. Elias, 35 ECAB 751 [1984].

If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee. Karen K. Cassell, 35 ECAB 1053 [1984].

The Board found that 5 U.S.C. section 8123(d) does not provide a basis for the rejection of a claim for compensation; rather it suspends the right of an employee to compensation during the period she refuses to submit to an examination. The Board therefore found that the Office improperly rejected appellant's claim for compensation under this section. The Board noted that the Office initially rejected appellant's claim because it found that she had obstructed the impartial medical examination. However, the record indicates that subsequent to the November 30, 1982 Office decision appellant requested reconsideration and noted that she had attempted to reschedule an appointment with the impartial specialist, with no success. She also submitted additional medical evidence. The Office requested that appellant submit medical records relating to her May 1982 nonemployment-related leg injury, and when she did not respond, the Office denied her request for modification after a review of the merits. In determining the merits of appellant's request for reconsideration, an Office claims examiner recommended that modification of the Office's prior "obstruction" decision be denied on the ground that appellant had not sustained her burden of proof to establish her claim, in that she had not submitted the requested medical evidence. A second claims examiner agreed, and noted that the evidence of record was insufficient to establish appellant's claim. The Board found that the Office's February 24, 1984 compensation order denying appellant's request for modification was inconsistent with the Office's initial decision of November 30, 1982. The Office's February 24, 1984 compensation order denied modification based on burden of proof grounds, and not on grounds of obstruction as was the case in the November 30, 1982 decision. When appellant submitted new medical evidence the Office should have made a merit decision regarding appellant's back injury claim and not merely have affirmed an "obstruction" decision. Therfore, a *de novo* decision on all aspects of the case should be made. Karen K. Cassell, 35 ECAB 1053 [1984].

REFUSAL TO UNDERGO

Section 8123 of the FECA authorizes the Office to require an employee who claims disability as a result of federal employment or who is already in receipt of compensation for such disability to undergo physical examination as it deems necessary. Subsection (d) of section 8123 states that "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness. William G. Saviolidis, 35 ECAB 283 [1983]; Grady O. Porter, 35 ECAB 983 [1984]; Francisco G. Garcia, 35 ECAB 1172 [1984].

Section 8123 of the FECA requires an employee who claims disability as a result of an employment injury to undergo such physical examinations as the Office deems necessary. Section 8123(d) provides that if an employee refuses to submit to an examination ordered by the Office, his right to compensation is suspended. Ernie Chavez, 35 ECAB 479 [1983]; Kalman Abramowitz, 35 ECAB 552 [1984].

The Board found that the Office properly suspended appellant's compensation for failure to undergo a medical examination. The Office directed appellant on May 20, 1982 to report for an examination. The direction was repeated in an August 2, 1982 letter. The doctor's office reported in an August 17, 1982 letter that appellant did not make an appointment for an examination. The Office therefore acted properly in suspending appellant's compensation for refusal to undergo a medical examination. Ernie Chavez, 35 ECAB 479 [1983].

An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. Kalman Abramowitz, 35 ECAB 552 [1984]; John J. Wyszynski, 35 ECAB 1122 [1983].

The Board found that the Office acted properly in requesting appellant to undergo examination and to obtain a CAT scan to aid in the diagnosis and treatment of his condition. The medical evidence of record was insufficient to determine the extent of appellant's disability or its causal relationship with the December 7, 1975 employment injury. Therefore the Office referral of appellant to the medical specialist was appropriate. Appellant was requested on several occasions to undergo examination by a Board-certified ophthalmologist to determine the extent of his vision impairment, if any, so the physician could provide an opinion on whether the condition was causally related to his employment. Upon appellant's refusal of the examination, the Office acted reasonably by invoking the provisions of 5 U.S.C. section 8123 and in suspending appellant's entitlement to compensation benefits until he ceased obstructing the examination. With regard to the CAT scan, appellant objected to the procedure as being dangerous and submitted a note from his attending physician, who stated that appellant's treatment did not require a CAT scan. However, the Office medical adviser pointed out that the scan was necessary to assist in determining the nature of appellant's condition. The medical adviser added that the CAT scan diagnostic procedure is noninvasive. There was no medical evidence to support appellant's claim that the procedure would be detrimental to his health. None of the reasons advanced by appellant for his refusal to undergo the required medical examination or diagnostic procedures were persuasive enough to justify his refusal to undergo reasonable medical examination. The Office properly invoked the provisions of section 8123. Kalman Abramowitz, 35 ECAB 552 [1984].

Section 8123(d) of the FECA states: "(d) If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee." Vernon A. Ambey, 35 ECAB 611 [1984]; William S. Johnson, 35 ECAB 622 [1984]; John J. Wyszynski, 35 ECAB 1122 [1984]; Francisco G. Garcia, 35 ECAB 1172 [1984].

Section 8123(d) of the FECA does not provide a basis for the rejection of a claim for compensation; rather it suspends the right of an employee to compensation during the period he refuses to submit to an examination. The Board therefore found that the Office improperly rejected appellant's claim for compensation under this section. However, the Board further found that the Office, in view of the lack of probative medical evidence, properly referred appellant to another specialist. After the appellant failed to undergo the examination in accordance with the Office's request, a second request was sent to appellant which warned appellant of the consequences of failing to comply with such an examination. Appellant again failed to undergo the examination. It would therefore be proper for the Office pursuant to section 8123(d) to suspend his possible entitlement to compensation during the period he obstructed such examination. Vernon A. Ambey, 35 ECAB 611 [1984].

The Office's Federal (FECA) Procedure Manual provides, in Chapter 3-400, Examinations, Treatment and Related Services, in paragraph 1: "It is the responsibility of the

Branch of Claims to invoke the provision requiring the suspension of compensation but, before doing so, the injured employee must be advised of the provisions of this section [8123(d)] of the Code and given an opportunity to present, in writing, his/her reasons for the refusal or obstruction." William S. Johnson, 35 ECAB 622 [1984].

The Board found that the Office acted improperly in suspending appellant's compensation benefits. The Office did not follow its established procedures for suspending compensation under section 8123(d) of the Act. Specifically the Office did not advise appellant of the provisions of section 8123(d) of the Act until its September 7, 1982 letter, which also advised him that his compensation benefits had been suspended retroactive to June 10, 1982. The Office thus did not comply with its established procedures before September 7, 1982 and its suspension of appellant's compensation benefits prior to that date was improper. William S. Johnson, 35 ECAB 622 [1984].

The Office acted properly in suspending appellant's compensation on ground that he refused to undergo a medical examination. The Office's referral of appellant to an otolaryngologist in Dallas was not unreasonable, in light of the problems documented in an Office memorandum, which the Office had experienced with two Board-certified otolaryngologists in Texarkana, Texas, the city closest to appellant's residence. A referral to a Board-certified otolaryngologist was needed to determine the extent and cause of appellant's hearing loss. Appellant's reason for refusing to submit to this examination was not sufficient to justify his refusal. Appellant stated that he did not feel safe in driving to Dallas, and that public transportation was not convenient. The Office answered these objections by furnishing information about bus transportation and by offering to reimburse appellant for such transportation and for meals, but appellant still refused to undergo the examination. Grady O. Porter, 35 ECAB 983 [1984].

Appellant refused to undergo neurological testing that had been recommended by the referral Board-certified orthopedists. The Office thereupon made a loss of wage-earning capacity determination. The proper procedure in this case is for the Office to consider the imposition of 5 U.S.C. 8123(d). Arthur Leral, 35 ECAB 1184 [1984].

Regulations enacted pursuant to section 8123 state that "the injured employee may have a qualified physician, paid by him or her, present at the time of such examination," and that "if the employee refuses to submit himself . . . for or in any way obstructs any examination, the employee's right to claim compensation under the Act shall be suspended until such refusal or obstruction ceases." John J. Wyszynski, 35 ECAB 1122 [1984].

The Board found that the Office's referral to a Board-certified orthopedic surgeon was reasonable under the circumstances and did not constitute an abuse of discretion. The Board further found that since appellant's reasons for refusing to submit to an examination were insufficient to justify his refusal, and since appellant did not inform the Office of his willingness to cooperate with an examination scheduled by the Office according to its applicable regulations, the Office's action in suspending appellant's possible entitlement to compensation was proper. At the time the Office referred appellant to the Board-certified orthopedic surgeon there was no rationalized medical report contained in the case record establishing causal relationship between appellant's current condition and the January 31, 1983 employment injury. The referral was therefore reasonable. Appellant reported for his exam accompanied by two lay persons and declined to answer questions concerning the employment injury. The doctor was unable to conduct his examination. By letter dated March 13, 1984 appellant's representative, one of the two lay persons present at the orignal examination, requested the scheduling of an examination by a physician of appellant's choice and asked that a third person be present in the examination room to insure the accuracy of appellant's medical history. On March 20, 1984, the Office properly informed appellant that pursuant to 5 U.S.C. section 8123(a) and the relevant regulations the only other person permitted to accompany appellant in the examination room was "a physician designated and paid by him." The Office further informed appellant of the provisions of 5 U.S.C. section 8123(d) relative to the penalty for either refusing to undergo or obstructing a medical examination, and allotted him two weeks within which to advise the Office as to whether or not he intended to cooperate with a physician selected by the Office. It also stated that it would reschedule the examination if he responded positively; however, appellant did not respond. Subsequently, in a letter dated April 11, 1984, the Office allotted appellant an additional ten days to advise it of his decision to either undergo or not to undergo a medical examination scheduled by the Office "according to the regulations outlined by this Office." Appellant's representative's letter of April 23, 1984 did not address the Office's inquiry. The Office's suspension of entitlement was found proper. John J. Wyszynski, 35 ECAB 1122 [1984].

A conflict in the medical evidence under 5 U.S.C. section 8123(a) was created, and it therefore became necessary to refer appellant to an impartial medical specialist to resolve the conflict. Consequently, it was reasonable for the Office to request appellant to undergo further examination. Under these circumstances, the Office properly invoked the provisions of section 8123(d), suspending his possible entitlement to compensation because he had refused to submit to a medical examination, thereby preventing proper adjudication of the case. Francisco G. Garcia, 35 ECAB 1172 [1984].

MEDICAL EXPENSES AND TREATMENT

In general

Section 8103 provides that an employee " . . . may intially select a physician to provide medical services, appliances, and supplies, in accordance with such regulations and instruction as the Secretary considers necessary . . . " Pursuant to that provision, 20 CFR 10.400(b) states: "An employee has only an initial choice of physicians. A change of physicians will be permitted only upon approval of the Office after employee submits an explanation for his or her desire to change." Mildred A. Lindall, 35 ECAB 287 [1983].

Section 8103(a) of the FECA provides for furnishing to an injured employee "the services, appliances, and supplies prescribed by a qualified physician" which the Office, under authority delegated by the Secretary of Labor, "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation." V. Lamar Skelton, 35 ECAB 564 [1984]; William S. Arthur, 35 ECAB 914 [1984].

The Board found that under section 8103(a) of the FECA the Office improperly denied appellant's request to purchase an exercise bicycle. There was medical evidence supporting appellant's contention that an exercise bicycle would give him some relief from his extensive employment-related vascular disease. An Office medical adviser described the exercise bicycle as being "appropriate" and again supported the purchase of the exercise bicycle by stating that the appliance in question would provide appellant needed exercise for his legs, overall conditioning of his cardiovascular system, and hopefully greater endurance to permit a greater activity level. There was no medical evidence disputing appellant's contention that the exercise bicycle will provide relief from the employment-related vascular condition. V. Lamar Skelton, 35 ECAB 564 [1984].

Under section 8103(a) of the FECA "the employee may intially select a physician to provide medical services." That section continues to state that "these expenses, when authorized or approved by the Secretary, shall be paid from the Employees' Compensation Fund." David S. Digerness, 35 ECAB 577 [1984].

Section 8101(2) of the FECA provides that a chiropractor is a "physician . . . only to the extent that [his] reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . ." Susan M. Herman, 35 ECAB 669 [1984].

The Board found that the Office acted improperly by declining to reimburse appellant for a medical examination authorized by the employing establishment. The record showed that appellant's official supervisor, pursuant to the Office's regulations, authorized an examination of appellant by Baptist Medical Center, and that such examination was undertaken on the date of the alleged injury. This created a contractual obligation, which does not involve appellant directly, to pay for the cost of this examination regardless of the action taken on the claim. Frederick J. Williams, 35 ECAB 805 [1984].

The Board found that appellant was entitled to medical benefits under the FECA. Even where no disability is demonstrated an employee with abnormalities in the pleural tissues due to an accepted asbestosis-related condition, as in the instant case, is entitled to the following benefits: payment of related medical expenses, a medical treatment regimen, and regular follow-up medical examinations to closely monitor for progression of the condition. Therefore, the case was also remanded to the Office for a determination of the extent of entitlement to medical benefits. Joseph C. Sanderson, 35 ECAB 864 [1984].

Section 8103 provides that an employee " . . . may initially select a physician to provide medical services, appliances, and supplies, in accordance with such regulations and instruction as the Secretary considers necessary . . . " Pursuant to that provision, 20 CFR 10.400(b) states: "An employee has only an initial choice of physicians. A change of physicians will be permitted only upon approval of the Office after employee submits an explanation for his or her desire to change." Mildred A. Lindall, 35 ECAB 287 [1983].

The Board found that appellant was not entitled to reimbursement of costs for his use of facilities available as an inclusive part of the monthly rent in his apartment complex for self-directed physical therapy program. In this case, appellant's self-directed program of physical therapy was recommended or prescribed by three physicians. The Office medical director and the Office consultant indicated that this program would give relief to appellant's symptoms. Appellant, however, had not incurred any specific, indentifiable medical expense in undergoing this physical therapy. The facilities were available to all residents of the apartment complex as a recreational facility. There was no separate cost or charge for using these facilities beyond the rent payment. Appellant therefore could not seek reimbursement for using these facilities. Use of the facilities are part of the rights he and his family enjoy in living at the apartment complex. Although they provide some relief to appellant, their therapeutic value is incidental to their recreational purpose. William S. Arthur, 35 ECAB 914 [1984]. –

Medical expenses, along with transportation and other expenses incident to securing medical care, are covered by section 8103 of the FECA. This section provides, in pertinent part: "(a) The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation. *** The employee . . . may be furnished necessary and reasonable transportation and expenses incident to the securing of such services, appliances, and supplies." Jeffrey R. Davis, 35 ECAB 950 [1984].

The Board found that appellant was not entitled to compensation for time he spent outside his normal duty hours travelling to and from the Northwest Pain Clinic. Appellant's regular work week was from Monday to Friday. The travel time for which he claimed compensation occurred on a Saturday and a Sunday. The Office paid appellant compensation for temporary total disability for 40 hours for each week he was in the Northwest Pain Clinic, and also paid for his transportation, lodging, and meals while he was there. Under these circumstances appellant's travel time outside his regular workweek for which he claimed compensation cannot be considered an expense incident to the securing of medical services, as no expense was incurred. The Office properly rejected his claim. Jeffrey R. Davis, 35 ECAB 950 [1984].

Medical expenses, along with transportation and other expenses incident to securing medical care, are covered by section 8103 of the FECA. This section provides, in pertinent part: "(a) The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation. *** The employee . . . may be furnished necessary and reasonable transportation and expenses incident to the securing of such services, appliances, and supplies." Jeffrey R. Davis, 35 ECAB 950 [1984].

AUTHORIZATION

The 1974 amendment to the Act adopted the recommendation of the National Commission on State Workmen's Compensation Laws that "the worker be permitted the initial selection of his physician, either from all the licensed physicians in the state or from a panel of physicians selected or approved by the workmen's compensation agency." However, Congress did not restrict the Office's power to approve appropriate medical care after the initial choice of a physician. The Office still has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor. Section 10.400(b) of Title 20 of the CFR is an appropriate exercise of that discretion which does not conflict with 5 U.S.C. 8103(a). The section provides: "An employee has only an initial choice of physicians. A change of physicians will be permitted only upon approval of the Office after the employee submits an explanation for his or her desire to change." An abuse of such discretion is not established merely by showing that the evidence could be construed in such a way so as to produce a contrary factual conclusion. Rosie C. Rudnicki, 35 ECAB 256 [1983].

The Board found that the Office properly exercised its discretion under section 8103(a) of the FECA as amended in 1974 in refusing to authorize surgery and a change of physicians. Appellant's reasons for requesting a change of physicians were her belief that the Board-certified orthopedic surgeon had incorrectly told her in September 1979 that nothing was wrong, his alleged failure to tell her of possible side-effects of a myelogram and failure to diagnose a ruptured disc until after consultation with a neurosurgeon. Appellant requested surgery based on the May 1981 opinion of a Board-certified orthopedic surgeon that she "would benefit from an L-5 S-1 fusion." This case did not involve the intitial selection of a physician. An Office medical adviser opined that surgery should not be authorized because the condition for which surgery was recommended was not employment related. A Board-certified orthopedic surgeon of professorial rank and an impartial specialist, reported he "certainly would not recommend further surgery." The Office found no evidence that appellant was not receiving proper care and adequately explained its reasons for refusing to authorize surgery and a change of physicians. There was no abuse of discretion. Rosie C. Rudnicki, 35 ECAB 256 [1983].

The Office is required by 5 U.S.C. 8103 to provide all medical care necessary on account of an employment injury. It is further provided that this care shall be furnished by or on the order of physicians designated or approved by the Office. Therefore, in the absence of an emergency, an employee may not recover for the cost of medical care obtained without prior approval. Mildred A. Lindall, 35 ECAB 287 [1983].

The Board found that the Office did not abuse its discretion in denying appellant reimbursement of payments for unauthorized treatment she received for the period commencing November 17, 1980. Appellant was authorized to see a doctor at the U.S.A.F. Elmendorf Hospital. He treated her on September 23, 1980 and discharged her from treatment at that time. She returned to the Primary Care Clinic of the Elmendorf Hospital and received treatment on September 25, 1980, September 29, 1980 and October 14, 1980. On November 17, 1980 she first went to see a second doctor. The examinations were not authorized by the Office, nor were they recommended by the treating physicians at the Primary Care Clinic, and there was no showing that an emergency condition existed. Therefore, the Board found that the Office properly rejected reimbursement of the expense for services by the second doctor. Mildred A. Lindall, 35 ECAB 287 [1983].

The Board found that appellant was entitled to reimbursement for medical services provided from January 6, 1982, the date appellant was notified of acceptance of his claim, until March 12, 1982, the date on which the Office notified appellant that treatment was no longer authorized. Appellant initially chose a holistic physician to treat the symptoms of his lead poisoning. After development of the case record, including review by an Office medical adviser who found a causal relationship between the diagnosis of lead poisoning and factors of appellant's employment, the Office accepted that condition as employment related and informed appellant that it would "pay medical bills which are proven to be related to that condition." This letter of January 6, 1982 is to be treated as *de facto* authorization for reimbursement of expenses for treatment from that date. However, appellant is not entitled to reimbursement of medical expenses after March 12, 1982, because the services were not authorized after that date. By March 12, 1982, the Office had determined that the medical services provided by the holistic physician were not generally accepted. David S. Digerness, 35 ECAB 577 [1984].

The Board found that the Office properly denied appellant reimbursement for unauthorized chiropractic treatment. The Office is required by 5 U.S.C. 8103 to provide all medical care necessary as a result of an employment injury. It is further provided that this care shall be furnished by or on the order of physicians designated or approved by the Office. In the absence of an emergency, an employee may not recover for the cost of medical care obtained without prior approval. There was nothing in the case record to indicate that the Office authorized treatment. Susan M. Herman, 35 ECAB 669 [1984].

The Board found that the Office acted improperly by declining to reimburse appellant for a medical examination authorized by the employing establishment. The record showed that appellant's official supervisor, pursuant to the Office's regulations, authorized an examination of appellant by Baptist Medical Center, and that such examination was undertaken on the date of the alleged injury. This created a contractual obligation, which does not involve appellant directly, to pay for the cost of this examination regardless of the action taken on the claim. Frederick J. Williams, 35 ECAB 805 [1984].

The Board found that the Office properly refused to pay medical benefits for chiropractor services after the date that appellant and the chiropractors were informed that payment would not be authorized. The weight of the medical evidence as represented by two radiologists and a neurologist established that appellant did not have a subluxation. Christine L. Kielb, 35 ECAB 1060 [1984].

DENTURES

Section 10.406 of title 20 of the CFR provides for furnishing repairs to and replacement of natural teeth, false teeth, and other prosthetic dental devices damaged by an injury in the performance of duty. Section 8101(5) of the FECA and the regulations enacted for the proper administration thereof, make it clear that the "damage or destruction [must be] incident to a personal injury requiring medical services." There is no provision in the Act for reimbursement for lost, damaged or destroyed personal property affected by an employment injury. The Board has consistently held that artificial dentures, being removable, constitute personal property and that their loss may not be charged against the compensation fund. Alan J. Ginglardi, 35 ECAB 874 [1985].

Appellant was not entitled to payment for replacement of his denture damaged in an employment injury. The evidence establishes that the damage was not to appellant's natural teeth, "fixed" false teeth, or to his jaw structure which required a change in his denture. Instead, the damage was to a removable denture which is considered the personal property of the owner. Therefore, appellant was not entitled to reimbursement for its replacement. Alan J. Ginglardi, 35 ECAB 874 [1985].

TRAVEL

The Poard found that appellant was not entitled to compensation for time he spent outside his normal duty hours travelling to and from the Northwest Pain Clinic. Appellant's regular work week was from Monday to Friday. The travel time for which he claimed compensation occurred on a Saturday and a Sunday. The Office paid appellant compensation for temporary total disability for 40 hours for each week he was in the Northwest Pain Clinic, and also paid for his transportation, lodging, and meals while he was there.

Under these circumstances appellant's travel time outside his regular workweek for which he claimed compensation cannot be considered an expense incident to the securing of medical services, as no expense was incurred. The Office properly rejected his claim. Jeffrey R. Davis, 35 ECAB 950 [1984].

MEDICAL OPINIONS

IN GENERAL

Determinations of legal standards in regard to medical questions presented by a case are outside the scope of expertise of the medical adviser or any other physician involved in a case. Richard A. Sroka, 35 ECAB 209 [1983].

In situations where there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. William J. Knight, Jr., 35 ECAB 650 [1984].

Case was not in posture for decision on the issue of whether appellant had disability after September 21, 1981 which was causally related to his July 1981 employment back and neck injury. The Board-certified surgeon to whom the employing establishment referred appellant made inappropriate comments concerning the center where appellant was being treated. The report of the specialist to whom the Office referred appellant was unclear on the issue of disability. The case was remanded for further development. Raymond L. Dixon, 35 ECAB 561 [1984].

The Office's refusal to reopen the case for a merit review was improper. Appellant submitted relevant medical evidence not previously of record sufficient to require the Office to reopen the case for reconsideration. The report of a Board-certified internist expressed the doctor's opinion that appellant's "persistent neuropathy is indeed probably diabetic, but was occasioned by injury, it not having existed prior to the injury . . ." The report of a general practitioner who was appellant's personal physician also supported causal relation. A Board-certified surgeon and Office medical consultant stated that, although the additional reports did not add "new evidence," they raised "provocative thinking," and he recommended the Office obtain an opinion from a neurologist. An Office claims examiner, however, recommended that reconsideration be denied, as neither doctor specialized in "an appropriate area, i.e. orthopedics and neurology," and neither provided medical rationale. The Board notes that as a Board-certified internist, the first doctor specialized in an area of medicine germane to the case, and his opinion supporting causal relationship between appellant's diabetic neuropathy and his employment injury was sufficient to require the reopening of the case on its merits. Following remand, the case record should be reviewed by a Board-certified neurologist, as recommended, for an opinion on the issue of causal relationship. Raymond D. Thomas, 35 ECAB 846 [1984].

Once the Office undertakes to develop the medical evidence, it should do so in the proper manner. The Office should have referred appellant to a Board-certified oncologist, the type of specialist best able to evaluate appellant's chrondosarcoma instead of referring appellant to an orthopedist. Isidore Gennino, 35 ECAB 442 [1983].

EFFECT OF CONFLICT IN

The weight of the medical evidence, represented by the thorough opinion of a Board-certified orthopedic surgeon who served as an impartial specialist, failed to establish that appellant had any disability subsequent to April 20, 1981 causally related to her 1973 employment injury. He examined appellant, reviewed the case record and medical reports, and concluded that her current disabilities were not related to her 1973 employment injury; he stated her back sprain should have resolved within 6 to 12 months following injury and that current symptoms were the result of the natural progression of her underlying degenerative joint disease. While the reports of two doctors lent some support to appellant's claim, neither physician gave an adequate medical rationale for their conclusion affirming causal relation nor did they indicate employment factors causing disability. In situations where there exist opposing medical reports and the case is referred to an impartial specialist for the purpose of resolving a conflict, the opinion of such specialist, if well-rationalized and based upon a proper factual background, must be given specialist weight. Annie P. Erby, 35 ECAB 155 [1983].

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. Unless the above-mentioned procedure is carried out by the Office, the intent of section 8123(a) of the FECA will be circumvented when the impartial specialist's medical report is not sufficient to resolve the conflict of medical evidence. Audrey Unice Bogan, 35 ECAB 187 [1983].

The case was not in posture for decision on the issue of whether appellant was disabled as a result of her 1972 employment injury after the date in 1979 when the Office terminated her compensation. The Office should not have sought clarification of the impartial specialist's report from the second Office medical consultant, without first requesting clarification from the impartial specialist. This is particularly true in light of the fact that the first consultant opined that the impartial specialist seemed to support causal relationship. On remand, the Office should request the impartial specialist to submit a supplemental report indicating whether appellant has fully recovered from her 1972 employment injury, and if so, when such recovery occurred. If appellant has not fully recovered from the employment injury, the Office should instruct the doctor to set forth all limitations for work which are due to residuals of the employment injury and any preexisting conditions. Following such further development as the Office deems appropriate, it should then issue a *de novo* decision. Audrey Unice Bogan, 35 ECAB 187 [1983].

The evidence failed to establish that appellant was disabled for work from October 8, 1981 through January 17, 1982 as a result of his March 17, 1981 employment injury. The Office determined that a conflict of medical opinion existed and referred appellant to a neurologist, who concluded that it would be "difficult to justify" appellant's disability from October 8, 1981 through January 17, 1982 as causally related to the March 17, 1981 employment injury. The impartial specialist noted the absence of findings in several tests performed. Although some medical reports lent support to appellant's claim, they lacked sufficient rationale and medical findings to carry his burden of proof. The many tests taken repeatedly failed to produce objective findings concerning any injury related conditions. The weight of the evidence was with the impartial specialist's report indicating appellant was not disabled due to his employment injury. John M. Tornello, 35 ECAB 234 [1983].

Case was not in posture for decision due to a conflict in the medical evidence concerning whether appellant had a pulmonary condition due to employment-related asbestos exposure. A Board-certified internist of professorial rank, based upon the history, an x-ray interpretation by a Board-certified radiologist, and the results of tests of ventilatory function, opined that appellant had an asbestos-related pulmonary condition; he rated this impairment as Class III under the AMA *Guides*. A Board-certified pulmonary specialist of professorial rank based his opinion on the history, an x-ray interpretation by a Board-certified radiologist, and the results of ventilatory function tests, however he concluded that appellant did not have asbestosis but rather a mild obstructive lung disease consistent with his history of cigarette smoking. To resolve this conflict, the Office should refer appellant, with the case record and a statement of accepted facts, to a specialist Board-certified in pulmonary diseases. The Office should explain to the specialist the medical evaluation guidelines it established for asbestosis examinations in the Federal Procedure Manual, Chapter 2-806(18), and request that his report conform to these guidelines. Judge Boykin, 35 ECAB 330 [1983].

When the impartial specialist's statement of clarification or elaboration is not forthcoming to the Office or if the doctor is unable to clarify or elaborate on his original report or if the doctor's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question. Lawrence A. Goff, 35 ECAB 426 [1983]; Leonard W. Waggoner, 35 ECAB 461 [1983].

Case was not in posture for decision. The impartial specialist selected by the Office to address the conflict in the medical evidence, failed to resolve the issue of whether appellant's disability due to his cardiopulmonary condition was causally related to factors of his employment. The Office should refer appellant together with the case record and a statement of accepted facts to an appropriate Board-certified specialist for a reasoned opinion on whether appellant's disabling cardiopulmonary condition was causally related to factors of his federal employment subsequent to January 1979. The referral physician should address whether such condition was either accelerated or aggravated by factors of appellant's employment and note the length of time any such acceleration or aggravation existed. Lawrence A. Goff, 35 ECAB 426 [1983].

The case was not in posture for decision on the issue of whether appellant is entitled to payment for chiropractic services after May 16, 1980. Appellant's attending chiropractor indicated in his November 24, 1980 report that x-rays taken on August 19, 1975 and August 15, 1980 revealed a subluxation of L3, L4 and L5. In addition a Board-certified chiropractic roentgenologist reviewed the x-rays and stated that "there is a left lateral flexion subluxation of L5 and L4 . . ." These x-rays were subsequently evaluated by a Board-certified radiologist, who concluded that they revealed "no evidence of subluxation." A Board-certified orthopedic surgeon also reviewed the x-rays of appellant's spine and concluded that "specifically there is no subluxation." Accordingly, there is a conflict in the evidence as to whether there is subluxation. To resolve this conflict, the Office should refer the x-rays, the case record and a statement of accepted facts to a Board-certified radiologist for a complete review. The radiologist should be requested to provide a rationalized medical opinion whether the x-rays reveal a subluxation of appellant's spine. After such further development as it may deem necessary, the Office should issue a *de novo* decision. Charles Delbert Ray, 35 ECAB 449 [1983].

While the appellant has the burden of proof to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, it has the obligation to secure a supplemental report from the specialist where the original report requires clarification. Leonard W. Waggoner, 35 ECAB 461 [1983].

The case was not in posture for decision and must be remanded for further development. Both the Board-certified family practitioner and an internist reported degenerative changes in appellant's right knee and evidence of a meniscal tear of long duration. Although the famlily practitioner did not provide any supporting rationale, he did report that appellant's "history, subsequent physical findings, and operative findings suggest that his pathology is secondary to the injury sustained in 1969." The family practitioner estimated appellant's permanent impairment of the right lower extremity as 25 percent.It was unclear from the record why the Office referred appellant to an internist before asking the family practitioner for an explanation of his estimate. Further, there was an apparent conflict in medical opinions concerning the causal relationship between appellant's condition and the March 3, 1969 employment injury. The Board also noted that the Office medical consultant did not assign anything for pain and appellant's other subjective complaints as reported by the above-mentioned physicians. Moreover, he did not take into consideration appellant's preexisting degenerative changes which both doctors reported. The Board further notes that the Office's consultant acting in the stead of a medical adviser was required by the Office's procedures to document his calculations to show how he arrived at the percentage of impairment, which calculations were to incorporate "all preexisting impairments of the scheduled member." He offered no explanation as to why the degenerative changes were not considered in the calculation. The Board found that there was a conflict in medical opinion regarding the percentage of permanent impairment of appellant's right lower extremity which necessitated referral to an impartial specialist for resolution pursuant to 5 U.S.C. section 8123(a). On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to an impartial Board-certified orthopedic sugeon, for a rationalized medical opinion as to appellant's permanent impairment of the right lower extremity resulting from the March 3, 1969 employment injury, taking into account all preexisting impairments of the leg. Pedro M. DeLeon, Jr., 35 ECAB 487 [1983].

The evidence failed to establish that the employee's death due to cardiac arrest was causally related to his employment. The weight of the medical evidence was represented by the report of the only Board-certified specialist in cardiovascular disease represented in the record. The Office referred the employee's case record for resolution of a conflict in opinion on the issue of causal relation. Upon review of that record, he concluded "that there is no association between [the employee's] atherosclerotic picture or his demise to his former employment." As a Board-certified and impartial specialist, that opinion was to be accorded special weight. Margaret Rose (Stanley A. Rose), 35 ECAB 514 [1984].

A conflict in medical evidence necessitating referral to an impartial specialist existed on the issue of whether the employee's death was due to his 1969 myocardial infarction. Two Board-certified cardiologists of professorial rank extensively discussed the process by which they thought that the employee's death was related to his accepted 1969 myocardial infarction. A third Board-certified cardiologist of professorial rank concluded that the employee's death was due solely to the underlying coronary artery disease and not the 1969 myocardial infarction. The case was remanded for resolution of the conflict in medical evidence. Esther Morginsky (Solomon Gross), 35 ECAB 540 [1984].

An Office medical consultant cannot serve as an impartial specialist to resolve a conflict in medical opinion. Charles H. Mitchell, 35 ECAB 587 [1984]; John Clement, 35 ECAB 959 [1984]; Vivian Hall, 35 ECAB 930 [1984].

In situations where there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. William J. Knight, Jr., 35 ECAB 650 [1984].

The case was not in posture for decision with respect to whether appellant had an employment-related emotional condition. The Board found that appellant's employment-related disability due to cervical injury had ceased based on the impartial specialist who opined that appellant had no physical disability at that time that would prevent him from performing the type of work he was able to perform prior to the accidents. The impartial specialist was aware of a Board-certified psychiatrist's previous evaluation and opinion that appellant did not have an emotional problem; however, he believed that appellant's complaints may have been due to functional causes, and strongly suggested another psychiatric opinion. Under these circumstances, the Board found that the report of an impartial specialist constituted the weight of the medical evidence. Accordingly, the Board found that appellant had no physical disability after October 12, 1981 causally related to his employment injuries, as evidenced in the report of the impartial specialist. However, while the impartial specialist's opinion that appellant's complaints may be due to functional causes has no probative value, his recommendation for another psychiatric opinion, because he was the Office chosen impartial specialist, should have been carried out by the Office. William J. Knight, Jr., 35 ECAB 650 [1984].

The case was not in posture for decision due to a conflict of medical opinion concerning whether the December 5, 1978 employment injury caused a temporary or permanent aggravation of appellant's venous condition of the leg. The Office medical adviser who reviewed the case noted there was a conflict of medical opinion and stated that the venogram results supported one doctor's opinion that the effects of the employment injury were temporary. While the second doctor's apparent unawareness of the venogram results somewhat diminished the weight of his report, the report still had sufficient weight to create a conflict. On remand, the Office should refer appellant to an appropriate Board-certified impartial specialist for a rationalized opinion concerning whether the 1978 employment injury caused a temporary or permanent aggravation of appellant's underlying condition. If the specialist believes the employment injury caused only a temporary aggravation, he or she should state when the aggravation ceased. The specialist should address whether the employment injury caused a permanent aggravation of the underlying condition and whether there are permanent residuals of the employment injury, including an increased sensitivity to reinjury and reinfection, which prevent appellant from continuing in his usual employment. Wayne D. Hackney, 35 ECAB 718 [1984].

The Office referred appellant and the case record to a Board-certified orthopedic surgeon for an impartial medical examination and opinion. However, there was no conflict in the medical opinion at that time requiring an impartial referral under section 8123(a) of the FECA. The resulting report which found no orthopedic pathology created a conflict with the opinion of a Board-certified surgeon, who diagnosed chronic lumbar myofascitis with the possibility of a ruptured intervertebral disc causally related to the June 1975 employment injury. The Office subsequently received the report of an orthopedic surgeon, and hospital reports from St. Luke's hospital. Dr. Smith diagnosed a herniated intervertebral disc at L5-S1 and performed a lumbar laminectomy and discectomy on March 29, 1983. He related appellant's back condition to the 1975 employment injury; however, his form report provided no rationale for his conclusion. The Office was requested to obtain clarification of this opinion on remand. Keith A. Knights, 35 ECAB 806 [1984].

The case was not in posture for decision on the issue of appellant's emotional condition and its relationship to her employment injury. The record demonstrated a conflict in the medical opinion evidence between the reports of a Board-certified psychiatrist, and a psychiatrist and Board-certified orthopedic surgeon. Although the case record was referred for resolution of the dispute, the referral physician was an Office medical consultant, and he cannot serve as an impartial specialist to resolve the conflict. Vivian Hall, 35 ECAB 930 [1984].

The weight of the medical evidence did not establish that appellant's back condition was related to the 1973 employment injury. The reports of the other physicians of record were inconsistent and created a conflict on the nature and extent of appellant's back condition and its relationship to her employment injury. In order to resolve the conflict, appellant was referred for an impartial group consultation. In situations where there exist opposing medical reports and the case is referred to impartial medical specialists for the purpose of resolving the conflict, the opinion of such specialists, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight. The report of the group orthopedic and neurological consultation that appellant had no orthopedic disability related to her federal employment constituted the weight of the medical evidence. Vivian Hall, 35 ECAB 930 [1984].

The weight of the medical evidence established that appellant did not have any disability after March 24, 1982 causally related to her 1967 employment-related back injury. The Board further found appellant was entitled to compensation for employment-related loss of wage-earning capacity from March 29, 1982 through August 30, 1983, the date the Office met its burden of proof with the impartial specialist's supplemental report. The impartial specialists concluded that appellant's spondylisthesis was neither permanently or temporarily aggravated by her 1967 employment injury. As the impartial specialist selected to resolve the conflict in the medical evidence, his reports were entitled to special weight. Mildred Kaye, 35 ECAB 952 [1984].

There was a conflict in the medical evidence as to whether appellant has an asbestos-related lung condition which would entitle him to future medical examinations and treatment and to compensation for any resulting disability for work. One pulmonary specialist opined that chest x-rays revealed pleural thickening; she diagnosed parenchymal and pleural asbestosis. The Office referral pulmonary specialist and radiologist concluded there was no evidence of asbestos-related disease. The Office should refer appellant, with a statement of accepted facts, all the chest x-rays of record, and the entire case record to a Board-certified pulmonary specialist for a rationalized medical opinion on whether appellant has a pulmonary condition causally related to employment-related asbestos exposure. The specialist should be requested to perform a complete pulmonary evaluation, including x-rays and pulmonary function studies. John Clement, 35 ECAB 959 [1984].

Where the Office secures an opinion from an impartial specialist to resolve a conflict in the medical opinion, as required by section 8123(a), it is improper for it to send appellant to a second impartial specialist merely because one of its medical advisers disagrees with the conclusion reached by the impartial specialist. Such action is open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view. John W. Slonaker, 35 ECAB 997 [1984].

The Office acted inappropriately in referring the impartial specialist's report to the Office medical consultant who had caused the conflict in medical evidence. She should not be allowed to comment on the report of the impartial specialist resolving the conflict. John W. Slonaker, 35 ECAB 997 [1984].

QUALIFIED PHYSICIANS (See also chiropractors)

Section 8101(2) of the FECA provides that a chiropractor is a "physician . . . only to the extent that [his] reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . . " Susan M. Herman, 35 ECAB 669 [1984].

With respect to the issue of whether appellant's alleged December 23, 1980 recurrence was causally related to her July 13, 1979 injury, the Board found that she had not established that the recurrence was so related. The only evidence in this case concerning the recurrence was the reports of the two chiropractors. A Board-certified radiologist and a Board-certified orthopedic surgeon did not find any spinal subluxation. The radiologist concluded in his July 13, 1979 x-ray report that appellant's lumbosacral spine was normal. The Board-certified orthopedic surgeon stated that x-rays failed to reveal any bony abnormality. In addition, the report of the April 1979 x-rays stated there was only a slight straightening of the lumbar curvature with no fracture, contrary to the statement of the chiropractor. The Office medical adviser who evaluated the case record opined it was reasonable to conclude that appellant did not have a subluxation as indicated by the chiropractors. The weight of the medical evidence was represented by these three reports. Therefore, the opinions of the chiropractors under the circumstances present did not constitute competent medical evidence to support a claim for compensation. Susan M. Herman, 35 ECAB 669 [1984].

The Office's refusal to reopen the case for further merit review was proper. On a previous appeal the Board affirmed the Office's denial of appellant's claim that her carpal tunnel syndrome was causally related to her 1982 employment injury. On reconsideration appellant submitted the duty status statement of an employing establishment nurse which indicated she should not lift over 15 pounds with her left arm until July 7, 1982. A nurse is not a "physician" within the meaning of section 8101(2) of the Federal Employees' Compensation Act, and this statement was therefore of no probative value with respect to the issue on reconsideration. Appellant submitted a report from a chiropractor which stated it was "conceivable and probable" that appellant's condition was "precipitated and/or exacerbated by trauma at work." Under section 8101(2) of the Act, chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . . " As the condition was not a subluxation, his report was of no probative value. The other medical reports submitted did not address the relevant issue of causal relationship. Betty G. Myrick, 35 ECAB 922 [1984].

WEIGHT OF

The evidence failed to establish that appellant was disabled from work from October 8, 1981 through January 17, 1982 as a result of his March 17, 1981 employment injury. The Office determined that a conflict of medical opinion existed and referred appellant to a neurologist, who concluded that it would be "difficult to justify" appellant's disability from October 8, 1981 through January 17, 1982 as causally related to the March 17, 1981 employment injury. The impartial specialist noted the absence of findings in several tests performed. Although some medical reports lent support to appellant's claim, they lacked sufficient rationale and medical findings to carry his burden of proof. The many tests taken repeatedly failed to produce objective findings concerning any injury-related conditions. The weight of the evidence was with the impartial specialist's report indicating appellant was not disabled due to his employment injury. John M. Tornello, 35 ECAB 234 [1983].

The weight of the medical evidence failed to establish that appellant had any disability causally related to exposure to toxic chemical fumes at work. The weight of the medical evidence was represented by the well-rationalized reports of a Board-certified specialist in toxicology and preventive medicine, a Board-certified gastroenterologist, and a Board-certified psychiatrist of professorial rank, with whom the Office medical adviser concurred. These doctors concluded that appellant's only organically based condition was hepatitis, which they felt was probably contracted by appellant through the experimental blood transfusions he received. Only a Board-certified surgeon supported causal relation; however, his reports were based on a history of "massive exposure" to chemicals, which history was not substantiated by the employing establishment. Furthermore, although he is a Board-certified specialist, his specialties (surgery and thoracic surgery) did not render him particularly qualified to render an opinion. Carl E. Hendrickson, 35 ECAB 593 [1984].

The Board found that the Office properly refused to pay medical benefits for chiropractor services after the date that appellant and the chiropractors were informed that payment would not be authorized. A Board-certified radiologist reported that dorsal x-rays taken on January 1981 showed normal alignment with no other injury present. A Board-certified radiologist of professorial rank reported in an August 1981 report that lumbosacral x-rays showed no abnormalities of alignment with the vertebral bodies intact and the disc spaces maintained. He concluded that the lumbar spine was normal. A Board-certified neurologist of professorial rank diagnosed lumbosacral spasm. A chiropractor diagnosed a subluxation of the dorsal spine. A chiropractor diagnosed a subluxation of the dorsal and lumbar spine. Both chiropractors and a chiropractor roentgenologist contended that the January 1981 and August 1981 x-rays showed subluxations. They contended that chiropractors were more qualified to diagnose a subluxation than a radiologist. These x-rays, however, were taken and interpreted by Board-certified radiologists. Their interpretation of their own x-rays are entitled to greater weight than the interpretation given by the chiropractors who subsequently reviewed the x-rays. The weight of the medical evidence as represented by two radiologists and a neurologist established that appellant did not have a subluxation. Christine L. Kielb, 35 ECAB 1060 [1984].

MULTIPLE SCLEROSIS

Appellant had not established that his multiple sclerosis was causally related to employment factors; he alleged in his claim that his disease was attributable to his overseas assignments, lowered resistance due to poor health conditions, working long hours and recurrent episodes of dysentary. Several submitted medical reports did not address causal relation. Several other reports were not sufficient to establish causal relation, as the opinions of the three doctors were speculative in nature and were of general application rather than addressed to the particular circumstances of appellant's claim. William J. Murray, 35 ECAB 606 [1984].

NEUROLOGICAL CONDITIONS

The evidence established that appellant's condition of polyneuropathy was causally related to his exposure to lead in the course of his federal employment. Environmental samples at the firing range revealed appellant was exposed to hazardous levels of lead. The medical evidence supported appellant's claim. A Board-certified neurologist and a Board-certified internist supported causal relation. A second Board-certified neurologist stated that he could not conclusively establish the etiology of the condition but noted appellant's exposure at the time he became symptomatic and his subsequent improvement when exposure had ceased. In view of appellant's exposure, the medical evidence supporting the claim and the second neurologist's opinion as to the futility of further testing, the Board found appellant met his burden of proof. Charles G. Williams, 35 ECAB 614 [1984].

OFFICE

IN GENERAL

Section 8126 of the FECA states, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles***." The section of the Act gives the Office discretion to grant or reject requests for subpoenas. George Lanzy, 35 ECAB 746 [1984].

The Board found that the Office did not abuse its discretion in denying appellant's request to subpoena witnesses. Appellant made a general statement that the witnesses were involved in the receipt, or had knowledge, of his initiating the claim. However, he did not provide a detailed statement indicating exactly what he hoped to prove nor has he attempted to produce the desired evidence in a manner other than by subpoena. The function of the Board on this appeal is to determine whether there has been an abuse of discretion. The Office considered appellant's request, noted the issue before the Office, and explained why it denied appellant's request. George Lanzy, 35 ECAB 746 [1984].

The Board found that the Office acted improperly by declining to reimburse appellant for a medical examination authorized by the employing establishment. The record showed that appellant's official supervisor, pursuant to the Office's regulations, authorized an examination of appellant by Baptist Medical Center, and that such examination was undertaken on the date of the alleged injury. This created a contractual obligation, which does not involve appellant directly, to pay for the cost of this examination regardless of the action taken on the claim. Frederick J. Williams, 35 ECAB 805 [1984].

HEARINGS, RIGHT TO BEFORE

Section 8124(b)(1) of the FECA dealing with a claimant's entitlement to a hearing before an Office representative states that "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary . . . is entitled, on request made within 90 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." Evelyn L. White, 35 ECAB 322 [1983]; Richard A. Ward, 35 ECAB 824 [1984].

The Board found that the Office's denial of appellant's request for a hearing was improper under the facts of this case. In its April 1, 1982 letter decision denying appellant's request for a hearing, the Office properly interpreted section 8124(b)(1) of the Act as requiring a request for a hearing to be made within 30 days of an Office merit decision and "before review under section 8128(a)" (a request for reconsideration). However, under the facts of this case appellant cannot be held to that standard. The Office's February 5, 1982 compensation order and explanation of appellant's further rights before the Office and Board did not explain the order of procedure to which the Office later held appellant. It was not until April 22, 1983, one year after the denial of appellant's request for a hearing, that the Office pointed out that a hearing before an Office representative was a matter of right only if the request was filed by appellant within 30 days of its March 31, 1981 merit decision and before a request for reconsideration. The Office further mislead appellant in its February 5, 1982 and August 2, 1982 compensation orders when it again informed her of her right to a hearing if a request was filed within 30 days of those compensation orders. The record showed that appellant's request for a hearing was filed on March 4, 1982, within 30 days of the Office's February 5, 1982 compensation order. Under the facts of this case it would be inequitable to hold appellant to a procedure incorrectly explained to her by the Office. In denying appellant's right to a hearing in the April 22, 1983 compensation order, the Office properly explained the procedure to appellant, however, this explanation was subsequent to holding appellant to such procedure.

Therefore, the Office's April 22, 1983 decision is set aside and the case is remanded to the Office for scheduling of a hearing, to be followed by a *de novo* decision. Evelyn L. White, 35 ECAB 322 [1983].

Section 8124(b)(1) of the FECA provides a claimant with the right to a hearing on his claim "on request made within 30 days after the date of issuance of the decision . . ." As the Board has pointed out this section "is unequivocal in setting forth the limitation on request for hearing . . ." John H. Brown, 35 ECAB 663 [1984].

The Board found that the Office properly denied appellant's request for a hearing. Prior to the 1966 amendments to the Act, a claimant had no right under the Act to a hearing. Although granting that right in the 1966 amendments, Congress specifically limited a hearing as a matter of right where the request is filed within the requisite 30 days. In the present case appellant's letter requesting a hearing was filed more than 30 days after the Office's decision. Appellant's request was not timely made and he therefore had no right to a hearing. Even though appellant has no right to a hearing if not requested within 30 days the Office must exercise its discretion in either granting or denying a late request for a hearing. The office properly exercised its discretion in denying appellant's request for a hearing. The Office considered the matter and determined that any new evidence appellant might have could be submitted together with a request for reconsideration. No arguments were advanced by appellant and there was nothing in the case record to indicate that a hearing would serve any useful purpose. John H. Brown, 35 ECAB 663 [1984].

Section 8126 of the FECA states, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles *** ." The section of the Act gives the Office discretion to grant or reject requests for subpoenas. George Lanzy, 35 ECAB 746 [1984]; Mary Louise Lightfoot, 35 ECAB 818 [1984].

The Board found that the Office did not abuse its discretion in denying appellant's request to subpoena witnesses. Appellant made a general statement that the witnesses were involved in the receipt, or had knowledge, of his initiating the claim. However, he did not provide a detailed statement indicating exactly what he hoped to prove nor has he attempted to produce the desired evidence in a manner other than by subpoena. The function of the Board on this appeal is to determine whether there has been an abuse of discretion. The Office considered appellant's request, noted the issue before the Office, and explained why it denied appellant's request. George Lanzy, 35 ECAB 746 [1984].

The Board found that the Office did not abuse its discretion in denying appellant's request to subpoena witnesses. Appellant's representative requested that the Office subpoena an orthopedist and a Board-certified internist, respectively, to appear at her hearing in order to give testimony regarding their respective medical opinions and to clarify their own diagnosis of appellant's condition. The Office informed appellant that the medical evidence of record revealed no evidence of continuing employment-related disability beyond February 2, 1980, as was indicated by her attending physician; that she had the burden to submit medical evidence in support of her claim; and that since she could perfect her claim by submitting the medical evidence necessary to establish a causal relationship between her disability after February 2, 1980 and the January 29, 1980 employment injury, from the same physicians for whose appearance she sought a subpoena, a subpoena was not justified in her case. The record did not show that appellant had attempted to get the doctors in question to clarify their opinions with respect to appellant's current disability through written reports or depositions. Mary Louise Lightfoot, 35 ECAB 818 [1984].

Section 8124(b)(1) of the FECA dealing with a claimant's entitlement to a hearing before an Office representative states that "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." Richard A. Ward, 35 ECAB 824 [1984].

The Board found that the Office improperly denied appellant's request for a hearing.

The Office properly informed appellant in its 1982 decision that he was entitled to a hearing before reconsideration of his claim under section 8128(a). The Office, however, vacated that decision on April 25, 1983. On June 20, 1983 it issued a new decision which revised the schedule award previously granted and which informed him he could request reconsideration or a hearing, or file an appeal with the Board. As the Office stated in its July 5, 1983 letter, if appellant disagreed with the Office's June 20, 1983 decision, "he may again exercise his appeal rights" of reconsideration, hearing or appeal. The case will be remanded to the Office for the Office to offer appellant a hearing concerning the issues dealt with in the June 20, 1983 Office decision and to issue a *de novo* decision. On remand, the Office should also determine whether appellant has an employment-related loss of wage-earning capacity, as he alleged. Richard A. Ward, 35 ECAB 824 [1984].

The Board found that the refusal by the Office of appellant's request for a hearing was proper. Appellant's request for a hearing was dated March 28, 1983 and was received by the Office on March 29, 1983, more than 30 days after the January 24, 1983 date of issuance of the Office's decision. Appellant does not have a right to a hearing, as his request was not made within the 30-day period imposed by section 8124 of the FECA. The Act provides a claimant with the right to a hearing on his or her claim "on request made within 30 days after the date of the issuance of the decision . . ." Section 8124 of the Act is unequivocal in setting forth the limitation on requests for hearings. The Office did not act improperly when it canceled the hearings scheduled upon a request which was not timely filed. Erling S. Mathisen, 35 ECAB 871 [1984].

The Office's refusal of appellant's hearing request was proper. The Office considered whether to grant the hearing request, although the request was not timely made. It decided not to grant the hearing request since the issue in the case was a medical one which could be effectively addressed on reconsideration. The Office's refusal to grant the hearing request did not constitute an abuse of discretion. The Board noted, however, that the Office's delays in scheduling and cancelling the hearings effectively thwarted appellant's ability to file a timely appeal on the merits of the case. Since the appeal was not docketed until March 9, 1984, more than one year from the date of issuance of the Office's January 24, 1983 decision on the merits, the Board had no jurisdication to review that decision. The case was therefore remanded to the Office for the issuance of a *de novo* decision on the merits of the case in order to preserve appellant's right of appeal. Erling S. Mathisen, 35 ECAB 871 [1984].

Even though there is no right to, nor is the Office obligated to hold a hearing if not requested within 30 days, as pointed out in *Herbert C. Holley*, the Office may within its discretionary powers grant or deny appellant's request, and must exercise its discretion. Erling S. Mathisen, 35 ECAB 871 [1984].

Section 8124(b) of the FECA provides that a claimant not satisfied with a decision on his claim is entitled, upon timely request, to a hearing before a representative of the Office. There is no provision in the FECA entitling a claimant to more than one hearing. If a claimant has received a hearing on an issue or set of issues and the hearing representative affirms the Office's decision, a claimant is not entitled to another hearing on that issue or set of issues even if he proffers new evidence. He may receive a second hearing only if the Office, in its discretion, grants him a hearing. Charles D. Watson, 35 ECAB 1068 [1984].

The Board found that the Office properly denied appellant's request for a second hearing. The Office concluded that a second hearing would serve no useful purpose. The Office, by the letter decision dated March 5, 1984, pointed out that appellant could submit the new medical opinion of his doctor in a request for reconsideration. Under these circumstances, the Office was not required to provide appellant a second hearing. Charles D. Watson, 35 ECAB 1068 [1984].

Section 8124(b) of the FECA provides that a claimant not satisfied with a decision on his claim is entitled, upon timely request, to a hearing before a representative of the Office. There is no provision in the FECA entitling a claimant to more than one hearing.

If a claimant has received a hearing on an issue or set of issues and the hearing representative affirms the Office's decision, a claimant is not entitled to another hearing on that issue or set of issues even if he proffers new evidence. He may receive a second hearing only if the Office, in its discretion, grants him a hearing. John S. Baldwin, 35 ECAB 1161 [1984].

The Board found that under the circumstances appellant was not afforded the hearing to which he was entitled under the FECA. The issue at the February 1980 hearing was appellant's capacity to perform the duties of a hotel clerk. After December 1,1981 the issue in this case focused on whether appellant was totally or partially disabled for employment for the period of May 22, 1974 to April 8, 1981. This was a separate and distinct issue from that which was addressed at the first hearing, *id est*, whether he had the capacity to perform the duties of a hotel clerk effective November 11, 1976. While certain elements of both issues focus on the question of appellant's partial disability for similar periods, the first hearing did not address the question of his permanent or partial disability from May 22, 1974 which commenced prior to the first Office loss of wage-earning capacity determination and continued to April 8, 1981, a date beyond the February 1980 hearing. The appellant made a request for a hearing on a September 25, 1983 decision rejecting appellant's claim for temporary total disability. The Office denied that request. Section 8124(b) of the FECA dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary . . . is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board noted that the Federal Procedure Manual (FECA) at Chapter 2-1601 paragraph 15 states that for cases requiring further action which are returned to the district offices, upon issuance of a new decision, the district office "will again notify claimant of the right to hearing, reconsideration or appeal." The case was remanded to offer appellant a hearing. John S. Baldwin, 35 ECAB 1161 [1984].

JURISDICTION OF

If appellant believes she has sustained a loss of wage-earning capacity due to residuals of her employment injury, she may file a claim for compensation. The Board noted that the Office so advised appellant by letter dated April 27,1983. However, such letter is null and void since at the time of the Office's letter appellant's appeal had been filed with the Board and pursuant to 20 CFR section 501.2(c), the Board and the Office may not simultaneously have jurisdiction over a claim. Rosie C. Rudnicki, 35 ECAB 256 [1983].

MEDICAL EXPERTS, REFERENCE TO

When the impartial specialist's statement of clarification or elaboration is not forthcoming to the Office or if the doctor is unable to clarify or elaborate on his original report or if the doctor's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a rationalized medical opinion on the issue in question. Lawrence A. Goff, 35 ECAB 426 [1983].

Case was not in posture for decision. The impartial specialist selected by the Office to address the conflict in the medical evidence, failed to resolve the issue of whether appellant's disability due to his cardiopulmonary condition was causally related to factors of his employment. The Office should refer appellant together with the case record and a statement of accepted facts to an appropriate Board-certified specialist for a reasoned opinion on whether appellant's disabling cardiopulmonary condition was causally related to factors of his federal employment subsequent to January 1979. The referral physician should address whether such condition was either accelerated or aggravated by factors of appellant's employment and not the length of time any such acceleration or aggravation existed. Lawrence A. Goff, 35 ECAB 426 [1983].

Once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner. The Office should have referred appellant to a Board-certified oncologist, the type of specialist best able to evaluate appellant's chondrosarcoma and its possible relationship to factors of his federal employment instead of referring appellant to a Board-certified orthopedist. Isidore J. Gennino, 35 ECAB 442 [1983]. -

The Board found that the Office erred by submitting the case to the referral physician without first determining whether the employee was exposed to the substances implicated by appellant's claim. The Board has held that "A failure to establish the facts of an employee's working conditions, before the [Office] submits a case to a medical expert, is error *per se* unless the facts are not in issue." Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

In denying compensation subsequent to September 26, 1979 the Office relied upon a June 4, 1982 report (based upon an examination of that date) from a Board-certified surgeon. However, he readdressed appellant's condition only as of the date of his examination. The Office medical adviser who reviewed the report concluded that appellant was fit-for-duty "as of the date of examination." The Office thus failed to properly address the issue of whether appellant had any disability subsequent to December 12, 1979 causally related to her employment injuries. The Office should therefore refer appellant together with the case record and a statement of accepted facts either back to the Board-certified surgeon or to an appropriate Board-certified specialist to determine whether appellant had any disability subsequent to December 12, 1979 causally related to either her May 11 or November 26, 1978 employment injuries. Adela Hernandez-Piris, 35 ECAB 839 [1984].

The case was not in posture for decision on the issue of appellant's emotional condition and its relationship to her employment injury. The record demonstrated a conflict in the medical opinion evidence between the reports of a Board-certified psychiatrist, and a psychiatrist and Board-certified orthopedic surgeon. Although the case record was referred for resolution of the dispute, the referral physician was an Office medical consultant, and he cannot serve as an impartial specialist to resolve the conflict. Vivian Hall, 35 ECAB 930 [1984].

An Office medical consultant cannot serve as an impartial specialist to resolve a conflict in medical opinion. Charles H. Mitchell, 35 ECAB 587 [1984]; John Clement, 35 ECAB 959 [1984]; Vivian Hall, 35 ECAB 930 [1984].

There was a conflict in the medical evidence as to whether appellant has an asbestos-related lung condition which would entitle him to future medical examinations and treatment and to compensation for any resulting disability for work. One pulmonary specialist opined that chest x-rays revealed pleural thickening; she diagnosed parenchymal and pleural asbestosis. The Office referral pulmonary specialist and radiologist concluded there was no evidence of asbestos-related disease. The Office should refer appellant, whith a statement of accepted facts, all the chest x-rays of record, and the entire case record to a Board-certified pulmonary specialist for a rationalized medical opinion on whether appellant has a pulmonary condition causally related to employment-related asbestos exposure. The specialist should be requested to perform a complete pulmonary evaluation, including x-rays and pulmonary function studies. John Clement, 35 ECAB 959 [1984].

Where the Office secures an opinion from an impartial specialist to resolve a conflict in the medical opinion, as required by section 8123(a), it is improper for it to send appellant to a second impartial specialist merely because one of its medical advisers disagrees with the conclusion reached by the impartial specialist. Such action is open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view. John W. Slonaker, 35 ECAB 997 [1984].

The Office acted inappropriately in referring the impartial specialist's report to the Office medical consultant who had caused the conflict in medical evidence. She should not be allowed to comment on the report of the impartial specialist resolving the conflict. John W. Slonaker, 35 ECAB 997 [1984].

NATURE OF OFFICE'S FUNCTION

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. Unless the above-mentioned procedure is carried out by the Office, the intent of section 8123(a) of the FECA will be circumvented when the impartial specialist's medical report is not sufficient to resolve the conflict of medical evidence. Audrey Unice Bogan, 35 ECAB 187 [1983].

The case was not in posture for decision on the issue of whether appellant was disabled as a result of her 1972 employment injury after the date in 1979 when the Office terminated her compensation. The Office should not have sought clarification of the impartial specialist's report from the second Office medical consultant, without first requesting clarification from the impartial specialist. This is particularly true in light of the fact that the first consultant opined that the impartial specialist seemed to support causal relationship. On remand, the Office should request the impartial specialist to submit a supplemental report indicating whether appellant has fully recovered from her 1972 employment injury, and if so, when such recovery occurred. If appellant has not fully recovered from the employment injury, the Office should instruct the doctor to set forth all limitations for work which are due to residuals of the employment injury and any preexisting conditions. Following such further development as the Office deems appropriate, it should then issue a *de novo* decision. Audrey Unice Bogan, 35 ECAB 187 [1983].

While the appellant has the burden of proof to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, it has the obligation to secure a supplemental report from the specialist where the original report requires clarification. When an impartial specialist's statement of clarification or elaboration is not forthcoming or if the doctor is unable to clarify or elaborate on his orginal report or if the doctors's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts, to a second impartial specialist for a rationalized medical opinion on the issues in question. Leonard W. Waggoner, 35 ECAB 461 [1983].

The Board found that the case was not in posture for decision. The Board-certified specialist in medical oncology to whom the Office referred the employee's case record stated that "the only practical test" of whether the employee's death was causally related to his employment was whether epidemiologic studies showed an increased incidence of malignant lymphomas among workers performing similar jobs. He suggested that such information could be obtained from the National Cancer Institute. An Office medical adviser stated that such information should be requested. It was improper for the Office to reject appellant's claim without attempting to procure this information, which is in the possession of another government agency. The referral physician's conclusion that the employee's death was not causally related to his employment was based in part on an assumption that his exposure to carcinogens was not greater than the exposure of a person living in a modern city. A Board-certified internist supported appellant's claim, based on a history of prolonged exposure to solvents such as carbon tetrachloride and benzene. The Office's development of the evidence regarding the employee's exposure to solvents, especially carbon tetrachloride and benzene, was inadequate. Although the Office attempted, with limited success, to obtain information on such exposures from the employing establishment where the employee worked from 1965 to 1970, the Office made no effort to ascertain the employee's exposure to these substances in his federal employment from 1942 to 1965. During this latter period the employee worked for two federal employers at two positions other than that of electrician, his position at the employing establishment. The case was remanded to the Office, which should attempt to obtain epidemiologic studies on the incidence of malignant lymphomas among workers performing jobs similar to those the employee performed throughout his federal career. The Office should also attempt to obtain information on the employee's exposure to solvents, throughout his federal employment. The Office should then refer the augmented case record to an appropriate medical specialist for an opinion whether the employee's death was causally related to his employment. Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

The Board found that the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim, as the medical evidence failed to establish that appellant's hearing loss was not causally related to his exposure to noise in his employment. In its efforts to determine whether appellant's hearing loss, for which it had issued a schedule award, was causally related to his exposure to noise at work, the Office referred appellant to three Board-certified otolaryngologists. The Office's referral letter to all three otolaryngologists contained an inaccurate statement underestimating the period of time during which appellant was exposed to noise. In addition, the Office's referral letter to these three otolaryngologists stated that appellant was exposed to aircraft flight line noise of up to 120 dBA, and that hearing protection was used during exposure. This statement did not make it clear that the exposure to 120 dBA was with the use of hearing protection, as the employing establishment indicated. In light of these discrepancies in the statements submitted to the otolaryngologists to whom it referred appellant and his case record, the Office did not meet its responsibility to have a proper evaluation based on an accurate history and medical background. Gerald W. Keoppel, 35 ECAB 885 [1984].

NECESSITY TO ESTABLISH FACTS/DISCLOSE BASIS OF DETERMINATION

Section 10.130 of part 20 of the CFR provides in pertinent part: "The Federal Employees' Compensation Act, as amended, requires determination of a claim, with findings of fact and a decision for or against the payment of compensation .* * * The decision shall contain findings of fact and a statement of reasons." Ernest L. Montoya, 35 ECAB 205 [1983].

The Board found that the Office "2-way memo," affirmed by the Office in its letter refusing to authorize payment for a home spa purchased by appellant for relief of back pain, did not constitute a final decision, pursuant to the requirements of 20 CFR 10.130. The Office stated in its April 22, 1982 "2-way memo" that it had "disallowed" appellant's request for a home spa and that it was not the Office's policy to authorize unsupervised therapy, nor to "authorize other than medical appliances" because they, *inter alia*, provide relief, and expedite return to work and removal from compensation rolls. The Office suggested that the doctor submit reports of appellant's progress and an "itemized statement" regarding any therapy he prescribed for appellant. Although the "2-way memo" contained a statement of reasons explaining the denial, it did not contain adequate findings of fact, and was not in the form of a final decision. It was not accompanied by "information as to the right to a hearing, to a review, and to an appeal to the Employees' Compensation Appeals Board, [which] shall be mailed to the claimant at his or her last known address." These deficiencies were not corrected in the 1983 letter. Since appellant is entitled to a final decision made in accordance with applicable law, the case was remanded for *de novo* consideration and preparation of a proper compensation order with appropriate findings of fact and rationale. Ernest L. Montoya, 35 ECAB 205 [1983].

The Board found that the Office erred by submitting the case to a referral physician without first determining whether the employee was exposed to the substances implicated by appellant's claim. The Board has held that "A failure to establish the facts of an employee's working conditions, before the Office submits the case to a medical expert, is error *per se* unless the facts are not at issue." Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

The case was not in posture for decision on the issue of whether appellant's hearing loss was causally related to employment factors. The statement of accepted facts provided to the referral physician contained inaccurate information concerning appellant's previous work history, particularly the dates of his military service. The Office incorrectly made findings of fact that the referral physician stated that appellant's hearing loss was due to his previous employment. The Office medical adviser who reviewed the case failed to address a medical report which was submitted subsequent to the referral examination; he also incorrectly stated appellant's period of federal employment, and concluded (where the report was not clear) that the referral physician believed appellant had a preexisting hearing loss. The referral physician relied in part on appellant's use of earmuffs or earplugs in negating causal relation. The Board noted that appellant stated that prior to 1976 he used earmuffs only in particularly noisy work. The Office was instructed to prepare an accurate statement of accepted facts and refer appellant with such statement and the medical evidence of record to a Board-certified otolaryngologist for complete otologic evaluation, audiometric testing and an opinion on causal relationship. Tony J. Fesko, 35 ECAB 644 [1984].

The Office should determine which, if any, such causes of appellant's condition are properly considered factors of employment pursuant to the principles developed in *Cutler*. Peter Sammarco, 35 ECAB 631 [1984].

The Office failed to meet its burden of establishing that it erroneously accepted appellant's myocardial infarction as employment related. The Office had accepted appellant's claim and paid compensation from 1974 to 1982. The doctor on whose report the termination of compensation was based stated that appellant was at home when the myocardial infarction had occurred and that nothing unusual had happened at work that day. The Office in its statement of accepted facts did not address the issue of whether appellant was subjected to pressure and stress during the course of his work day despite the fact that the claim was apparently accepted based on this premise. Moreover, the doctor did not address the question of whether pressure and stress during the course of a work day can precipitate a myocardial infarction in an individual such as appellant with a similar degree of atherosclerotic heart disease. In addition, the rationale offered by the Office medical adviser erroneously suggested that an at-home injury is *per se* noncompensable. Due to these deficiencies, the Office failed to meet its burden of proof. Patrick Costello, 35 ECAB 712 [1984].

The Board found that the case was not in posture for decision. The Board-certified specialist in medical oncology to whom the Office referred the employee's case record, stated that "the only practical test" of whether the employee's death was causally related to his employment was whether epidemiologic studies showed an increased incidence of malignant lymphomas among workers performing similar jobs. He suggested that such information could be obtained from the National Cancer Institute. An Office medical adviser stated that such information should be requested. It was improper for the Office to reject appellant's claim without attempting to procure this information, which is in the possession of another government agency. The referral physician's conclusion that the employee's death was not causally related to his employment was based in part on an assumption that his exposure to carcinogens was not greater than the exposure of a person living in a modern city. A Board-certified internist supported appellant's claim, based on a history of prolonged exposure to solvents such as carbon tetrachloride and benzene. The Office's development of the evidence regarding the employee's exposure to solvents, especially carbon tetrachloride and benzene, was inadequate. Although the Office attempted, with limited success, to obtain information on such exposures from the employing establishment where the employee worked from 1965 to 1970, the Office made no effort to ascertain the employee's exposure to these substances in his federal employment from 1942 to 1965. During this latter period the employee worked for two federal employers at two positions other than that of electrician, his position at the employing establishment. The case was remanded to the Office, which should attempt to obtain epidemiologic studies on the incidence of malignant lymphomas among workers performing jobs similar to those the employee performed throughout his federal career. The Office should also attempt to obtain information on the employee's exposure to solvents, throughout his federal employment. The Office should then refer the augmented case record to an appropriate medical specialist for an opinion whether the employee's death was causally related to his employment. Eleanor E. Dringus (Stephen J. Dringus), 35 ECAB 530 [1984].

The case was not in posture for decision on the issue of whether appellant had a pulmonary condition causing disability or impairment which is causally related to his exposure to asbestos in federal employment. On remand, the Office should clarify appellant's smoking history and amend the statement of accepted facts to include an accurate smoking history and to include periods of asbestos exposure prior to July 1954. The Office should obtain a complete copy of the report of the August 11, 1982 pulmonary function study and attempt to obtain appellant's 1981 and 1982 chest x-ray films. The Office should then refer appellant with the films, an accurate statement of accepted facts and the case record to a specialist, preferably Board-certified in pulmonary disease, who has not been connected with the case previously, nor associated with anyone previously connected with the case. The Office should request the specialist to perform a complete pulmonary evaluation including new x-rays and pulmonary function studies and to have a serial reading made of the previous x-rays. The specialist should address whether appellant has a pulmonary condition causally related to asbestos exposure at work and if so, whether appellant has any permanent impairment or disability due to that condition. After any further development deemed necessary by the Office, the Office should issue a *de novo* decision. Raymond Charles, 35 ECAB 703 [1984].

Case was not in posture for decision. The impartial specialist selected to resolve the conflict in medical evidence reported that he could find no unusual stress to conclude stress aggravated or precipitated appellant's myocardial infarction. In light of the fact that the FECA does not require the showing of unusual stress, the impartial specialist should be requested to clarify his opinion by answering the following questions: (1) whether appellant's August 18, 1981 myocardial infarction was causally related to the stress of his job duties; (2) if so, whether the residuals of that myocardial infarction have any adverse effect on appellant's ability to work; and (3) whether appellant's underlying cardiac condition was related by causation or aggravation, to his federal employment. The Board futher noted that in light of the significance placed on appellant's activities prior to his myocardial infarction on August 18, 1981, the statement of accepted facts should contain a more detailed description. John J. Gallagher, 35 ECAB 1128 [1984].

PROCEDURES OF

Section 10.130 of part 20 of the CFR provides in pertinent part: "The Federal Employees' Compensation Act, as amended, requires determination of a claim, with findings of fact and a decision for or against the payment of compensation .*** The decision shall contain findings of fact and a statement of reasons." Ernest L. Montoya, 35 ECAB 205 [1984].

The Board noted that the Federal Employees' Compensation Procedure Manual of the Office provides: "Scheduled Awards and Calculations of Impairment: The phrase 'permanent disability' in 5 U.S.C. 8107(a) is interpreted to mean 'permanent physical impairment.' The same standards for evaluating such impairment are applied in all cases. The MA [medical adviser] shall in all cases document his/her calculations to show how he/she arrived at the percentage of impairment, *incorporating all preexisting impairments of the scheduled member . . .* " Raymond E. Gwynn, 35 ECAB 247 [1983].

Section 8123(d) of the FECA does not provide a basis for the rejection of a claim for compensation; rather it suspends the right of an employee to compensation during the period he refuses to submit to an examination. The Board therefore found that the Office improperly rejected appellant's claim for compensation under this section. However, the Board further found that the Office, in view of the lack of probative medical evidence, properly referred appellant to another specialist. After the appellant failed to undergo the examination in accordance with the Office's request, a second request was sent to appellant which warned appellant of the consequences of failing to comply with such an examination. Appellant again failed to undergo the examination. It would therefore be proper for the Office pursuant to section 8123(d) to suspend his possible entitlement to compensation during the period he obstructed such examination. Vernon A. Ambey, 35 ECAB 611 [1984].

The Office's Federal (FECA) Procedure Manual provides, in Chapter 3-400, Examinations, Treatment and Related Services, in paragraph 1: "It is the responsibility of the Branch of Claims to invoke the provisions requiring the suspension of compensation but, before doing so, the injured employee must be advised of the provisions of this section [8123(d)] of the Code and given an opportunity to present, in writing, his/her reasons for the refusal or obstruction." William S. Johnson, 35 ECAB 622 [1984].

The Board found that the Office acted improperly in suspending appellant's compensation benefits. The Office did not follow its established procedures for suspending compensation under section 8123(d) of the Act. Specifically the Office did not advise appellant of the provisions of section 8123(d) of the Act until its September 7, 1982 letter, which also advised him that his compensation benefits had been suspended retroactive to June 10, 1982. The Office thus did not comply with its established procedures before September 7, 1982 and its suspension of appellant's compensation benefits prior to that date was improper. William S. Johnson, 35 ECAB 622 [1984].

Section 8126 of the FECA states, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel the attendance of witness within a radius of 100 miles. ***" The section of the Act gives the Office discretion to grant or reject requests for subpoenas. George Lanzy, 35 ECAB 746 [1984]; Mary Louise Lightfoot, 35 ECAB 818 [1984].

The Board found that the Office did not abuse its discretion in denying appellant's request to subpoena witnesses. Appellant made a general statement that the witnesses were involved in the receipt, or had knowledge, of his initiating the claim. However, he did not provide a detailed statement indicating exactly what he hoped to prove nor has he attempted to produce the desired evidence in a manner other than by subpoena. The function of the Board on this appeal is to determine whether there has been an abuse of discretion. The Office considered appellant's request, noted the issue before the Office, and explained why it denied appellant's request. George Lanzy, 35 ECAB 746 [1984].

The Board found that the Office did not abuse its discretion in denying appellant's request to subpoena witnesses. Appellant's representative requested that the Office subpoena an orthopedist and a Board-certified internist, respectively, to appear at her hearing in order to give testimony regarding their respective medical opinions and to clarify their own diagnosis of appellant's condition. The Office informed appellant that the medical evidence of record revealed no evidence of continuing employment-related disability beyond February 2, 1980, as was indicated by her attending physician; that she had the burden to submit medical evidence in support of her claim; and that since she could perfect her claim by submitting the medical evidence necessary to establish a causal relationship between her disability after February 2, 1980 and the January 29, 1980 employment injury, from the same physicians for whose appearance she sought a subpoena, a subpoena was not justified in her case. The record did not show that appellant had attempted to get the doctors in question to clarify their opinions with respect to appellant's current disability through written reports or depositions. Mary Louise Lightfoot, 35 ECAB 818 [1984].

The Office acted inappropriately in referring the impartial specialist's report to the Office medical consultant who had caused the conflict in medical evidence. She should not be allowed to comment on the report of the impartial specialist resolving the conflict. John W. Slonaker, 35 ECAB 997 [1984].

According to the Federal (FECA) Procedure Manual: "When an employee has suffered a work-related injury which results in permanent residuals there may be disability for work when medical evidence establishes that further exposure to the implicated employment conditions would endanger the employee's health, although the residuals of the injury taken alone might not be disabling. Since exposure to asbestos dust generally results in permanent and irreversible changes in the pulmonary system, in those cases where a diagnosis of asbestos-related disease occurs without disabling pulmonary impairment, or without disability due to associated symptomatology, medical evidence may be submitted which indicates that continued employment in a certain job (or certain work environment) is contraindicated. That is, a treating physician may find an individual 'disabled' for continued normal employment because his job requires (or may place him in an environment which includes) continued exposure to asbestos dust. * * * If continued exposure at any level is contraindicated by medical evidence and if the employing agency cannot certify that the normal employment will take place in an environment that conforms to such levels, the claimant will be entitled to compensation for loss of wage-earning capacity if reassignment to a safe work environment results in reduced wages or if no such work is available." Joseph C. Sanderson, 35 ECAB 864 [1984].

An Office medical consultant cannot serve as an impartial specialist to resolve a conflict in medical opinion. Charles H. Mitchell, 35 ECAB 587 [1984]; John Clement, 35 ECAB 959 [1984].

The case was not in posture for decision on the issue of whether appellant had a permanent impairment of his lungs due to asbestos exposure at work. In rejecting appellant's claim, the Office did not follow the procedures it has established for evaluating claims for asbestosis. The Federal (FECA) Procedure Manual states: "If the claimant submits a report of recent medical evaluation from a personal physician at the time of filing (or prior to our referral), the report should be carefully evaluated to determine its completeness according to the requirements of OWCP medical guidelines. If the report indicates asbestos-related disease but is deficient according to OWCP requirements, the claimant should be referred, as described above, at OWCP expense." The Office did not carefully evaluate a general surgeon's October 1, 1981 report to determine its completeness according to the requirements of the Office's medical guidelines. No Office medical adviser or consultant reviewed this report, and the Office's March 21, 1984 compensation order contains an erroneous finding that this report indicated appellant has no evidence of pleural or parenchymal asbestosis. The report, in fact, states that x-rays showed no evidence of pleural or parenchymal asbestosis, but that appellant had at least a Class 2 pulmonary impairment which was causally related to his exposure to asbestos. A. Z. Edwards, 35 ECAB 1114 [1984].

OVERPAYMENT (See also Forfeiture under 8106(b))

IN GENERAL

The appropriate provision for waiver of overpayments, 5 U.S.C. section 8129(b), provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Ollie Rankins, 35 ECAB 264 [1984]; Cheryl L. Pittman, 35 ECAB 312 [1983].

Subsequent to the Supreme Court's decision in *Califano v. Yamasaki*, 422 U.S. 682 (1979), the Office revised the procedures to be followed in adjudicating overpayment of compensation cases. In FECA Bulletin No. 80-35, issued October 20, 1980, the Office interpreted the phrase "defeat the purpose of this subchapter" to mean: ". . . defeat the purpose of benefits under the FECA, i.e., to provide at least a subsistence income for beneficiaries. This depends upon whether the individual has an income or financial resources sufficient for more than ordinary needs, or is largely or solely dependent upon current payment of benefits for the necessities of life." In the same bulletin, the phrase "against equity and good conscience" was defined as meaning that it would be "inequitable to ask for repayment from the individual regardless of financial circumstances," depending upon whether the individual by reason of payment has "relinquished a valuable right" or changed his position for the worse. Ollie Rankins, 35 ECAB 264 [1983].

Section 8129(a) of the FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment "shall" be made by decreasing later payments of compensation. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [the FECA] or would be against equity and good conscience." In order to qualify for this exception, the recipient of an overpayment of compensation must be without fault. If he is not, there is no basis for waiving the overpayment, and adjustment shall be made. Gordon W. England, 35 ECAB 295 [1983].

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show the incorrect payment resulted from: "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." Gordon W. England, 35 ECAB 295 [1983]; Lillie M. Schooler (Richard Schooler), 35 ECAB 409 [1983].

(FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2—claims. Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures set forth in the Procedure Manual to be followed in handling overpayment of compensation cases. Cheryl L. Pittman, 35 ECAB 312 [1983].

Section 8129(b) of the FECA provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [the Act] or would be against equity and good conscience." It will be noted that, in order to qualify for this waiver, the recipient of an overpayment of compensation must be without fault. Lillie M. Schooler (Richard Schooler), 35 ECAB 409 [1983].

An overpayment in the amount of $1,519.53 existed in this case. Under section 8101(17) of the FECA (to which the death benefits provision, section 8133, refers to the definition of a student), the status of "student" is accorded only to those under 23 years of age. The daughter of appellant and the deceased employee became 23 years of age on January 29, 1980, after which she was no longer entitled to the "student" exemption from termination of death benefits upon becoming 18 years of age. The Office continued to pay appellant compensation on behalf of the son and the daughter until December 1, 1980 at the rate of 55 percent of the deceased employee's monthly pay, instead of the 40 percent to which the son was entitled from January 29, 1980 to December 1, 1980 pursuant to section 8133 of the Act, set forth above. The Office's calculations show that the amount of the overpayment was correctly computed at $1,519.53. Ursula B. Wirth (guardian), 35 ECAB 557 [1984].

The Board found that the Office improperly computed the overpayment of compensation. The $150 the Office deducted from appellant's entitlement to compensation for each week he worked was an arbitrary figure. The fact that he was able to work intermittently in his trucking business 30 to 70 hours per week indicated that he was not totally disabled. Accordingly, the Office, rather than using the arbitrary figure of $150 for each week worked, should have determined whether he had an employment-related loss of wage-earning capacity. This should be determined in accordance with the well-established principle that wage-earning capacity represents the employee's ability to earn, taking into consideration the effects of the employment-related impairment, his actual earnings, if any, his usual occupation, his age, extent of education and all other relevant factors. The Office should use this loss of wage-earning capacity determination as the basis on which to compute any overpayment. Phillip D. Queen, 35 ECAB 573 [1984].

The FECA, 5 U.S.C. section 8129(b) provides for waiver of an overpayment only under the following circumstances: "Adjustment or recovery by the U.S. may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." In determining whether an individual is "without fault," what constitutes "fault" depends on such circumstances as whether the facts show the incorrect payment resulted from: "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." Russell W. Flagg, 35 ECAB 879 [1984]; Edward Thomas Johnston, 35 ECAB 910 [1984].

COLLECTION

The Office acted improperly in directing appellant to pay $200.00 each month in recovering the overpayment. The Office hearing representative, after pointing out that appellant's monthly income exceeded his monthly expenses by only $107.35 and that his assets in saving accounts and certificates of deposit totalled $14,729.32, concluded that paying $200.00 a month toward the recovery of the overpayment would not create a financial hardship upon appellant but provided no reasoning for this conclusion. The Office was instructed to reconsider the amount of money appellant will be required to pay each month, taking into account the financial status of appellant and explaining why the amount would not cause undue financial hardship. Robert N. Vachon, 35 ECAB 691 [1984].

The case was not in posture for decision on the issue of recovery. Here, the Office hearing representative failed to make detailed findings of fact or offer adequate rationale in support of his decision. He did not adequately address the contention of appellant's representative that the overpayment should be waived as unduly burdensome, nor did he adequately consolidate appellant's expenses and compare them against his spendable income. James E. Johnson, 35 ECAB 695 [1984].

FAULT

The Board found that appellant was not without fault in the creation of the $6,748.12 overpayment. The evidence established that appellant received notice in the Office's July 24, 1967 letter that he was receiving compensation at the augmented rate because his wife and son qualified as dependents. In that same letter, appellant was also advised of the necessity to inform the Office of any changes in the status of his dependents. Accordingly, he either knew or should have known that his compensation was to be reduced when he no longer had any dependents, *i.e.*, when his divorce from his wife became final on March 23, 1977. This knowledge was especially evident in view of the information which appellant was required to furnish the Office every year concerning the status of his dependents, which for the previous ten years had always included at least one dependent—his wife. Since appellant was not "without fault," there is no basis for waiver of the overpayment under 5 U.S.C. section 8129(b) and adjustment must be made. Gordon W. England, 35 ECAB 295 [1983].

In determining whether an individual is "without fault," what constitues "fault" depends on such circumstances as whether the facts show the incorrect payment resulted from: "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." Cheryl L. Pittman, 35 ECAB 312 [1983].

The Board found that the weight of the evidence established that appellant was not "without fault" in receiving the overpayment in issue. An Office letter CA-1049 specifically instructed appellant that any compensation checks she received after resuming work "MUST BE RETURNED." When appellant resumed her employment she stated that she informed the employing establishment's injury compensation supervisor that the Office had to be notified of her return to work; however, appellant failed to notify the Office in a timely fashion. Thus, when the Office was finally informed of appellant's reemployment, it had already issued additional compensation checks. Appellant returned one check but kept another because she said she needed it to get back and forth to work. By appellant's own admission she knew or should have known that the payments she received after her return to work were "incorrect." Under these circumstances, the Board found that in retaining additional benefits after her return to work appellant was not without fault within the meaning of section 8129(b). The case was remanded to determine the amount of overpayment. Cheryl L. Pittman, 35 ECAB 312 [1983].

The Board found that appellant was without fault in the creation of the $4,401.24 overpayment. The Office applied the third standard to appellant in determining that she was not without fault in the creation of the overpayment. In its June 15, 1974 letter to appellant, the Office notified appellant that she could elect VA benefits instead of FECA benefits and stated that "If VA benefits are elected, no further FECA benefits will be paid." In her April 27, 1979 letter to the Office, appellant requested that her FECA benefits be terminated at the same time her VA benefits would begin. Accordingly, by her own statements and actions, appellant has shown that she either knew or should have known that she was not entitled to receive dual payments; she was therefore not without fault in the creation of the overpayment. Lillie M. Schooler (Richard Schooler), 35 ECAB 409 [1983].

The Board requested that the Director of the Office submit a legal memorandum in this case. The Board indicated that appellant testified that he shared in the profits of operating a farm with his sons. Appellant indicated that his sons performed the physical labor while he provided advice and financial support and arranged for the sales of crops. The Board noted that in *Vernon Booth* the Board held that income consisting of profits from a business which constituted a return on investment could not be considered as earnings even if the profits were augmented by a claimant's personal attention to business. The Director of the Office, in response, filed a motion to remand on December 15, 1983. The Director stated that the evidence was insufficient to establish that appellant knowingly understated his earnings. He also stated that decision of the Office in this case was inconsistent with the Board's decision in *Booth*. He indicated that appellant's "earnings" since his employment injury were in the nature of a return on investment, profits from management and business acumen and were not "earnings" within the meaning of 5 U.S.C. section 8106(b). The Director therefore requested that the case be remanded. He indicated that, on remand, the Office would void the overpayment decision and issue a *de novo* decision on all aspects of the case. The Board granted the motion. Haran H. Golden, 35 ECAB 1180 [1984].

The Board found that appellant was not without fault in creating the overpayment. The Office's 1976 letter to appellant stated "In no event may compensation be paid beyond the end of the semester or enrollment period after he reaches the age of 23 or has completed four years of education beyond the high school level." While this sentence, as pointed out by appellant, contains the disjunctive "or", the plain meaning of the sentence is that no compensation may be paid if either of the stated conditions occurs. The Board found that appellant was aware, or reasonably should have been aware, that the daughter was not entitled to compensation after her 23rd birthday on January 29, 1980. Appellant therefore accepted a payment which she knew, or should have been expected to know, was incorrect and is not without fault in creating the overpayment. Ursula B. Wirth (guardian), 35 ECAB 557 [1984].

The Board found that appellant was without fault in the creation of the overpayment. The two grounds on which the Office based its finding of fault were without merit. The first ground was that he was aware he should have reported his earnings. However, appellant informed the Office of his intermittent self-employment in his November 30, 1980 response to an Office questionnaire. The second ground was that the Office's December 17, 1980 letter instructed him to return any compensation checks received after he returned to work. However, appellant, in his November 30, 1980 response, informed the Office of his self-employment prior to the Office's December 17, 1980 letter informing him of his entitlement to a specific amount of compensation. Under the circumstances, it was reasonable for appellant to have assumed that the Office took his November 30, 1980 letter into account when it informed him on December 17, 1980 of his entitlement to compensation. Accordingly, appellant was not on notice that the Office erred in computing his compensation entitlement. Phillip D. Queen, 35 ECAB 573 [1984].

The Office correctly determined that appellant was at fault in creating the overpayment when she continued to apply for and accept compensation benefits, knowing that her children were not entitled to them. Appellant was requested by the Office to submit information annually concerning her children's ages and their dependency status. Furthermore, she had been instructed by the Office to return any checks received after the date the children reached age 18 together with a full explanation of any change occurring in the children's status. Although appellant notified the Office that her children had eventually left her custody, she continued to apply for compensation on their behalf and did not return the checks as required after they reached age 18. Viola M. Mundy (guardian), 35 ECAB 680 [1984].

The Office properly determined that appellant was not without fault in the creation of the overpayment. Appellant contended that he had no knowledge that his schedule award payments were to end on August 26, 1975 because he did not see the Office's March 21, 1974 decision granting the schedule award, which contained this information, until sometime in April 1980 when he went through his wife's papers. Up until the time his wife became ill toward the end of 1979, she would open all of the mail coming into their home.

The Board noted however, that the schedule award was addressed and mailed directly to appellant, who deposited the monthly checks of compensation he received. He reasonably should have known that the schedule award was to have ended on August 26, 1975 and that he was not entitled to any compensation thereafter. Appellant was not without fault within the meaning of section 8129(b) in the creation of the overpayment. Robert N. Vachon, 35 ECAB 691 [1984].

The evidence established that appellant was not "without fault" in receiving the overpayment in issue. There was a note at the bottom of appellant's schedule award letter which read: "Your compensation stops when you have been paid for last day shown above in period of award." The record revealed that after the expiration of the schedule award on December 28, 1978, appellant received additional compensation for the period July 16, 1981 to Febuary 25, 1982, which he retained, thereby creating an overpayment in the amount of $4,296.00. When notified that an overpayment in that amount had been created, appellant, through his attorney, stated that he did receive a check in the summer of 1981 which puzzled him since he had not received payment since December 1978 and the check was not supplemented with an explanation; that he returned the check to the Hearing Loss Task Force, but that it was subsequently returned to him, again without explanation; and that therefore he "honestly believed the payment constituted some form of additional compensation for his hearing loss." Appellant further stated that when these supplemental payments ceased, he wrote the Office on two occasions for an explanation as to the reason for termination, but received no reply. The record contained no evidence of appellant's alleged written attempts to return the supplemental payments to the Office. In retaining additional benefits, for over seven months, after he had received notification in the February 8, 1978 schedule award letter that his compensation payments would end as of December 28, 1978: "the last day . . . in period of award," coupled with fact that he questioned entitlement to the supplemental 1981 monies since he had not received a payment since 1978 (and allegedly attempted to return it), appellant has demonstrated that he knew, or should have known, that he was not entitled to the payment received over two and one-half years after the expiration date of the original award. The Board found that appellant was not without fault within the meaning of section 8129(b); therefore there was no basis for waiving the overpayment. Russell W. Flagg, 35 ECAB 879 [1984].

The Board found that the weight of the evidence showed that appellant was not "without fault" in accepting the overpayment in issue. On September 8, 1982 an Office form letter, CA-1049, was sent to appellant informing him of his obligation to report any employment to the Office and return any compensation checks received after he began working. This letter was sent to appellant's address of record. He had not changed his address at the time the letter was sent. The record contained a copy of the letter and the original was not returned to the Office. This did not support appellant's contention that he did not receive the September 8, 1982 letter. In view of the fact that the employing establishment received a copy of the form letter, it is to be presumed that a letter mailed to an individual in the ordinary course of a business activity was received. Secondly, the memorandum of an Office claims examiner's September 28, 1982 telephone conversation with appellant, which detailed appellant's responses with respect to the overpayment, tended to cast doubt on appellant's contentions of not receiving his telephone calls or his mail. The weight of the evidence established that appellant was aware of the terms of his compensation payments. Edward Thomas Johnston, 35 ECAB 910 [1984].

The Board found that appellant was not "without fault" with respect to the overpayment of compensation benefits and that therefore the overpayment was not subject to waiver. Because of an error by the Office in entering appellant's compensation into the automatic compensation payment system, appellant was paid monthly compensation from June 1981 to January 1982 based on temporary total disability compensation of $835.00 gross instead of partial disability compensation of $445.00 gross based on his 53 percent loss of wage-earning capacity. The increase in appellant's monthly checks was so great that he should have known the payment was incorrect. Appellant accepted such payment and stated that he believed the Office owed him the money because it had mistakenly reduced his compensation from temporary total to partial disability compensation. Appellant, however, was informed by the Office on June 19, 1974 that he was no longer temporarily totally disabled, but only partially disabled and was informed on May 15, 1975 that his compensation would be reduced based on his 53 percent loss of wage-earning capacity. He was further informed in May 22, 1975 and March 3, 1976 letters that there was no basis for the Office to change its decision reducing compensation. In its November 19, 1980 compensation order issued to appellant at his correct address on June 10, 1981, the Office denied modification of its 1975 decision which had reduced his compensation. Appellant was aware or should have been aware that his compensation was based on partial disability and that his monthly checks from June 1981 to January 1982 which he accepted were incorrect. Appellant was not "without fault" with respect to the overpayment of compensation and therefore the overpayment must be recovered. Luis D. Alamo, 35 ECAB 1045 [1984].

The case was not in posture for decision on the issue of whether appellant was at fault with respect to an overpayment. By letter dated November 7, 1983 the Office informed appellant of the overpayment and its preliminary finding that he was at fault in the matter, and gave him an opportunity to respond to the findings. He replied by letter dated November 29, 1983 that he was later "told the checks would continue" and when they did he "assumed this to be correct." Appellant specially identified his rehabilitation counselor as telling him that he would be reinstated in his job or retrained for another job before his compensation would be terminated. It appeared, however, that the Office failed to consider or address the specific reasons proffered by appellant with respect to the finding "not without fault" in causing the overpayment. On remand the Office should further develop the evidence regarding the reasons proffered by appellant. The Office should specifically determine the exact information given appellant and when this information was given. Robert J. O'Neil, 35 ECAB 1169 [1984].

WAIVER

The Board found that the case was not in posture for decision on the overpayment issue. The Office should have informed appellant before his hearing of its interpretation of section 8129(b). The Office's September 15, 1981 letter to appellant did not adequately inform him of its interpretation, and the hearing representative made no attempt to provide such interpretation. Appellant was therefore deprived of an effective opportunity to present evidence and arguments in support of his request for waiver of the overpayment. Upon remand, the office should provide appellant with its interpretations of the terms "defeat the purpose of [the Act]" and "against equity and good conscience." The Office should then develop the case record as it deems necessary and, if requested, provide appellant with a new hearing. A *de novo* decision should then be issued, including detailed findings of fact and a rationalized opinion on (1) whether recovery of the overpayment would "defeat the purpose of [the Act]" and (2) whether recovery would be "against equity and good conscience." Ollie Rankins, 35 ECAB [1983].

In *Orba Light*, the Board held that in cases involving a waiver of an overpayment of compensation, the Office must issue a decision which: "Includes both detailed findings of fact and, applying these findings, a rationalized opinion on (1) whether recovery of the overpayment would 'defeat the purpose of this subchapter [of the Act]' and (2) whether recovery would be 'against equity and good conscience.' " James E. Johnson, 35 ECAB 695 [1984]; Robert Krebs, 35 ECAB 756 [1984].

The case was not in posture for decision on the issue of recovery. Here, the Office hearing representative failed to make detailed findings of fact or offer adequate rationale in support of his decision. He did not adequately address the contention of appellant's representative that the overpayment should be waived as unduly burdensome, nor did he adequately consolidate appellant's expenses and compare them against his spendable income. James E. Johnson, 35 ECAB 695 [1984].

The Office made detailed findings of fact regarding appellant's expenses, but failed to offer adequate rationale in support of its decision. The Office's summary conclusion that recovery of the overpayment "would not be against equity or good conscience nor would defeat the purpose of the Act" was not sufficiently rationalized to meet the Office's burden on this issue. Robert Krebs, 35 ECAB 756 [1984].

PERFORMANCE OF DUTY, INJURY IN

IN GENERAL

The case was not in posture for decision. The Office did not identify the evidence or give rationale for its conclusion that appellant's fall was idiopathic. One physician indicated that the etiology of appellant's fall was undetermined. He and appellant stated that appellant did not have a similar fall prior to the date of injury. The evidence was unclear as to whether the fall was caused by a physical, nonoccupational condition. The case must be remanded for further development on the issue of whether appellant's fall on March 20, 1982 was an idiopathic fall or an unexplained fall. Should the Office on remand conclude that the fall was idiopathic, the claim cannot be rejected solely on that basis. Appellant testified that in his fall he hit a railing, a storm door and a set of steps. The Office should consider appellant's contention and determine whether any of these objects may be considered factors of employment. On remand, the Office should further develop the case record to determine whether appellant hit any objects in his fall before striking the immediate supporting surface which may have caused or contributed to his injury. The Office should prepare a statement of accepted facts, including definitions of an idiopathic fall and an unexplained fall and a determination of whether appellant, in his fall, hit any intervening objects. The Office should then submit the statement to a medical opinion on the cause of appellant's fall and injury. If they should determine that appellant's fall was idiopathic, these physicians should be asked whether his injury was caused or worsened by striking an object found by the Office to be a factor of the employment. Albert E. Hermann, Jr., 35 ECAB 167 [1983].

It is a general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, or at lunch time are compensable. Annette Stonework, 35 ECAB 306 [1983].

The Board noted that Larson in his *Workmen's Compensation Law* treatise states that "Injuries occurring *on the premises* during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he pleases." Annette Stonework, 35 ECAB 306 [1983].

Federal (FECA) Procedure Manual, Chapter 1-805(i)(1)(ii) states that an inju [illegible] hich occurs on the premises of the employing establishment occurs in the performance of duty if the employee "was engaged in something which was a reasonable incident of the employment," such as "personal acts of the employee for his/her comfort, health, convenience, and relaxation." Annette Stonework, 35 ECAB 306 [1983].

The Board found that appellant's fall was sustained in the performance of duty. Appellant's fall occurred while she was on her regular lunch hour on the premises of the employing establishment. These facts were sufficient to establish that her injury was sustained in the performance of duty. The fact that appellant for her convenience used a portion of her lunch hour to purchase stamps for her personal use from a combination exhibit and postal facility on the premises of the employing establishment did not take her injury outside the performance of duty. Annette Stonework, 35 ECAB 306 [1983].

An employee who is on a trip for his employer is under the protection of the FECA while engaged in activities essential to or reasonably incidental to these special activities. However, when he deviates from the activities incidental to his employment, he ceases to be within the protection of the Act and an injury occurring during such deviation is not compensable. An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip unless the deviation is so insubstantial that it may be disregarded. James E. Johnson, 35 ECAB 695 [1984].

The Board found that the Office sustained its burden of proof when it rescinded its prior acceptance of appellant's injury as having been sustained while in the performance of duty. The evidence established that appellant had substantially deviated from the course of his employment for personal reasons, and was therefore no longer in the performance of duty when he was involved in the accident of December 14, 1975. After appellant's supervisor directed him to make a special trip to Towson to pick up the mail on Allegheny Avenue and pick up lunch on route, appellant did not take the assigned and most direct route to the assigned mailbox. His journey of more than two and one-half miles west of Charles Street, the official route going due north to Towson, in search of a familiar restaurant, constituted a personal mission. At the time of the accident he had not resumed his journey to Towson and was not engaged in any activity reasonably incidental to his employment mission. Therefore, the injury sustained was not compensable. James E. Johnson, 35 ECAB 695 [1984].

This rule states off-premises injuries sustained by employees having fixed hours and places of work while going to or coming from work, are generally not compensable as they do not arise out of and in the course of the employment. Stephen E. Fraser, 35 ECAB 760 [1984]; Lelita M. Gomez (Irieno C. Gomez), 35 ECAB 814 [1984].

It is a well-settled principle of workers' compensation law, and the Board has so held, that an injury resulting from an idiopathic fall—where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment—is not within the coverage of the FECA. Such an injury does not arise out of a risk connected with the employment and it, therefore, is not compensable. MacArthur Crenshaw, 35 ECAB 1073 [1984].

It is well-settled, and the Board has recognized on numerous occasions, that although a fall is idiopathic, an injury or death resulting from it is compensable if "some job circumstance or working condition intervenes in contributing to the incident or injury; for example, the employee falls onto, into, or from an instrumentality of the employment," or where, instead of falling directly to the floor on which he has been standing, the employee strikes a part of his body against a wall, a piece of equipment, furniture, or machinery, or some like object. MacArthur Crenshaw, 35 ECAB 1073 [1984].

The Board has held that when an employee consents to a physical examination and an injury results, the examination is a factor of the employment. If this factor aggravated the employee's emotional condition so as to cause his disability, the disability is compensable. Edward Louis Hoffman, 35 ECAB 1158 [1984].

Case was not in posture for decision. Appellant attributed his myocardial infarction to "aggravation" caused by the nurse and physician at the health unit. The Office did not make a finding based on the *Schulz* decision as to whether the physical examination caused appellant's disability. The case was therefore remanded for the purpose of having a finding made on this question. Edward Louis Hoffman, 35 ECAB 1158 [1984].

The Board granted the motion to remand. The Director stated that the Office had reevaluated the claim and had concluded that the deceased employee "was in fact in the performance of duty when he was killed on August 17, 1979." In an accompanying memorandum, the Director stated, among other things, that the parking lot in which the employee parked his car was leased by the employing establishment; that although the employees were not required to park on the lot, "it appears the lot was leased for the exclusive use of U.S. Postal Service employees"; that parking was provided without cost to the employees; and that parking "was controlled by permit by the U.S. Postal Service." The Director pointed out that the parking lot assumed the status of a portion of the employer's premises, and accordingly, "coverage under the FECA would apply to any injury or death sustained while traveling between the parking lot and place of employment, i.e., [between] two portions of the employer's premises." The Director concluded, therefore, that under the circumstances of this case, the employee was considered to be within the scope of his employment when he was killed while "crossing the street en route between two portions of the employer's premises." Marjorie Monagin (William Monagin), 35 ECAB 1189 [1984].

DEVIATION FROM DUTY

The Board found that even applying a liberal interpretation of the term "performance of duty" to the facts in this case resulted in the conclusion that appellant was not in the performance of his duties as a uniformed officer of the Secret Service at the time of his self-inflicted head wound. Without reaching the issue of the propriety of application of Office Program Memorandum 270, the Board found that applying the standards of Program Memorandum 219 to the facts of appellant's case resulted in the finding that while appellant may have been eligible for benefits as a law enforcement officer under section 8191 he was not in the performance of his official duties as a law enforcement officer at the time of his self-inflicted gunshot wound. Even under the most liberal interpretation, the act of deliberately placing oneself in the situation of self-inflicting a gunshot wound would be such a deviation from the performance of duty as to remove the action from the coverage of the Act. Mark A. Cognetti, 35 ECAB 734 [1984].

An employee who is on a trip for his employer is under the protection of the FECA while engaged in activities essential to or reasonably incidental to these special activities. However, when he deviates from the activities incidental to his employment, he ceases to be within the protection of the Act and an injury occurring during such deviation is not compensable. An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip unless the deviation is so insubstantial that it may be disregarded. James E. Johnson, 35 ECAB 695 [1984].

OFF-PREMISE INJURIES

As a general rule, off-premises injuries sustained by employees having fixed hours and places of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Such injuries are considered the ordinary, nonemployment hazards of the journey itself which are shared by all travelers. This rule also applies where an employee is leaving his permanent duty station after work and is injured in an area adjacent to the federal building where he worked but which is not owned or controlled by the federal government. Vincent Siderine, 35 ECAB 304 [1983].

The Board found that appellant was not injured in the performance of duty. The evidence established that at the time of injury appellant had finished his scheduled tour of duty and left the employing establishment premises. His status at that time was that of a "fixed premises" employee with fixed hours of going to and coming from work. He was therefore subject to the "going and coming" rule generally applicable to such employees. Although appellant contended that the employing establishment controlled the area which surrounded the "blue collection boxes," this area was not owned or controlled by the employing establishment. The area is public property, owned and controlled by the township. The rain gutter which caused appellant's mishap, was constructed and maintained by the town. Vincent Siderine, 35 ECAB 304 [1984].

The Board has stated as a general rule that off-premise injuries sustained by employees having fixed hours and places of work, while going or coming from work, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travellers. Stephen Fraser, 35 ECAB 760 [1984]; Lelita M. Gomez (Irieno C. Gomez), 35 ECAB 814 [1984].

The Board found that the employee's fatal accident did not occur in the performance of duty. The employee was proceeding home after completion of his work shift. The fatal injury did not occur on the employment premises. His status at that time was that of a "fixed premises" employee with fixed hours of work who was returning home from work.

He was therefore subject to the "going and coming" rule generally applicable to such employees, and his death was not compensable. Lelita M. Gomez (Irieno C. Gomez), 35 ECAB 814 [1984].

RECREATIONAL ACTIVITIES

The general criteria for performance of duty as it relates to recreational and social activities is set forth in *Larson* as follows: "Recreational or social activities are within the course of employment when (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." Eileen Anita Byrnes, 35 ECAB 843 [1984]; Bruce A. Romeo, 35 ECAB 1012 [1984].

Larson specifically addresses the issue of athletic teams, stating that the pertinent performance of duty test involves the following criteria: "[O]n or off the premises and in or out of working hours; varying shades of employer initiative; differences in amount of employer contribution of money or equipment; differing quantities and types of employer benefit." *Larson* states that the outcome of such recreation cases turns on the "different 'mix' in the fact situation." Eileen Anita Byrnes, 35 ECAB 843 [1984]; Bruce A. Romeo, 35 ECAB 1012 [1984].

The case was not in posture for decision on whether appellant's injury in a softball game constituted an injury in performance of duty. The record was not sufficiently developed for a decision to be made on the issue of performance of duty. More was required than the conclusory statements in the employing establishment's August 1983 letter that it derived no benefit from appellant's participation in the softball game, and it is not dispositive that she was not required, persuaded, or paid to play in the game by the employing establishment. The Board noted that the August 12, 1983 letter stated that an "NCEL Recreation Association" furnished the equipment used by appellant's team. On remand, the Office should further develop the record to determine whether the connection between this organization and the employing establishment was such as to give the employing establishment direct control over the recreational activity as in the cases of the organizations in *Lester W. Dustin* and *Michael J. Kearney*. After such further development as is necessary, the Office should determine the "mix" in the fact situation in the case at hand of types and amount of employer "initiative," "contribution of money or equipment," and "benefit," within the meaning of the above-mentioned discussions from *Larson*. The Office should then issue a *de novo* decision. Eileen Anita Byrnes, 35 ECAB 843 [1984].

The case was not in posture for decision as the record had not been adequately developed for a decision regarding the issue of whether appellant sustained an injury in the performance of duty. The Board noted that both appellant and the union representative who served on the Postal Employees Social and Recreational Committee contended that the Committee was appropriated funds from a percentage of the money derived from the vending machines located on the employing establishment's premises, which were in turn negotiated under contract by the agency's procurement office. The union representative further stated that the U.S. Post Office Inspector audited the Committee's expenditures, "dictate[d] all the policies," and stated that if the agency disapproved of an allotment of funds, "it just is not spent." The record also contained a policy statement for food service operations and social and recreational funds stating that the agency was prohibited from discriminatory practices "in the disbursement of social and recreational funds," and describing the installation head's responsibility to ensure proper operation of the Committee's activities. On remand, the Office should develop the record (including securing the comments of the employing establishment with respect to the specific allegations made by appellant and his union representative) to determine whether the connection between the Committee and the employing establishment was so substantial as to give the employing establishment direct control over the recreational activity as in the cases of the organizations in *Stephen H. Greenleigh*, *Lester W. Dustin*, and *Michael J. Kearney*, or whether there was only a minimal causal connection between the Committee and the employing establishment as in the cases of *Donald C. Huebler* and *Kermit T. Bryant*. It was noted that the softball game in which appellant was injured was not played on the employing establishment's premises. While this factor is not controlling, it is one of those to be considered. The Office should determine the "mix" in the fact situation in the case at hand of types and amount of employer "initiative," "contribution of money or equipment," and "benefit," within the meaning of the above-mentioned discussions from *Larson*. Bruce A. Romeo, 35 ECAB 1012 [1984].

SPECIAL MISSION OR TEMPORARY DUTY

The Board found that the Office sustained its burden of proof when it rescinded its prior acceptance of appellant's injury as having been sustained while in the performance of duty. The evidence established that appellant had substantially deviated from the course of his employment for personal reasons, and was therefore no longer in the performance of duty when he was involved in the accident of December 14, 1975. After appellant's supervisor directed him to make a special trip to Towson to pick up the mail on Allegheny Avenue and pick up lunch on route, appellant did not take the assigned and most direct route to the assigned mailbox. His journey of more than two and one-half miles west of Charles Street, the official route going due north to Towson, in search of a familiar restaurant, constituted a personal mission. At the time of the accident he had not resumed his journey to Towson and was not engaged in any activity reasonably incidental to his employment mission. Therefore, the injury sustained was not compensable. James E. Johnson, 35 ECAB 695 [1984].

Where an employee is on a temporary duty assignment away from his regular place of employment, he is covered by the FECA 24 hours a day with respect to any injury that results from activities incidental to his temporary assignment. The fact that an employee was on a special mission or in travel status during the time a disabling condition manifested itself does not raise an inference that the condition was causally related to the incidents of the employment. Thus, if appellant's hearing loss had resulted from activities incidental to his employment the injury would have been compensable. However, according to the Board-certified otolaryngologist's interpretation of the history provided by appellant to the employing establishment hospital physician, his hearing loss appeared when he awoke from his sleep without any apparent relationship to the incidents of his employment; therefore, the condition cannot be regarded as employment related. Stanley K. Takahaski, 35 ECAB 1064 [1984].

PHLEBITIS

The Office failed to meet its burden of proof in terminating appellant's compensation on May 20, 1982. There was no rationalized factual and medical evidence indicating that appellant's disability beginning on March 18, 1977 was not causally related to his federal employment. In fact, a doctor stated in his September 28, 1981 report that he did not have appellant's medical records from his prior treatment. There was evidence that appellant underwent a chordotomy as a result of his phlebitis condition, as well as evidence that appellant sustained residuals associated with this surgical procedure. The Office was instructed to refer appellant, with the case record and a statement of accepted facts, to a Board-certified specialist for a rationalized opinion regarding issue of whether appellant's condition was causally related to the 1967 employment incident or to the authorized venograms and whether the chordotomy was causally related to the accepted phlebitis condition. Jimmie D. Brewer, 35 ECAB 197 [1983].

PLACES OUTSIDE THE UNITED STATES

Appellant, in support of her request for reconsideration, cited a regulation that stated: "(b) The total aggregate compensation payable in any case under part (a) of this section for injury or death or both, shall not exceed the sum of $4000.00 exclusive of medical cost. The maximum monthly rate of compensation in any case shall not exceed the sum of $50.00." This regulation was superseded by a new regulation with respect to injuries occurring on or after July 1, 1968, as follows; "The total aggregate compensation payable in any case, for injury or death or both, shall not exceed $8,000, exclusive of medical costs and burial allowance. The weekly rate of compensation for disability or death shall not exceed $35.00." However, section 25.21(j) of the regulations provides that only compensation for temporary disability shall be paid periodically; compensation for death benefits is payable in a lump sum. Appellant was therefore not entitled to a monthly or a weekly compensation payment. As explained in the first decision of the Board, the lump sum payment appellant received in compensation for her husband's death was the full amount of compensation to which she was entitled by regulation. She therefore did not submit any new substantial legal argument that would require the Office to reconsider her case. Marta Z. DeGuzman (Amadeo DeGuzman), 35 ECAB 309 [1983].

Section 8181(b)(3) of the FECA provides for continuation of pay "under accounting procedures and such other regulations as the Secretary may require." Section 10.202(a) of the Office's regulations sets forth nine specific instances of when "the employing agency may, on the basis of the information submitted by the employee, or secured on investigation, controvert a claim and terminate an employee's [continuation of] pay." One of those instances is set out in section 10.202(a)(3) as being when "the employee is neither a citizen nor resident of the United States or Canada (i.e., a foreign national employed outside of the United States or Canada)." While section 10.202(a) states only that the employing establishment "may" controvert continuation of pay, section 10.202(b) of the regulations indicates that controversion in the nine enumerated instances is not optional, but mandatory. Section 10.202(b) states that "In all other cases, the employing agency may controvert an employee's right to continuation of pay, however, such employee's regular pay shall not be interpreted during the 45-day period unless the controversion is sustained by the Office and until the employing agency is so notified." That language, permitting controversion "in all other cases," implies that in those situations specified in section 10.202(a), there is no choice for the employing establishment but to controvert continuation of pay. The Federal Procedure Manual, Chapter 2-500, which addresses continuation of pay supports this conclusion by stating that "The employing agency will . . . controvert a claim and terminate an employee's pay only if . . . the employee is neither a citizen nor a resident of the United States, Canada, or the Canal Zone (i.e., a foreign national employed outside the United States, Canada, or the Canal Zone.)" Section 8137 of the Act addresses the payment of compensation to noncitizens or nonresidents of either the United States or Canada. Section 8137(b) states that "Compensation paid under this subsection is instead of all other compensation from the United States for the same injury or death, and a payment made under this subsection is deemed compensation under this subchapter and is satisfaction of all liability of the United States in respect to the particular injury or death." The Federal Procedure Manual states that "persons who are noncitizens and nonresidents of the United States or Canada, and who are injured while working outside the continental United States or Canada, come under the provisions of 5 U.S.C. 8137. They are excluded from COP [continuation of pay]." Zohra Ben Ali, 35 ECAB 1156 [1984].

PROCEDURE ON APPEAL TO OR REVIEW BY BOARD

APPEALABLE ACTION

Appellant asserted on appeal that the Office's April 12, 1984 decision used an incorrect rate of pay. As that issue was raised by appellant and disposed of by the Board in the last appeal, it was not involved in the Office's April 12, 1984 letter and was therefore not a proper issue in this appeal. See 20 CFR 501.6(c). Fred Stingl, 35 ECAB 1197 [1984].

AUTHORIZED REPRESENTATIVE

20 CFR 501.11(a) requires a statement signed by appellant authorizing representation be received by the Board before an appeal can proceed to decision. No such authorization was received within the time allotted by the Board and the Board dismissed the appeal. Laurence R. Kane, Jr., 35 ECAB 1182 [1984].

JURISDICTION OF BOARD

The Board found that the Office "2-way memo," affirmed by the Office in its letter refusing to authorize payment for a home spa purchased by appellant for relief of back pain, did not constitute a final decision, pursuant to the requirements of 20 CFR 10.130. The Office stated in its April 22, 1982 "2-way memo" that it had "disallowed" appellant's request for a home spa and that it was not the Office's policy to authorize unsupervised therapy, nor to "authorize other than medical appliances" because they, *inter alia*, provide relief, and expedite return to work and removal from compensation rolls. The Office suggested that the doctor submit reports of appellant's progress and an "itemized statement" regarding any therapy he prescribed for appellant. Although the "2-way memo" contained a statement of reasons explaining the denial, it did not contain adequate findings of fact, and was not in the form of a final decision. It was not accompanied by "information as to the right to a hearing, to a review, and to an appeal to the Employees' Compensation Appeals Board, [which] shall be mailed to the claimant at his or her last known address." These deficiencies were not corrected in the 1983 letter. Since appellant is entitled to a final decision made in accordance with the applicable law, the case was remanded for *de novo* consideration and preparation of a proper compensation order with appropriate findings of fact and rationale. Ernest L. Montoya, 35 ECAB 205 [1983].

If appellant believes she has sustained a loss of wage-earning capacity due to residuals of her employment injury, she may file a claim for compensation. The Board noted that the Office so advised appellant by letter dated April 27, 1983. However, such letter is null and void since at the time of the Office's letter appellant's appeal had been filed with the Board and pursuant to 20 CFR section 501.2(c), the Board and the Office may not simultaneously have jurisdiction over a claim. Rosie C. Rudnicki, 35 ECAB 256 [1983].

With respect to the Office's April 29, 1983 decision, the Board noted that under its applicable rules and procedures the Board and the Office may not simultaneously have jurisdiction over the same case. When the Board docketed the appeal on April 13, 1983 and informed the Office that an appeal had been filed with respect to appellant's claim the Office no longer had jurisdiction over that claim. Thereafter, it did not have authority to issue its decision of April 29, 1983. Such decision is therefore null and void. George J. Kemble, 35 ECAB 370 [1983].

The Office's refusal of appellant's hearing request was proper. The Office considered whether to grant the hearing request, although the request was not timely made. It decided not to grant the hearing request since the issue in the case was a medical one which could be effectively addressed on reconsideration. The Office's refusal to grant the hearing request did not constitute an abuse of discretion. The Board noted, however, that the Office's delays in scheduling and cancelling the hearings effectively thwarted appellant's ability to file a timely appeal on the merits of the case. Since the appeal was not docketed until March 9, 1984, more than one year from the date of issuance of the Office's January 24, 1983 decision on the merits, the Board had no jurisdiction to review that decision. The case was therefore remanded to the Office for the issuance of a *de novo* decision on the merits of the case in order to preserve appellant's right of appeal. Erling S. Mathisen, 35 ECAB 871 [1984].

PULMONARY OR RESPIRATORY CONDITIONS

IN GENERAL

The weight of the medical evidence was represented by the rationalized opinion of a Board-certified pulmonary specialist that appellant's employment-related disability had ceased no later than July 22, 1982, the date of his examination of appellant. However, the case was not in posture for decision with respect to the period prior to July 22, 1982. In its March 23, 1982 decision, the Board, finding that the Office had failed to produce medical evidence which would warrant a change in its previous findings that appellant sustained an employment-related aggravation of obstructive pulmonary disease, remanded the case for referral of appellant, a statement of accepted facts and medical reports from the case record "to appropriate Board-certified specialists, for an examination of all the medical aspects of this case." The Board emphasized that "these evaluations should include opinions as to whether appellant's current condition was causally related by aggravation to factors of his employment insofar as they can be identified, and, if so, the extent of any such aggravation." Since no medical rationale for selecting the date of November 30, 1974 as the date of termination of disability has been provided, the Office has not met its burden of proof on this issue and the case must be remanded for further development. On remand, the Office should refer appellant, along with the case record (or at least the medical reports of record) and a statement of accepted facts, back to the Board-certified pulmonary specialist for a rationalized medical opinion concerning when the employment-related aggravation of appellant's obstructive pulmonary condition ceased. The Office should authorize him to consult other specialists, if he deems it appropriate, and should request a rationalized medical opinion on whether appellant may have been only partially disabled for any period prior to the date the aggravation ceased, as well as specifically addressing the medical reports supporting employment-related aggravation beyond November 30, 1974. John D. Pope, Ph.D., 35 ECAB 229 [1983].

The case was not in posture for decision on whether appellant had any disability or permanent impairment due to a pulmonary condition which he alleged was causally related to exposure to hazardous materials and toxic fumes. The reports of two Board-certified internists specializing in pulmonary diseases seemed to support the conclusion that residuals from appellant's employment-related pulmonary condition prevented him from continuing his federal employment as a plastic worker, the basis for payment of compensation according to *O'Neill*. A third Board-certified internist specializing in pulmonary disease arrived at a contrary conclusion consistent with *Hearn*, stating that exposure to irritant chemicals and fumes was capable of creating a temporary aggravation which would have ceased when appellant ceased his employment. The Office should refer appellant together with the case record and a statement of accepted facts to a Board-certified pulmonary specialist for a fully reasoned opinion on whether appellant had a disabling pulmonary condition subsequent to March 3, 1978 that was either caused or permanently aggravated by his exposure to toxic substances at work. The specialist should also be asked to give his opinion as to whether appellant has any pulmonary impairment, that is, a permanent loss of use of either lung. The Office should then evaluate the specialist's report for the purpose of determining whether appellant is entitled to compensation for a loss of wage-earning capacity in light of the principles set forth in the above-mentioned cases of *Hearn* and *O'Neill*. If causal relationship, by means of direct causation or permanent aggravation, is indicated the Office should determine appellant's entitlement to a schedule award by applying the tables in the *AMA Guides*. Maurice E. Anderson, 35 ECAB 277 [1983].

The weight of the medical evidence established that appellant's disability after May 20, 1983 was not causally related to his federal employment. The Office met its burden of proof with the detailed well-rationalized opinion of a Board-certified internist, who opined in July 1981 that appellant's disability and pulmonary impairment were due to emphysema which was in turn most likely due to appellant's thirty-three year history of cigarette smoking. The internist, after reviewing the medical evidence of record and the results of his own testing, opined that while someone with pulmonary emphysema may be more likely to have a spontaneous pneumothorax, the spontaneous pneumothorax or factors of appellant's employment did not cause or aggravate the emphysema or lead to a decrease in his ventilatory capacity. The internist emphasized that appellant's ventilatory impairment was obstructive and not related to the pneumothorax condition which would produce a restrictive impairment. The worsening of appellant's ventilatory impairment from 1975 to the time of the 1981 examination was due to the "natural course of pulmonary emphysema." Hubert W. Pickens, 35 ECAB 298 [1983].

The medical evidence established that appellant's reaction to cigarette smoke was only a temporary aggravation which ceased when he left work. One doctor explained in his two reports that appellant's respiratory symptoms were "precipitated by exposure to cigarette smoke." He stated further that appellant should "be allowed to work in a smoke-free environment." A second doctor explained that appellant's exposure to irritants such as cigarette smoke "will not affect him unduly or should not cause permanent problems."

There was no medical evidence that the underlying sensitivity to cigarette smoke was caused by appellant's employment or that further exposure would cause permanent damage. The medical evidence only showed that appellant had a temporary aggravation of his condition that ended when he stopped work. Russell E. Kimball, 35 ECAB 310 [1983].

The medical evidence did not establish that appellant had a permanent impairment of his lungs causally related to his employment. This obstructive pulmonary disease was not shown to be causally related to or permanently aggravated by appellant's exposure to airborne contaminants in his employment. The only support for such a relationship was the statement of a Board-certified internist that appellant's obstructive pulmonary disease may be related to his occupational exposure as well as to smoking. This statement was equivocal and did not establish causal relation, especially in light of a Board-certified pulmonary specialist's statement that it was "overwhelmingly most likely" that appellant's chronic obstructive pulmonary disease was related to his history of smoking. Gene Collins, 35 ECAB 544 [1984].

The medical evidence of record failed to establish that appellant's right pneumothorax was causally related to his employment injury. Appellant's treating physician provided some support for this claim but his reports were not sufficient to establish causal relationship. The Office medical consultant negated causal relationship. The Board-certified impartial specialist reviewed the case record, chest x-ray films and relevant medical literature and opined in a detailed well-rationalized report that development of a pneumothorax three weeks after chest trauma was "exceedingly unlikely." He concluded that the pneumothorax was related to appellant's underlying chronic obstructive pulmonary disease which in turn was presumed to be secondary to heavy cigarette smoking. Charles Gilderoy Wotring, 35 ECAB 658 [1984].

ASBESTOS-RELATED

The medical evidence failed to establish that appellant had an employment-related pulmonary condition which caused disability or permanent impairment. There was some support for appellant's claim in the report of a Board-certified internist. His reasoning however, that appellant had a Class 2 impairment based on the criteria of the AMA *Guides* in spite of appellant's having pulmonary function test results which are "virtually within normal limits" was not persuasive. A Board-certified specialist in both internal medicine and pulmonary disease reported appellant denied any pulmonary symptoms, that pulmonary function tests were "entirely within the normal limits," and that the chest x-ray showed "no acute pulmonary infiltrates," and "no specific increased interstitial changes." A Board-certified specialist in both internal medicine and pulmonary disease who served as an Office medical consultant, reviewed the entire case record and opined that the established diagnosis was "asbestos exposure without current evidence of asbestos related pulmonary disease." Roscoe Lacy, 35 ECAB 324 [1983].

The Board found that appellant did not have a disabling pulmonary condition or a permanent impairment of his lungs causally related to his exposure to asbestos at work. An Office medical consultant on pulmonary cases explained how he applied the AMA *Guides* to the findings of a Board-certified pulmonary specialist to arrive at a Class 1, zero percent impairment. There was no evidence that appellant had a permanent impairment of his lungs due to employment-related asbestos exposure. There was no evidence that appellant's employment-related asbestos exposure caused a disabling condition. Arthur Kelly, Jr., 35 ECAB 319 [1983].

Case was not in posture for decision due to a conflict in the medical evidence concerning whether appellant had a pulmonary condition due to employment-related asbestos exposure. A Board-certified internist of professiorial rank, based upon the history, an x-ray interpretation by a Board-certified radiologist, and the results of tests of ventilatory function, opined that appellant had an asbestos-related pulmonary condition; he rated his impairment as Class III under the AMA *Guides*. A Board-certified pulmonary specialist of professorial rank based his opinion on the history, an x-ray interpretation by a Board-certified radiologist, and the results of ventilatory function tests, however he concluded that appellant did not have asbestosis but rather a mild obstructive lung disease consistent with his history of cigarette smoking. To resolve this conflict, the Office should refer appellant, with the case record and a statement of accepted facts, to a specialist Board-certified in pulmonary diseases. The Office should explain to the specialist the medical evaluation guidelines it established for asbestosis examinations in the Federal Procedure Manual, Chapter 2-806(18), and request that his report conform to these guidelines. Judge Boykin, 35 ECAB 330 [1983].

The Board found that appellant was currently temporarily totally disabled and was entitled to compensation for an occupational-related lung condition. However, it was unclear from the evidence of record when the period of temporary total disability began. The Board found that because of appellant's lung condition, which the Office accepted as employment related, he is currently "disabled for work" or incapable, because of this condition, "to earn the wages which [he] was receiving at the time of such injury." Based on the Board's interpretation of the term "disability" therefore, appellant was entitled under 5 U.S.C. section 8102(a) to compensation. This was true despite the Office's finding that appellant had no loss of wages because he had retired voluntarily and therefore was not entitled to compensation. In view of the Office's acceptance of an employment-related occupational lung condition, which its Office medical adviser agreed resulted in total disability, the provisions of eligibility for compensation, and the definition of the term "disability," the Office's finding of ineligibility for compensation was inconsistent. It is unclear from the record when appellant's period of temporary total disability began. Once this date is determined, following any further action as the Office deems necessary, payment of compensation for appropriate periods of disability should be made. George J. Kemble, 35 ECAB 370 [1983].

The case was not in posture for decision due to a conflict in medical evidence. A Board-certified internist concluded based on a history, x-ray and pulmonary function studies that appellant had disability "midway between classes two and three"; on the other hand, a Board-certified pulmonary specialist concluded that appellant had no pulmonary impairment secondary to asbestos exposure. The Office medical consultant's report provided little clarification and in any event because he was a consultant, he could not serve as an impartial specialist. Charles H. Mitchell, 35 ECAB 587 [1984].

The Board found that appellant did not have a disabling pulmonary condition causally related to his exposure to asbestos at work. There was no medical evidence that appellant's employment-related asbestos exposure caused a disabling pulmonary condition. Appellant continued to work following the filing of his claim, no physician stated he was disabled, and the Office medical consultant concluded that he was not disabled. Aaron Crenshaw, 35 ECAB 686 [1984].

The case was not in posture for decision on the issue of whether appellant had a pulmonary condition causing disability or impairment which is causally related to his exposure to asbestos in federal employment. On remand, the Office should clarify appellant's smoking history and amend the statement of accepted facts to include an accurate smoking history and to include periods of asbestos exposure prior to July 1954. The Office should obtain a complete copy of the report of the August 11, 1982 pulmonary function study and attempt to obtain appellant's 1981 and 1982 chest x-ray films. The Office should then refer appellant with the films, an accurate statement of accepted facts and the case record to a specialist, preferably Board-certified in pulmonary disease, who has not been connected with the case previously, nor associated with anyone previously connected with the case. The Office should request the specialist to perform a complete pulmonary evaluation including new x-rays and pulmonary function studies and to have a serial reading made of the previous x-rays. The specialist should address whether appellant has a pulmonary condition causally related to asbestos exposure at work and if so, whether appellant has any permanent impairment or disability due to that condition. After any further development deemed necessary by the Office, the Office should issue a *de novo* decision. Raymond Charles, 35 ECAB 703 [1984].

The Office has established guidelines for the evaluation of asbestos claims. These require that the medical reports used to determine the extent of any pulmonary disability include the following information: *Pulmonary Function Studies*: Pulmonary function studies must include measurement of the following functions (the report of the results of the FVC, and Diffusing Capacity must include actual recorded values, the percent of predicted normal, and identification of the normal standard applied for tests conducted before and/or after the use of bronchodilators). The studies should be performed under the supervision or direction of a Board-certified pulmonary specialist. *Forced Vital Capacity* (FVC) and *Forced Expiratory Volume in one Second* (FEV_1) measured in liters and representing the best of three efforts; and the FEV_1/FVC ratio (FEV1%) computed from these results . . . The report must be accompanied by appropriately labeled spirometric tracings (for all tests) showing distance per second on the abscissa and distance per liter on the ordinate. The Office guidelines also suggest that the AMA *Guides* be used to determine the percent of pulmonary impairment. Joseph Robinson, 35 ECAB 726 [1984].

The case was not in posture for decision. An Office medical consultant reviewed the medical evidence and noted that the September 1, 1982 report showed a forced vital capacity (FVC) of 3.05 liters or 71 percent predicted. The consultant concluded that "the degree of respiratory impairment secondary to asbestos-related disease is 0%. However, utilizing the AMA *Guides* a FVC of 71 percent represents a Class 2 (10%-20%) respiratory impairment. The consultant provided no rationale for his conclusions that appellant had zero percent disability. Moreover, that report also revealed a forced expiratory volume at one second (FEV_1) of 2.61 liters or 84 percent of predicted, and a second doctor's October 12, 1983 pulmonary function studies showed a FVC rating which was consistent with Class 2 respiratory impairment under the AMA *Guides*. On remand, appellant's case record should be referred to the Office medical consultant for a clarifying opinion as to how he arrived at zero percent impairment using either the pulmonary function studies' values of either report. Joseph Robinson, 35 ECAB 726 [1984].

The Board found that appellant was entitled to medical benefits under the FECA. Even where no disability is demonstrated an employee with abnormalities in the pleural tissues due to an accepted asbestosis-related condition, as in the instant case, is entitled to the following benefits: payment of related medical expenses, a medical treatment regimen, and regular follow-up medical examinations to closely monitor for progression of the condition. Therefore, the case was also remanded to the Office for a determination of the extent of entitlement to medical benefits. Joseph C. Sanderson, 35 ECAB 864 [1984].

The medical evidence established that appellant contracted an asbestos-related condition due to factors of his federal employment, but that he was not totally disabled therefrom. The Office failed, however, to consider any loss of wage-earning capacity which may have resulted from an asbestos-related condition, as a result of inability to continue working in an environment such as that of appellant's former position. The description of appellant's former position indicates that he would have sustained such exposure if he continued in that position. Thus, while the evidence showed that appellant was not totally disabled from work, it indicated that the residuals of his employment-related condition may have prevented him from continuing his former position. This case should be distinguished from one involving a temporary aggravation of a preexisting condition. In such a case, the underlying condition is not caused by employment factors; any aggravation of the condition by employment factors is compensable only as long as it lasts. No compensation benefits are payable after the aggravation ceases, even though the employee cannot return to his former position. However, where, as here, the condition is itself employment related, compensation benefits may be payable if the impairment prevents the employee from engaging in the kind of work he was doing when injured. Joseph C. Sanderson, 35 ECAB 864 [1984].

According to the Federal (FECA) Procedure Manual: "When an employee has suffered a work-related injury which results in permanent residuals there may be disability for work when medical evidence establishes that further exposure to the implicated employment conditions would endanger the employee's health, although the residuals of the injury taken alone might not be disabling. Since exposure to asbestos dust generally results in permanent and irreversible changes in the pulmonary system, in those cases where a diagnosis of asbestos-related disease occurs without disabling pulmonary impairment, or without disability due to associated symptomatology, medical evidence may be submitted which indicates that continued employment in a certain job (or certain work environment) is contraindicated. That is, a treating physician may find an individual 'disabled' for continued normal employment because his job requires (or may place him in an environment which includes) continued exposure to asbestos dust. *** If continued exposure at any level is contraindicated by medical evidence and if the employing agency cannot certify that the normal employment will take place in an environment that conforms to such level, the claimant will be entitled to compensation for loss of wage-earning capacity if reassignment to a safe work environment results in reduced wages or if no such work is available." Joseph C. Sanderson, 35 ECAB 864 [1984].

The Office has established guidelines for the evaluation of asbestosis claims. These require that the medical reports used to determine the extent of any pulmonary disability include the following information: "*Pulmonary Function Studies*: Pulmonary function studies must include measurement of the following functions (the report of the results of FVC, FEV, and diffusing capacity must include actual recorded values, the percent of predicted normal, and identification of the normal standard applied for tests conducted before and/or after the use of bronchodilators). These studies should be performed under the supervision or direction of a Board-certified pulmonary specialist. *Forced Vital Capacity* (FVC) and *Forced Expiratory Volume in one Second* (FEV_1) measured in liters and representing the best of three efforts; and the FEV_1/FVC ratio (FEV1%) computed from these results . . . The report must be accompanied by appropriately labeled spirometic tracings (for all tests) showing distance per second on the abscissa and distance per liter on the ordinate." The Office's guidelines also suggest that the AMA *Guides* be used to determine the percent of pulmonary impairment. Wheeler Morris, 35 ECAB 939 [1984].

The case was not in posture for decision and must be remanded for further development on the issue of whether appellant had any disability due to employment-related asbestos exposure. A Board-certified internist specializing in pulmonary disease who examined appellant at the request of the Office reported that appellant had a "significant asbestos exposure history," and noted that x-rays revealed "mild bilateral pleural thickening with an elevated right hemidiaphragm." The doctor diagnosed, among other things, pleural asbestosis, and noted that pulmonary function studies were within normal limits. The Office consultant concurred with this assessment but added that appellant was not disabled from his position as a result of asbestos exposure, and that he had a zero percent lung impairment secondary to asbestosis. The Board noted that one criteria of a zero impairment according to the *Guides* is that at least two of the three FEV_1, FVC and MVV tests be performed and be not less than 85 percent of the predicted values. In the present case the pulmonary function test value for FVC was 68 percent of predicted and the MVV value was 57 percent of predicted, both of which were less than 85 percent of the predicted value. These values, according to the AMA *Guides*, are a Class 3 or 25-35 percent impairment, which normally would entitle appellant to a schedule award. It appeared that neither physician correlated these findings with AMA *Guides* because they both concluded that the pulmonary function studies were normal. Wheeler Morris, 35 ECAB 939 [1984].

The case was not in posture for decision on the issue of whether appellant was entitled to medical benefits or disability compensation under the Act for an employment-related pulmonary condition. A Board-certified internist specializing in pulmonary diseases stated that x-rays revealed pleural plaquing and pleural asbestosis. A Board-certified specialist in pulmonary diseases stated that x-rays showed no significant pleural thickening or pleural plaques. A Board-certified radiologist stated that x-rays showed pleural thickening. A Board-certified internist specializing in pulmonary diseases who acted as an Office consultant in this case, stated that x-rays showed probable minimal pleural thickening of appellant's left lower lung suggestive of asbestos-related disease, but considered the evidence of asbestos-related pleural disease borderline or equivocal and not sufficient for a definite diagnosis. The Office should refer appellant to an appropriate medical specialist for a reasoned opinion whether he has a condition causally related to his exposure to asbestos in his federal employment. If so, appellant would be entitled to medical benefits of the Act. He would also be entitled to compensation for any disability due to such a condition. Anderson Reynolds, 35 ECAB 957 [1984].

The weight of the medical evidence established that appellant did not have a disabling pulmonary condition causally related to his federal employment. A general surgeon concluded that "because of the patient's severe and heavy asbestos exposure it is very likely that this places significant proportion of the cause [of his pulmonary condition]." His conclusion was inconclusive and speculative in that it was not supported by any evidence of asbestos-related lung disease. A Board-certified internist specializing in pumonary diseases concluded based on pulmonary function testing showing moderate obstructive lung disease and chest x-rays, which were interpreted by a "B" reader showing no evidence of pleural or interstitial lung disease, that appellant did not have any pulmonary disease causally related to his exposure to asbestos. This conclusion was concurred with by a Board-certified internist specializing in pulmonary diseases and an Office consultant. The medical evidence of record was not probative of any causal relationship between appellant's pulmonary condition and his exposure to asbestos at work. Joaquin Souza, 35 ECAB 977 [1984].

There was no rationalized evidence of record supporting appellant's claim for an asbestos-related pulmonary condition resulting from his exposure to asbestos in federal employment. He failed to meet his burden of proof. The Board-certified internist specializing in pulmonary diseases to whom the Office referred appellant concluded based on examination and testing that appellant had no physiologic or significant impairment. The Office medical consultant concurred with this assessment. Appellant's doctor, a general surgeon, did not provide any rationalized medical opinion explaining why decreased lung volumes alone caused appellant's pulmonary function tests to be abnormal especially since the rest of the tests were normal; this, coupled with the fact that chest x-rays did not reveal any asbestosis, did not support the surgeon's conclusion of a Class 2 impairment under the AMA *Guides*. Edward E. Olson, 35 ECAB 1099 [1984].

The Board found that appellant failed to establish that he had any disability or impairment causally related to his exposure to asbestos in his federal employment. The Office accepted that he had sustained a condition. A general surgeon examined appellant and reported that his pulmonary function tests were abnormal, however, he stated that the tests showed a moderate degree of obstructive disease of an emphysematous type. The doctor noted appellant's exposure to asbestos and opined that "this may have some influence upon his respiratory abnormalities," however, this opinion was speculative, and therefore, of little probative value. He stated that appellant had "no significant evidence of restrictive pulmonary disease," and although he classified appellant into the category between Class 2 and 3 of the AMA *Guides* for disability and respiratory impairment he did not relate this impairment to asbestos exposure, but rather to obstructive pulmonary disease. A Board-certified pulmonary specialist evaluated appellant and found no evidence for interstitial lung disease, nor any pulmonary limitation or changes suggestive of a restrictive lung disease. A Board-certified pulmonary specialist reviewed the medical evidence and concluded that appellant had pleural thickening but zero percent impairment secondary to asbestos exposure. There was no convincing medical evidence of record showing that appellant had any disability or impairment as a result of his exposure to asbestos in federal employment. Richard Uuereb, 35 ECAB 1105 [1984].

The case was not in posture for decision on the issue of whether appellant had a permanent impairment of his lungs due to asbestos exposure at work. In rejecting appellant's claim, the Office did not follow the procedures it has established for evaluating claims for asbestosis. The Federal (FECA) Procedure Manual states: "If the claimant submits a report of recent medical evaluation from a personal physician at the time of filing (or prior to our referral), the report should be carefully evaluated to determine its completeness according to the requirements of OWCP medical guidelines. If the report indicates asbestos-related disease but is deficient according to OWCP requirements, the claimant should be referred, as described above, at OWCP expense." The Office did not carefully evaluate a general surgeon's October 1, 1981 report to determine its completeness according to the requirements of the Office's medical guidelines. No Office medical adviser or consultant reviewed this report, and the Office's March 21, 1984 compensation order contained an erroneous finding that this report indicated appellant had no evidence of pleural or parenchymal asbestosis. The report, in fact, stated that x-rays showed no evidence of pleural or parenchymal asbestosis, but that appellant had at least a Class 2 pulmonary impairment which was causally related to his exposure to asbestos. A. Z. Edwards, 35 ECAB 1114 [1984].

ASTHMA

The weight of the medical evidence failed to establish that appellant's asthmatic condition was caused or permanently aggravated by his federal employment. One Board-certified internist stated there was insufficient evidence that there was causal relation. A second Board-certified internist, who specializes in treatment of asthma and allergies, appeared to be saying only that appellant's asthma originated during his federal employment, without indicating that factors of his federal employment contributed to the initial appearance of the condition. Accordingly, neither doctor supported appellant's contention that his asthma was caused or permanently aggravated by his federal employment. The Office medical adviser and medical consultant also negated any permanent aggravation in their reports. John W. MacDonald, 35 ECAB 430 [1983].

Well-reasoned medical reports indicated that appellant's asthma was directly caused by factors of her employment, and that the continued existence of such factors prevented her from returning to her job as a nurse. The medical evidence of record therefore did not support the conclusion that appellant had an underlying condition of asthma which was temporarily aggravated by factors of her employment and that such aggravation ceased when she stopped work. The evidence is, rather, consistent with the principle enunciated by the Board in *O'Neill*. Although appellant could not return to the nursing job she held when she was injured, the medical evidence of record indicated that she was not totally disabled from gainful employment. Medical evidence revealed that when away from the precipitating factors at work, appellant was apparently able to function normally. The Office should determine appellant's loss of wage-earning capacity as of the date she stopped work. It should request a work tolerance limitations form noting both the physical and environmental restrictions under which appellant could work. The Office should then select a job consistent with those restrictions and have an Office medical adviser give his opinion as to whether appellant could have performed the selected position as of the date in 1979 she stopped work. Elise H. Daniel, 35 ECAB 359 [1983].

REVIEW UNDER SECTION 8128

IN GENERAL

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128. Material which is repetitious or duplicative of that already in the case record is of no evidentary value and does not constitute a basis for reopening a case. Marta Z. DeGuzman (Amadeo DeGuzman), 35 ECAB 309 [1983].

The reopening of a case for reconsideration requires the submission of evidence not previously submitted of a substantive or probative nature. Patricia J. Kelsesky, 35 ECAB 549 [1984].

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128. Accordingly, as is well-established under Board precedent, the Office is required to reopen a case on its merits when such evidence or contentions are presented. Ethel D. Curry, 35 ECAB 737 [1984]; Richard N. Thomas, 35 ECAB 742 [1984]; Raymond

K. Thomas, 35 ECAB 846 [1984]; Jacob Samaan, 35 ECAB 1050 [1984]; Victor M. Garcia, 35 ECAB 995 [1984].

The Board noted that the Office's compensation order refused to reopen appellant's case because the additional evidence lacked "substantial probative value." This is not the correct test to follow in determining whether to reopen a case for reconsideration. Ethel D. Curry, 35 ECAB 737 [1984]; Raymond K. Thomas, 35 ECAB 846 [1984].

It is well settled that the Office may review a claim under 5 U.S.C. section 8128 at any time and where supported by the evidence, may set aside or modify a prior decision and issue a new decision. Mildred Kaye, 35 ECAB 952 [1984].

The Board found that appellant's claim for continuation of pay was barred by the 30-day time limitation provision for filing under the Act. Subsequent to the Office's decision, appellant submitted a letter stating that she did not file form CA-1 within 30 days of the incident because it was not until after that time that her physician informed her that the difficulty with her left knee resulted from the January 21, 1982 employment incident and was not due to her past history of phlebitis as she was previously told. In denying appellant's application for review, the Office stated that appellant's explanation for failure to file a claim for continuation of pay within 30 days of the injury did not meet the criteria for waiver of the 30 day period because appellant "was aware or should have been aware that Notice of Injury must be filed within 30 days of the date of injury." The Board noted that the Office's reasoning for denial of appellant's application for review was erroneous although its conclusion was correct. In that regard, the Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a) which sets forth the filing requirements for continuation of pay. There was, therefore, no provision in the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury. The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag*. As appellant filed form CA-1, notice of traumatic injury and claim for continuation of pay/compensation more than 30 days after the January 21, 1982 injury, her claim for continuation of pay was barred by the applicable time limitation provision. Therefore, the Office did not abuse its discretion in its refusal to reopen appellant's case for further consideration of the merits of the claim. Patricia J. Kelsesky, 35 ECAB 549 [1984].

The Office's refusal to reopen the case for further merit review was proper. On a previous appeal the Board affirmed the Office's denial of appellant's claim that her carpal tunnel syndrome was causally related to her 1982 employment injury. On reconsideration appellant submitted the duty status statement of an employing establishment nurse which indicated she should not lift over 15 pounds with her left arm until July 7, 1982. A nurse is not a "physician" within the meaning of section 8101(2) of the FECA, and this statement was therefore of no probative value with respect to the issue on reconsideration. Appellant submitted a report from a chiropractor which stated it was "conceivable and probable" that appellant's condition was "precipitated and/or exacerbated by trauma at work." Under section 8101(2) of the Act, chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . . " As the condition was not a subluxation, his report was of no probative value. The other medical reports submitted did not address the relevant issue of causal relationship. Betty G. Myrick, 35 ECAB 922 [1984].

The Board found that 5 U.S.C. section 8123(d) does not provide a basis for the rejection of a claim for compensation; rather it suspends the right of an employee to compensation during the period she refuses to submit to an examination. The Board therefore found that the Office improperly rejected appellant's claim for compensation under this section. As for the second issue, the Board noted that the Office initially rejected appellant's claim because it found that she had obstructed the impartial medical examination. However, the record indicated that subsequent to the November 30, 1982 Office decision appellant requested reconsideration and noted that she had attempted to reschedule an appointment with the impartial specialist with no success. She also submitted additional medical evidence. The Office requested that appellant submit medical records relating to her May 1982 nonemployment-related leg injury, and when she did not respond, the Office denied her request for modification after a review of the merits. In determining the merits of appellant's request for reconsideration, an Office claims examiner recommended that modification of the Office's prior "obstruction" decision be denied on the ground that appellant had not sustained her burden of proof to establish her claim, in that she had not submitted the requested medical evidence. A second claims examiner agreed, and noted that the evidence of record was insufficient to establish appellant's claim. The Board found that the Office's February 24, 1984 compensation order denying appellant's request for modification was inconsistent with the Office's initial decision of November 30, 1982. The Office's February 24, 1984 compensation order denied modification based on burden of proof grounds, and not on grounds of obstruction as was the case in the November 30, 1982 decision. When appellant submitted new medical evidence the Office should have made a merit decision regarding appellant's back injury claim and not merely have affirmed an "obstruction" decision. Therefore, a *de novo* decision on all aspects of the case should be made. Karen K. Cassel, 35 ECAB 1053 [1984].

The Board found that the refusal of the Office to reopen the case for a merit review did not constitute an abuse of discretion as the only evidence submitted in support of the reconsideration request was a report by a clinical psychologist which was repetitive of his testimony at the Office hearing. Bruce E. Martin, 35 ECAB 1090 [1984].

LEGAL CONTENTIONS NOT PREVIOUSLY CONSIDERED

Appellant, in support of her request for reconsideration, cited a regulation that stated: "(b) The total aggregate compensation payable in any case under part (a) of this section for injury or death or both, shall not exceed the sum of $4000.00 exclusive of medical cost. The maximum monthly rate of compensation in any case shall not exceed the sum of $50.00." This regulation, was superseded by a new regulation with respect to injuries occurring on or after July 1, 1968, as follows; "The total aggregate compensation payable in any case, for injury or death or both, shall not exceed $8,000, exclusive of medical costs and burial allowance. The weekly rate of compensation disability or death shall not exceed $35.00." However, section 25.21(j) of the regulations provides that only compensation for temporary disability shall be paid periodically; compensation for death benefits is payable in a lump sum. Appellant was therefore not entitled to a monthly or a weekly compensation payment. As explained in the first decision of the Board, the lump sum payment appellant received in compensation for her husband's death was the full amount of compensation to which she was entitled by regulation. She therefore did not submit any new substantial legal argument that would require the Office to reconsider her case. Marta Z. DeGuzman (Amadeo DeGuzman), 35 ECAB 309 [1983].

The Board found that the Office acted improperly by refusing to reopen the case for further consideration on the merits of whether appellant was injured in performance of duty when she slipped and fell on a sidewalk outside a building on the base where she regularly ate breakfast. The Board noted that the case presented legal contentions not previously considered by the Office and appellant had submitted relevant new evidence pertaining to her activities on the date of injury. On the prior appeal, the Board requested that the Office submit a legal memorandum on the issue as it presented a case of first impression. The Office responded by filing a memorandum with the Board. Thereafter, appellant's attorney requested that the appeal be dismissed so he could submit new evidence and request reconsideration by the Office. The evidence submitted was relevant to the present case and the Office should have reviewed it on the merits. Nona J. Noel, 35 ECAB 439 [1983].

The Board found that the refusal of the Office to reopen the case for further consideration on its merits did not constitute an abuse of discretion. In his reconsideration request, appellant did not submit any relevant evidence not previously of record. He did advance the legal contention that he had been adjudicated totally disabled under the provisions of the Social Security Act for the period he claimed benefits under the FECA. Material which is duplicative of that already in the case record is of no evidentiary value and does not constitute a basis for reopening a case. The reports from the USPHS were duplicative of previous reports submitted by appellant and already a part of the record at the time of the Office's merit decision. With respect to appellant's contention that he was totally disabled under the Social Security Act provisions, the Board noted that 42 U.S.C. section 423(d), for the purposes of the Social Security Act, defines disability as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . ." That disability may be due to any cause. That provision has no application to appellant's entitlement to compensation under the FECA where appellant must establish a causal relationship between his disability commencing July 7, 1979 and his employment injury before he would be entitled to benefits. Victor M. Garcia, 35 ECAB 995 [1984].

REFUSAL TO REOPEN HELD IMPROPER

The FAA medical certification letters submitted by appellant in support of his request for reconsideration were sufficient to require further development of the evidence by the Office. Such further development was especially important in light of the fact that the Office did not request a work tolerance evaluation of appellant from his attending physician. The case was remanded so that the Office may obtain a work tolerance evaluation from appelant's physician who should also be requested to provide an opinion on whether appellant, in light of his physical limitations and any medications he may be taking for his employment-related condition, is capable of performing the duties of a commercial airplane pilot and, if so, whether on a full or part-time basis. The Office should then ascertain from the FAA whether appellant is physically and otherwise qualified for such position. Upon further development of the case record deemed necessary, the Office shall recalculate appellant's loss of wage-earning capacity and issue a *de novo* decision. Gerald A. Maher, 35 ECAB 508 [1984].

The Board found that the Office's refusals to reopen the case for a merit review were improper. Appellant submitted relevant evidence not previously of record that was sufficient to require the Office to reopen the case for reconsideration. Following the January 29, 1980 compensation order terminating her compensation, appellant submitted a January 18, 1983 note and a February 21, 1983 report of an orthopedic surgeon who treated appellant during her October 1982 hospitalization, expressing the doctor's opinion that appellant's condition was causally related to her 1971 employment injury. Following the May 31, 1983 compensation order denying reconsideration, appellant submitted a June 8, 1983 report also supporting causal relationship. These reports were relevant with respect to the issues in the case. The Board noted that the Office's compensation orders refused to reopen appellant's case because of the findings that the additional evidence lacked "substantial probative value." This was not the correct test to follow in determining whether to reopen a case for reconsideration. Ethel D. Curry, 35 ECAB 737 [1984].

The Board found the Office's refusal to review the case on the merits was improper. The reports submitted by appellant in support of his request for reconsideration contained physical limitations on sitting and walking which appeared inconsistent with the physical requirements of the selected watchman position. Richard N. Thomas, 35 ECAB 742 [1984].

The Office's refusal to reopen the case for a merit review was improper. Appellant submitted relevant medical evidence not previously of record sufficient to require the Office to reopen the case for reconsideration. The report of a Board-certified internist expressed the doctor's opinion that appellant's "persistent neuropathy is indeed probably diabetic, but was occasioned by injury, it not having existed prior to the injury . . ." The report of a general practitioner who was appellant's personal physician also supported causal relation. A Board-certified surgeon and Office medical consultant, stated that, although the additional reports did not add "new evidence," they raised "provocative thinking," and he recommended the Office obtain an opinion from a neurologist. An Office claims examiner, however, recommended that reconsideration be denied, as neither doctor specialized in "an appropriate area, i.e., orthopedics and neurology," and neither provided medical rationale. The Board noted that as a Board-certified internist, the first doctor specialized in an area of medicine germane to the case, and his opinion supporting causal relationship between appellant's diabetic neuropathy and his employment injury was sufficient to require the reopening of the case on its merits. Following remand, the case record should be reviewed by a Board-certified neurologist, as recommended, for an opinion on the issue of causal relationship. Raymond K. Thomas, 35 ECAB 846 [1984].

The Board found that the Office's refusals to reopen the case for a merit review were improper. To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128. Accordingly, as is well-established under Board precedent, the Office is required to reopen a case on its merits when such evidence or contentions are presented. Appellant submitted relevant evidence not previously of record that was sufficient to require the Office to reopen the case for reconsideration. The Office's August 10, 1981 letter decision denied appellant's claim on the ground that the evidence failed to establish a causal relationship between the employment incident and his allegedly disabling condition. The submitted reports of an osteopath directly addressed the issue of causal relationship and were therefore relevant to the issue on reconsideration. The Board noted that two compensation orders in part denied reconsideration on the ground that the additional evidence lacked "substantial probative value." This is not the correct test to follow in determining whether to reopen a case for reconsideration. Floyd S. Sherwood, 35 ECAB 974 [1984].

The Board found that the Office's refusal to reopen the case for further merit review was improper. Appellant submitted relevant medical evidence sufficient to require the Office to reopen the case for reconsideration. Following the September 1982 denial of reconsideration, appellant submitted a report of a family practitioner, which stated he was still "under active medical care for peptic ulcer disease and discogenic disease, lumbar spine," and that x-rays indicated "postbulbar ulcer with hypertension in the stomach, as well as thickened fold, suggesting gastritis." The Board noted that the Office had accepted appellant's claim for a duodenal ulcer, as well as for a back condition, as employment related, and thus evidence on appellant's current gastrointestinal condition was relevant to whether he had a continuing employment-related condition. The reports of two chiropractors were not sufficient to require reopening of the case as no subluxation was demonstrated to exist. Jacob Samaan, 35 ECAB 1050 [1984].

REVIEW ON OFFICE'S OWN MOTION

It is well settled that the Office may review a claim under 5 U.S.C. 8128 at any time and where supported by the evidence may set aside or modify a prior decision and issue a new decision. Mildred Kaye, 35 ECAB 952 [1984].

SCHEDULE AWARDS

IN GENERAL

It is well-established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included. As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him." Raymond E. Gwynn, 35 ECAB 247 [1983].

Larson, *The Law of Workmen's Compensation*, section 12.20 and section 58.21 (1982). "Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition [in this case osteoarthritis], the entire disability is compensable, and . . . no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death." Larson, section 59.22. Raymond E. Gwynn, 35 ECAB 247 [1983].

The Board noted that the Federal Employees' Compensation Procedural Manual of the Office provides: "Scheduled Awards and Calculations of Impairment: The phrase 'permanent disability' in 5 U.S.C. 8107(a) is interpreted to mean 'permanent physical impairment.' The same standards for evaluating such impairment are applied in all cases. The MA [medical adviser] shall in all cases document his/her calculations to show how he/she arrived at the percentage of impairment, *incorporating all preexisting impairments of the scheduled member* . . ." Raymond E. Gwynn, 35 ECAB 247 [1983].

The Board noted that appellant received temporary total disability compensation until the effective date of his schedule award. The Board has stated that when a claimant is receiving disability compensation for the residuals of an employment injury up to the effective date of a schedule award, made with respect to the same injury, the Office has the burden of proving that after the expiration of the period of the award the employee no longer has disability for work. The Board noted that the Office incorrectly informed appellant in a letter that after the termination of his schedule award he had the burden to establish that his injury prevented him from performing his usual work or caused a loss of wage-earning capacity. The Office had the obligation to resume payment of compensation for temporary total disability from the date of the expiration of the schedule award until such time that it proves appellant is no longer totally disabled. Otto M. Haga, 35 ECAB 769 [1984].

Section 8107(c) of the FECA does not provide for a schedule award for an impairment of the shoulder *per se* but rather for the loss or loss of use of an arm. Shirley A. Hayes, 35 ECAB 985 [1984].

AMA GUIDES

The case was not in posture for decision on the issue of whether appellant had more than a 10 percent loss of use of his right leg. The Office medical adviser, relying on the findings reported by a Board-certified orthopedist and a Board-certified neurologist recommended a 10 percent permanent impairment of appellant's right leg, which was less than that estimated by the Board-certified orthopedist. The Office should request the above-mentioned specialists to provide an evaluation using the AMA *Guides*, setting forth the specific findings used to determine the impairment rating. The Office, after any further development deemed necessary, shall then issue a *de novo* decision. Donald Miller, 35 ECAB 145 [1983].

Although the AMA *Guides* has been accepted by the Office and the Board as a general guide for evaluating the degree of permanent impairment, some impairments which prevent a limb from functioning normally, such as pain and weakness, are not reflected in the tables but should also be considered. All factors which prevent a limb from functioning normally should be considered, together with any loss of motion, in evaluating the degree of permanent loss of use for the purpose of determining a schedule award. Harry Fekeris, 35 ECAB 665 [1984].

The weight of the medical evidence established that appellant had a 20 percent permanent impairment of her right arm, instead of the 7 percent previously awarded by the Office. A Board-certified orthopedic surgeon who specializes in hand surgery stated that appellant had writer's cramp manifested by pain, incoordination, and eventual inability to control objects in her hand. A Board-certified orthopedic surgeon stated that he was "quite familiar" with the AMA *Guides*, but that there was nothing in the AMA *Guides* which directly pertained to appellant's type of problem. He estimated that appellant had a 20 percent permanent impairment of her right arm. The two Board-certified orthopedic surgeons who examined appellant concluded that appellant had a 20 percent permanent impairment of her right arm. The two Board-certified orthopedic surgeons who acted as Office medical consultants stated that the evaluation of the Board-certified orthopedist specializing in hand surgery was entitled to great weight in determining the permanent impairment of appellant's right arm. The Office medical adviser who is Board-certified in preventive medicine and occupational medicine applied the AMA *Guides* but considered only loss of sensation in appellant's digits of the right hand. Barbara J. Hines, 35 ECAB 1071 [1984].

ARM

The case was not in posture for decision on the issue of whether appellant had more than a 15 percent permanent impairment of his right upper extremity. The Board noted that there were great variations in the reports of the Board-certified specialists who examined appellant as to the extent of his permanent partial impairment. An Office medical adviser reviewed the above reports on February 19, 1982 and concluded that,"based on ranges of motion, it would be reasonable to increase the schedule award to 15 percent impairment of right upper extremity for pain crepitation." No mention was made in this report of the atrophy found in one of the reports. In addition, the medical adviser did not adequately discuss the contrary medical reports, nor did she provide any rationalized medical opinion evidence in support of her conclusion that appellant had a 15 percent permanent impairment of his right upper extremity. On September 10, 1982 one doctor subsequently reported improved ranges of motion and concluded that appellant had a ten percent permanent impairment of his right upper extremity. Another doctor reported vastly different but improving ranges of motion in his November 4, 1982 and December 16, 1982 reports and concluded that, based on the ranges of motion together with findings of tenderness and atrophy, appellant had a 30 percent permanent impairment. He did not include specific percentage values in his report. A second Office medical adviser reviewed this evidence on March 16, 1982 and concluded that, based on the last reported ranges of motion, appellant had no more than a 15 percent permanent impairment, and appeared to be improving. However. the Board noted that the medical adviser did not comment regarding the estimate of a 30 percent impairment. On remand, appellant together with a statement of accepted facts and the entire case record, should be referred to an appropriate Board-certified specialist for examination and evaluation. The Office should request the specialist to provide a well-reasoned medical opinion as to the date of maximum improvement and the extent of appellant's permanent partial impairment of his right upper extremity. The specialist should assign specific percentage values to any findings such as pain, crepitation or atrophy. Linwood D. Holmes, 35 ECAB 792 [1984].

The weight of the medical evidence established that appellant had no more than a 50 percent impairment of his right upper extremity, a 10 percent impairment of his right lower extremity, and a 10 percent permanent impairment of his left lower extremity, for which he received schedule awards. Jess L. Green, 35 ECAB 893 [1984].

Section 8107(c) of the FECA does not provide for a schedule award for an impairment of the shoulder *per se* but rather for the loss or loss of use of an arm. Shirley A. Hayes, 35 ECAB 985 [1984]. —

The Board found that appellant had no more than 10 percent impairment of the upper extremity. The referral Board-certified orthopedic surgeon provided measurements in degrees of restriction of movement of the right shoulder and opined that appellant had an impairment of the right shoulder "in the neighborhood of thirty percent." The Office medical adviser reviewed this report and, pursuant to the applicable provisions of Chapter I of the AMA *Guides*, stated that appellant's 30 degree loss of forward flexion of the right shoulder, as measured by the Board-certified orthopedist, constituted a three percent impairment, and her 15 degree loss of internal rotation constituted a three percent impairment. The medical adviser rated appellant's impairment due to pain as four percent, for a total impairment of 10 percent. All other medical reports in the case record were primarily concerned with the extent of appellant's disability. The Office properly followed the AMA *Guides* in determining appellant's schedule award; the orthopedist's estimate of a thirty percent impairment referred to appellant's shoulder, not her arm. Shirley A. Hayes, 35 ECAB 985 [1984].

The weight of the medical evidence established that appellant had a 20 percent permanent impairment of her right arm, instead of the 7 percent previously awarded by the Office. A Board-certified orthopedic surgeon who specializes in hand surgery stated that appellant had writer's cramp manifested by pain, incoordination, and eventual inability to control objects in her hand. A Board-certified orthopedic surgeon stated that he was "quite familiar" with the AMA *Guides*, but that there was nothing in the AMA *Guides* which directly pertained to appellant's type of problem. He estimated that appellant had a 20 percent permanent impairment of her right arm. The two Board-certified orthopedic surgeons who examined appellant concluded that appellant had a 20 percent permanent impairment of her right arm. The two Board-certified orthopedic surgeons who acted as Office medical consultants stated that the evaluation of the Board-certified orthopedist specializing in hand surgery was entitled to great weight in determining the permanent impairment of appellant's right arm. The Office medical adviser who is Board-certified in preventive medicine and occupational medicine applied the AMA *Guides* but considered only loss of sensation in appellant's digits of the right hand. Barbara J. Hines, 35 ECAB 1071 [1984].

BENEFICIARIES OF AWARDS UNPAID AT DEATH

Section 8109 of the FECA provides that portions of schedule awards upaid at the death of an employee are payable to the children, widow or widower, or parents in a specified order of precedence. The term "widow" is defined to mean "the wife living with or dependent for support on the decedent at the time of his death, or living apart for reasonable cause or because of his desertion." Mary Bee McCabe, 35 ECAB 218 [1983].

It is well-established that questions affecting relationship, such as the validity of marriage or divorce, are determined by the statutory and decisional domestic relations law of the jurisdiction where the alleged marriage took place. In the present case, the laws of Hawaii are applicable. It is noted that the Hawaiian law does not recognize common law marriages. Hawaii statutory section 572-1(7) provides: "It shall be in no case lawful for any persons to marry in the state without a license for that purpose duly obtained from the agent appointed to grant marriage licences." Mary Bee McCabe, 35 ECAB 218 [1983].

The Board found that appellant failed to establish that she is the widow of the deceased employee as she did not come within that class of beneficiaries as defined by section 8109. The state laws of Hawaii do not recognize common law marriages. Since she is not the "widow" of the employee she is not entitled to the unpaid portion of his schedule award. The Board further found that only those classes of persons specifically named in section 8109 (a)(3)(D) of the Act are eligible for compensation due under a schedule award and unpaid at the time of the employee's death. When Congress made provision for a schedule of compensation for the total or partial loss of a member or function of the body in 1949, it made clear that in the absence of any surviving specified beneficiaries the unpaid schedule award would lapse. Should there be no such beneficiaries or should they die before receiving full payment, any balance remaining could be used to defray the employee's burial expenses. Any further balance not so applied would lapse. The disposition of unpaid schedule awards is provided for in a manner similar to that in the New York Law and Longshoremen's Act. Mary Bee McCabe, 35 ECAB 218 [1983].

CONCURRENT PAYMENTS

Appellant's second schedule award should have commenced on October 24, 1980, the date of maximum improvement. Should the Office find that appellant is entitled to disability compensation subsequent to December 12, 1979 such compensation would not continue during this modified period of the schedule award. The Office would, however, be required to determine appellant's continuing entitlement to compensation when such award ended. If appellant is entitled to disability compensation subsequent to December 12, 1979 the importance of determining the correct date of maximum improvement for the second schedule award becomes apparent. Depending upon the length of appellant's disability, an incorrect retroactive determination of appellant's maximum improvement date could deprive her of compensation to which she is entitled in light of the fact that she cannot receive both a schedule award and disability compensation concurrently. Adele Hernandez-Piris, 35 ECAB 839 [1984].

Eye

There appeared to be a conflict in the medical evidence regarding appellant's loss of vision in the left eye. An Office medical adviser reviewed the case record and opined that appellant's loss of vision in the left eye was not causally related to his federal employment but rather was due to an embolism from an arterisclerotic plaque in one of his carotid arteries. On the other hand, a Board-certified opthalmologist stated that hypertension can directly cause occular problems similar to those experienced by appellant. This opinion constituted sufficient evidence to require further development by the Office. Wiley L. Wall, 35 ECAB 413 [1983].

The question of maximum improvement was not properly determined by the Office. The standard to be used in determining the date of maximum improvement is when the physical condition of the injured member of the body has stabilized and will not improve further. One doctor stated that the date of maximum improvement was March 1, 1977. Another doctor stated on October 13, 1977 that it was poossible for the employee's vision to improve following laser therapy but it takes "many months to realize." A third doctor stated that October 31, 1977, the date of the doctor's report, was the date of maximum improvement in view of the recorded visions of that time. An Office medical adviser then stated that May 7, 1981 was the correct date, but did not provide any rationale for determining that date as the date of maximum improvement. The Office was instructed to refer the case record, along with a statement of accepted facts, to a Board-certified ophthalmologist of professorial rank for a rationalized opinion regarding the proper date of maximum improvement. Charles J. Cortese (Anthony L. Cortese), 35 ECAB 1017 [1984].

Facial disfigurement

In a case involving a disfigurement, the question before the Board is whether the amount awarded by the Office was based upon sound and considered judgment and was "proper and equitable" under the circumstances as provided by 5 U.S.C. section 8107(c)(21). In determining what constitutes a "proper and equitable" award for disfigurement, sound and equitable evaluation must be exercised as to the likely economic effect of the claimant's disfigurement in securing and maintaining employment. James L. Lattanzi, 35 ECAB 584 [1984].

The Board found that the Office, in determining the amount of the schedule award for facial disfigurement in the present case at $350.00, did not abuse its discretion. Because of their experience Office deputy commissioners and assistant deputy commissioners have the status as experts in evaluating disfigurements for schedule award purposes as long as they personally viewed appellant in the present case, and found no serious disfigurement. The case record showed that the assistant deputy commissioner took into consideration the proper factors and circumstances and made a sound and considered judgment which was "proper and equitable" under section 8107(c)(21) of the FECA. James L. Lattanzi, 35 ECAB 584 [1984].

Factors in calculating impairment

The Board has stated in numerous cases that some impairments, such as pain and weakness, which limit the normal function of a limb but are not reflected in the AMA *Guides*, should be considered in determining the amount of a schedule award. Shirley A. Hayes, 35 ECAB 985 [1984].

Although the AMA *Guides* has been accepted by the Office and the Board as a general guide for evaluating the degree of permanent impairment, some impairments which prevent a limb from functioning normally, such as pain and weakness, are not reflected in the tables but should also be considered. All factors which prevent a limb from functioning normally should be considered, together with any loss of motion, in evaluating the degree of permanent loss of use for the purpose of determining a schedule award. Harry Fekeris, 35 ECAB 665 [1984].

The case was not in posture for decision on the issue of whether appellant had more than a 15 percent permanent impairment of his right upper extremity. The Board noted that there were great variations in the reports of the Board-certified specialists who examined appellant as to the extent of his permanent partial impairment. On remand, appellant together with a statement of accepted facts and the entire case record, should be referred to an appropriate Board-certified specialist for examination and evaluation. The Office should request the specialist to provide a well-reasoned medical opinion as to the date of maximum improvement and the extent of appellant's permanent partial impairment of his right upper extremity. The specialist should assign specific percentage values to any findings such as pain, crepitation or atrophy. Linwood D. Holmes, 35 ECAB 792 [1984].

The case was not in posture for decision on the percentage impairment of appellant's right leg. A Board-certified orthopedic surgeon stated that "on the right [leg] there is 15 degrees of dorsiflexion and 20 degrees of plantar flexion." He opined that appellant had a ten percent permanent impairment of the right foot and ankle. Although the Office medical adviser used September 27, 1983, the date the specialist examined appellant, as the date of maximum improvement and concurred with the doctor that appellant had ten percent loss, the medical adviser did not base the percentages of permanent partial loss of use of appellant's right leg on the figures provided. The Office medical adviser based the schedule award on the following factors: "pain/discomfort/itch/swelling [and] atrophy/tenderness/swelling." He did not assign a percentage for the reported loss of motion in accordance with the AMA *Guides*. Accordingly, the assignments should be reviewed and the extent of permanent partial loss of use of appellant's right leg recalculated, in order to determine the proper percentage. In making this redetermination of the extent of loss of motion, "specified functional impairments" should be itemized and stated in terms of percentage loss of use "of the member" in accordance with the AMA *Guides* tables. "Each impairment not covered by the *Guides* should be estimated in terms of percentage loss of use." Marvin W. Friedland, 35 ECAB 836 [1984].

The Board found that appellant had no more than 10 percent impairment of the upper extremity. The referral Board-certified orthopedic surgeon provided measurements in degrees of restriction of movement of the right shoulder and opined that appellant had an impairment of the right shoulder "in the neighborhood of thirty percent." The Office medical adviser reviewed this report and, pursuant to the applicable provisions of Chapter I of the AMA *Guides*, stated that appellant's 30 degree loss of forward flexion of the right shoulder, as measured by the Board-certified orthopedist, constituted a three percent impairment, and her 15 degree loss of internal rotation constituted a three percent impairment. The medical adviser rated appellant's impairment due to pain as four percent, for a total impairment of 10 percent. All other medical reports in the case record were primarily concerned with the extent of appellant's disability. The Office properly followed the AMA *Guides* in determining appellant's schedule award; the orthopedist's estimate of a thirty percent impairment referred to appellant's shoulder, not her arm. Shirley A. Hayes, 35 ECAB 985 [1984].

The weight of the medical evidence established that appellant had a 20 percent permanent impairment of her right arm, instead of the 7 percent previously awarded by the Office. A Board-certified orthopedic surgeon who specialized in hand surgery stated that appellant had writer's cramp manifested by pain, incoordination, and eventual inability to control objects in her hand. A Board-certified orthopedic surgeon stated that he was "quite familiar" with the AMA *Guides*, but that there was nothing in the AMA *Guides* which directly pertained to appellant's type of problem. He estimated that appellant had a 20 percent permanent impairment of her right arm. The two Board-certified orthopedic surgeons who examined appellant concluded that appellant had a 20 percent permanent impairment of her right arm. The two Board-certified orthopedic surgeons who acted as Office medical consultants stated that evaluation of the Board-certified orthopedist specializing in hand surgery was entitled to great weight in determining the permanent impairment of appellant's right arm. The Office medical adviser who is Board-certified in preventive medicine and occupational medicine applied the AMA *Guides* but considered only loss of sensation in appellant's digits of the right hand. Barbara J. Hines, 35 ECAB 1071 [1984].

HAND

The Office improperly determined that appellant had an eight percent employment-related permanent impairment of his left hand. The first Office medical adviser determined that appellant had an eight percent permanent loss of use of his left hand and the second Office medical adviser concluded that appellant had a five percent permanent loss of use of that hand. Both medical advisers relied, in part, upon findings by the Board-certified orthopedic surgeon to whom appellant was referred by the Office. However, neither medical adviser explained why his conclusion as to the percentage permanent impairment of appellant's left hand differed from a specialist in the relevant field. The Office should therefore have an Office medical adviser estimate the degree of permanent impairment of appellant's left hand, with specific reference to the specialist's report and testimony. Should the medical adviser conclude that appellant has less than 30 percent permanent loss of use of his left hand he should explain the basis for his differing with the specialist's conclusion. Harry Fekeris, 35 ECAB 665 [1984].

HEARING LOSS

The Office evaluates industrial hearing loss in accordance with the standards of the National Institute for Occupational Safety and Health, using the frequencies of 1,000, 2,000, and 3,000 cycles per second. These standards are found in Chapter 6 of *Occupational Exposure to Noise*. Using these and other standards adopted by the Office and approved by the Board, the hearing loss in either ear must exceed an average at these frequencies of 25 decibels when the audiogram is based on an ISO-ANSI calibration, as was the case here, in order for there to be a compensable loss under the FECA. The first 25 decibels are discounted as having no significance with respect to the ability to hear everyday speech under everyday conditions. Edgar Dillon, 35 ECAB 336 [1983]; James Lewis, 35 ECAB 627 [1984]; Jack R. Lingren, 35 ECAB 676 [1984].

The Board found that the Office properly applied its standardized procedures to the September 14, 1982 audiogram, and that under these standards appellant did not have a ratable loss of hearing. The evidence established that appellant had a hearing loss but not sufficiently large to be ratable for the purpose of entitlement to compensation under the FECA. Edgar Dillon, 35 ECAB 336 [1983].

The schedule awards provision of the FECA provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act specifies the amount of compensation to be paid for particular impairments; the award for total (100 percent) loss of binaural hearing is 200 weeks of compensation. Less than total loss is compensated at a proportionate rate, so that for a 98 percent binaural hearing loss, the award is 196 weeks, or 98 percent of 200 weeks. The Act requires the compensation to be based on an employee's "monthly pay" which, in a case such as this, is "the monthly pay at the time of injury." The period of the award is to commence with the date of maximum improvement. James Lewis, 35 ECAB 627 [1984].

The publication *Occupational Exposure to Noise* does not provide a method for calculating the percentage of binaural hearing loss. Therefore, the Office makes this calculation by using the formula for computing binaural hearing impairment of the AMA *Guides* after the percent loss of hearing in each ear has been determined at 1,000, 2,000, and 3,000 cycles per second. James Lewis, 35 ECAB 627 [1984].

The schedule awards provision of the FECA provides for compensation to employees sustaining permanent impairment from loss, or loss of use, of specified members of the body. The Act specifies the amount of compensation to be paid for particular impairments; the award for total (100 percent) loss of monaural hearing is 52 weeks of compensation. Less than total loss is compensated at a proportionate rate, so that for a 23 percent monaural hearing loss the award is 11.96 weeks, or 23 percent of 52 weeks. The Act requires the compensation to be based on an employee's "monthly pay" which, in a case such as this, is "the monthly pay at the time of injury." The weekly compensation in a case such as this, is determined by the employee's monthly rate of pay on the date of injury. Where the injury was sustained over a period of time, as in this case, that date is the date of last exposure to the employment factors causing the injury. Here, the record showed the injury was sustained over a five-year period, ending on June 9, 1979. Appellant's weekly compensation under the award was based on his rate of pay on that date. Overtime pay is not included in determining appellant's weekly pay rate, but his premium pay was included in the calculation. The Board found that the evidence showed that June 9, 1979 was appellant's date of last exposure and that the Office was correct in setting the appellant's rate of compensation under the award based on his salary on that date. The period of award is to commence with the date of maximum improvement. Jack R. Lindgren, 35 ECAB 676 [1984].

The Board found that the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim, as the medical evidence failed to establish that appellant's hearing loss is not causally related to his exposure to noise in his employment. In its efforts to determine whether appellant's hearing loss, for which it had issued a schedule award, was causally related to his exposure to noise at work, the Office referred appellant to three Board-certified otolaryngologists. The Office's referral letter to all three otolaryngologists contained an inaccurate statement underestimating the period of time during which appellant was exposed to noise. In addition, the Office's referral letter to these three otolaryngologists stated that appellant was exposed to aircraft flight line noise of up to 120 dBA, and that hearing protection was used during exposure. This statement did not make it clear that the exposure to 120 dBA was with the use of hearing protection, as the employing establishment indicated. In light of these discrepancies in the statements submitted to the otolaryngologists to whom it referred appellant and his case record, the Office did not meet its responsibility to have a proper evaluation based on an accurate history and medical background. Gerald W. Keoppel, 35 ECAB 885 [1984].

Leg

The case was not in posture for decision on the issue of whether appellant had more than a 10 percent loss of use of his right leg. The Office medical adviser, relying on the findings reported by a Board-certified orthopedist and a Board-certified neurologist, recommended a 10 percent permanent impairment of appellant's right leg, which was less than that estimated by the Board-certified orthopedist. The Office should request the above-mentioned specialists to provide an evaluation using the AMA *Guides*, setting forth the specific findings used to determine the impairment rating. The Office, after any further development deemed necessary, shall then issue a *de novo* decision. Donald Miller, 35 ECAB 145 [1983].

The Board found that the Office improperly calculated the amount of appellant's schedule award in that it failed to incorporate the preexisting impairment of the left knee. The Office medical advisers erred by not following the procedures established by the Office in calculating scheduled awards. The 25 percent impairment estimate of the Board-certified physicians constituted the weight of the medical evidence. Raymond E. Gwynn, 35 ECAB 247 [1983].

The case was not in posture for decision and must be remanded for further development. Both the Board-certified family practitioner and an internist reported degenerative changes in appellant's right knee and evidence of a meniscal tear of long duration. Although the family practitioner did not provide any supporting rationale, he did report that appellant's "history, subsequent physical findings, and operative findings certainly suggest that his pathology is secondary to the injury sustained in 1969." The family practitioner estimated appellant's permanent impairment of the right lower extremity as 25 percent. It was unclear from the record why the Office referred appellant to an internist before asking the family practitioner for an explanation of his estimate. Further, there was an apparent conflict in medical opinions concerning the causal relationship between appellant's condition and the March 3, 1969 employment injury. The Board also noted that the Office medical consultant did not assign anything for pain and appellant's other subjective complaints as reported by the above-mentioned physicians. Moreover, he did not take into consideration appellant's preexisting degenerative changes which both doctors reported.

The Board further noted that the Office's consultant acting in the stead of a medical adviser was required by the Office's procedures to document his calculations to show how he arrived at the percentage of impairment, which calculations were to incorporate "all preexisting impairments of the scheduled member." He offered no explanation as to why the degenerative changes were not considered in the calculation. The Board found that there was a conflict in medical opinion regarding the percentage of permanent impairment of appellant's right lower extremity which necessitated referral to an impartial specialist for resolution pursuant to 5 U.S.C. section 8123(a). On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to an impartial Board-certified othopedic surgeon, for a rationalized medical opinion as to appellant's permanent impairment of the right lower extremity resulting from the March 3, 1969 employment injury, taking into account all *preexisting* impairments of the leg. Pedro M. DeLeon, Jr., 35 ECAB 487 [1983].

The medical evidence established that appellant had no more than a 17 percent impairment of the right leg for which he received a schedule award. Appellant's attending Board-certified orthopedist reported appellant had a permanent disability of the knee of about 20 to 25 percent; however, he failed to specify what factors he included in that estimate and failed to address percentage impairment of the relevant member, the leg. The Office medical adviser properly applied the criteria of the AMA *Guides* which have been adopted by the Office and approved by the Board as a standard for evaluating scheduled losses, to the measurements set forth by the referral othopedist and concluded after adding a ten percent impairment for pain that appellant had a 17 percent permanent impairment of the right leg. Otto M. Haga, 35 ECAB 769 [1984].

The case was not in posture for decision on the percentage impairment of appellant's right leg. A Board-certified orthopedic surgeon stated that "on the right [leg] there is 15 degrees of dorsiflexion and 20 degrees of plantar flexion." He opined that appellant had a ten percent permanent impairment of the right foot and ankle. Although the Office medical adviser used September 27, 1983, the date the specialist examined appellant, as the date of maximum improvement and concurred with the doctor that appellant had ten percent loss, the medical adviser did not base the percentages of permanent partial loss of use of appellant's right leg on the figures provided. The Office medical adviser based the schedule award on the following factors: "pain/discomfort/itch/swelling/ [and] atrophy/ tenderness/swelling." He did not assign a percentage for the reported loss of motion in accordance with the AMA *Guides*. Accordingly, the assignments should be reviewed and the extent of permanent partial loss of use of appellant's right leg recalculated, in order to determine the proper percentage. In making this redetermination of the extent of loss of motion, "specified functional impairments" should be itemized and stated in terms of percentage loss of use "of the member" in accordance with the AMA *Guides* tables. Each impairment not covered by the *Guides* should be estimated in terms of percentage loss of use. Marvin W. Friedland, 35 ECAB 836 [1984].

LUNG

The case was not in posture for decision on whether appellant had any disability or permanent impairment due to a pulmonary condition which he alleged was causally related to exposure to hazardous materials and toxic fumes. The reports of two Board-certified internists specializing in pulmonary diseases seemed to support the conclusion that residuals from appellant's employment-related pulmonary condition prevented him from continuing his federal employment as a plastic worker, a basis for payment of compensation according to *O'Neill*. A third Board-certified internist specializing in pulmonary disease arrived at a contrary conclusion consistent with *Hearn*, stating that exposure to irritant chemicals and fumes was capable of creating a temporary aggravation which would have ceased when appellant ceased his employment. The Office should refer appellant together with the case record and a statement of accepted facts to a Board-certified pulmonary specialist for a fully reasoned opinion on whether appellant had a disabling pulmonary condition subsequent to March 3, 1978 that was either caused or permanently aggravated by his exposure to toxic substances at work. The specialist should also be asked to give his opinion as to whether appellant has any pulmonary impairment, that is, a permanent loss of use of either lung. The Office should then evaluate the specialist's report for the purpose of determining whether appelllant is entitled to compensation for a loss of wage-earning capacity in light of the principles set forth in the above-mentioned cases of *Hearn* and *O'Neill*. If causal relationship, by means of direct causation or permanent aggravation, is indicated, the Office should determine appellant's entitlement to a schedule award by applying the tables in the *AMA Guides*. Maurice E. Anderson, 35 ECAB 277 [1983].

The case was not in posture for a decision as to whether appellant had a permanent impairment of his lungs causally related to his asbestos exposure at work which would entitle him to a schedule award. The AMA *Guides* have been adopted by the Office and approved by the Board as an appropriate standard for evaluating schedule losses under the FECA. The Office medical consultant adequately explained why he applied the AMA's *Guides* to the findings of the Office referral physician rather than to those submitted by appellant's physician, stating that the inclusion of a normal exercise study provided a more comprehensive evaluation and spoke strongly against underlying interstitial pulmonary disease. He further stated that the only possible point of conflict between the two doctors was the difference in diffusing capacities, and that priority had to be accorded to the later and normal value as an asbestos-related diffusion impairment would not be expected to resolve to normal with time. However, he did not adequately explain how application of the AMA *Guides* resulted in his conclusion that appellant had a class 1, zero percent impairment. In particular, he did not specifically address the finding in pulmonary function testing of an FVC of 81 percent of predicted, in light of the table in the AMA *Guides* which appears to indicate that the FVC [Forced Vital Capacity] for a class 1, zero percent impairment should not be less than 85 percent of predicted. Aaron Crenshaw, 35 ECAB 686 [1984].

With respect to appellant's possible entitlement to a schedule award, the Board noted that a schedule award is payable only for the loss or loss of use of a function or member of the body that is specifically enumerated in section 8107 of the FECA. The Act was amended effective September 7, 1974 authorizing a schedule award for loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary [of Labor]." Pursuant to regulations, the Office has provided for a schedule award for a lung impairment. However, the 1974 amendments specifically state that this provision is applicable only to an injury or death occurring on or after the date of enactment, September 7, 1974. This amendment was therefore inapplicable to appellant's condition because his exposure to asbestos occurred prior to the effective date of the 1974 amendments. Wheeler Morris, 35 ECAB 939 [1984]; Anderson Reynolds, 35 ECAB 957 [1984]; John Clement, 35 ECAB 959 [1984]; Joaquin Souza, 35 ECAB 977 [1984].

There was no rationalized evidence of record supporting appellant's claim for an asbestos-related pulmonary condition resulting from his exposure to asbestos in federal employment. He failed to meet his burden of proof. The Board-certified internist specializing in pulmonary diseases to whom the Office referred appellant concluded based on examination and testing that appellant had no physiologic or significant impairment. The Office medical consultant concurred with this assessment. Appellant's doctor, a general surgeon, did not provide any rationalized medical opinion explaining why decreased lung volumes alone caused appellant's pulmonary function tests to be abnormal especially since the rest of the tests were normal; this, coupled with the fact that chest x-rays did not reveal any asbestosis, did not support the surgeon's conclusion of a Class 2 impairment under the AMA *Guides*. Edward E. Olson, 35 ECAB 1099 [1984].

MAXIMUM IMPROVEMENT

In the first decison in the *Born* case, the Board repeated the well-settled rule that the period covered by a schedule award commences on the date that the employee reaches maximum improvement, which "means that the physical condition of the injured member of the body has stabilized and will not improve further." In the second *Born* decision, the Board pointed out that a retroactive determination of the date of maximum improvement is not *per se* erroneous. The determination of such date is to be made in each case on the basis of the medical evidence; it "may properly be set at 'some distant time in the past' if the medical evidence establishes this was the proper date. However, because of the adverse effect such a retroactive determination would have on the employee, the evidence must be strong enough so that it 'clearly and convincingly establishes' the maximum improvement had in fact been reached by that date." Wayne K. Brauer, 35 ECAB 496 [1984].

The case was not in posture for decision with respect to the issue of whether the Office properly determined the date of maximum improvement. An October 21, 1980 medical report stated that "I have no further recommendations for any diagnostic or therapeutic measures concerning his [appellant's] left knee problem." An orthopedic surgeon did not provide an opinion regarding the extent of permanent impairment of appellant's left lower extremity, nor the date of appellant's maximum medical improvement. An orthopedic surgeon's statements concerning the date of maximum medical improvement were inconsistent. In his October 21, 1980 report he seemed to imply that maximum medical improvement had been reached. In a February 10, 1982 report, the doctor stated that he treated appellant up to November 9, 1981 and that maximum medical improvement had been reached; however, in his May 27, 1982 report he stated his agreement with the Office medical adviser's determination of October 21, 1980 as being the date of maximum medical improvement. Therefore, it could be said that the evidence "clearly and convincingly establishes" that maximum improvement had been reached by October 21, 1980. The Office should request a rationalized opinion regarding the date appellant's employment-related left knee condition reached maximum medical improvement. Wayne K. Brauer, 35 ECAB 496 [1984].

The schedule award commences on the "date of maximum improvement" or the point at which the injury has stabilized and will not improve further. That determination is based on the medical evidence, and the date is usually the date of the medical examination which determined the extent of the hearing loss. James Lewis, 35 ECAB 627 [1984]; Jack R. Lindgren, 35 ECAB 676 [1984].

The case was not in posture for decision on the issue of whether appellant had more than a 15 percent permanent impairment of his right upper extremity. The Board noted that there were great variations in the reports of the Board-certified specialists who examined appellant as to the extent of his permanent partial impairment. An Office medical adviser reviewed the above reports on February 19, 1982 and concluded that, "based on ranges of motion, it would be reasonable to increase the schedule award to 15 percent impairment of right upper extremity for pain and crepitation." No mention was made in this report of the atrophy found in one of the reports. In addition, the medical adviser did not adequately discuss the contrary medical reports, nor did she provide any rationalized medical opinion evidence in support of her conclusion that appellant had a 15 percent permanent impairment of his right upper extremity. On September 10, 1982 one doctor subsequently reported improved ranges on motion and concluded that appellant had a ten percent permanent impairment of his right upper extremity. Another doctor reported vastly different but improving ranges of motion in his November 4, 1982 and December 16, 1982 reports and concluded that, based on the ranges of motion together with findings of tenderness and atrophy, appellant had a 30 percent permanent impairment. He did not include specific percentage values in his report. A second Office medical adviser reviewed this evidence on March 16, 1982 and concluded that, based on the last reported ranges of motion, appellant had no more than a 15 percent permanent impairment, and appeared to be improving. However, the Board noted that the medical adviser did not comment regarding the estimate of a 30 percent impairment. On remand, appellant together with a statement of accepted facts and the entire case record, should be referred to an appropriate Board-certified specialist for examination and evaluation. The Office should request the specialist to provide a well-reasoned medical opinion as to the date of maximum improvement and the extent of appellant's permanent partial impairment of his right upper extremity. The specialist should assign specific percentage values to any findings such as pain, crepitation or atrophy. Linwood D. Holmes, 35 ECAB 792 [1984].

Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. Adela Hernandez-Piris, 35 ECAB 839 [1984]; Charles J. Cortese (Anthony L. Cortese), 35 ECAB 1017 [1984].

The Board found that appellant reached maximum improvement on October 24, 1980 with respect to her right arm condition. As the Office hearing representative properly pointed out in his decision the Office chose the incorrect date of appellant's maximum improvement. The period covered by a schedule award commences on the date that the employee reaches maximum improvement from the residuals of his employment injury. The Office had chosen January 29, 1980, the date appellant retired on disability, as the date of maximum improvement. However, there was no medical report indicating that appellant's right arm had stabilized until the October 24, 1980 report in which he noted that appellant had already been given adequate treatment for her fractured right wrist and in which he set forth findings as to the range of motion of that wrist. Adela Hernandez-Piris, 35 ECAB 839 [1984].

Appellant's second schedule award should have commenced on October 24, 1980, the date of maximum improvement. Should the Office find that appellant is entitled to disability compensation subsequent to December 12, 1979 such compensation would not continue during this modified period of the schedule award. The Office would, however, be required to determine appellant's continuing entitlement to compensation when such award ended. If appellant is entitled to disability compensation subsequent to December 12, 1979 the importance of determining the correct date of maximum improvement for the second schedule award becomes apparent. Depending upon the length of appellant's disability, an incorrect retroactive determination of appellant's maximum improvement date could deprive her of compensation to which she is entitled in light of the fact that she cannot receive both a schedule award and disability compensation concurrently. Adela Hernandez-Piris, 35 ECAB 839 [1984].

The determination of the date of maximum improvement is factual in nature and depends primarily on the medical evidence. These rules apply to permanent impairment covered by the schedule award provisions of the FECA. Charles J. Cortese (Anthony L. Cortese), 35 ECAB 1017 [1984].

The question of maximum improvement was not properly determined by the Office. The standard to be used in determining the date of maximum improvement is when the physical condition of the injured member of the body has stabilized and will not improve further. One doctor stated that the date of maximum improvement was March 1, 1977. Another doctor stated on October 13, 1977 that it was possible for the employee's vision to improve following laser therapy but it takes "many months to realize." A third doctor stated that October 31, 1977, the date of the doctor's report, was the date of maximum improvement in view of the recorded visions of that time. An Office medical adviser then stated that May 7, 1981 was the correct date, but did not provide any rationale for determining that date as the date of maximum improvement. The Office was instructed to refer the case record, along with a statement of accepted facts, to a Board-certified ophthalmologist of professorial rank for a rationalized opinion regarding the proper date of maximum improvement. Charles J. Cortese (Anthony L. Cortese), 35 ECAB 1017 [1984].

NONSCHEDULE DISABILITY

The Board found that appellant was not entitled to a schedule award for his loss of coronary capacity. The Board has repeatedly held that a schedule award is not payable for the loss or loss of use of a part of the body or function not specifically enumerated in the FECA. The Board has held that this principle applies equally to body members which are not enumerated in the schedule provision as it read before the 1974 amendment and to organs which are not enumerated in the regulations promulgated pursuant to the 1974 amendment. Since the heart is not a body part specifically enumerated in either the Act or the regulations promulgated thereunder, there is no schedule award available in this case. Edgar L. Pake, 35 ECAB 1011 [1984].

PREEXISTING IMPAIRMENTS

Larson, *The Law of Workmen's Compensation*, section 12.20 and section 58.21 (1982). "Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition [in this case osteoarthritis], the entire disability is compensable, and . . . no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death." Larson, section 59.22. Raymond E. Gwynn, 35 ECAB 247 [1983].

It is well-established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included. As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him." Raymond E. Gwynn, 35 ECAB 247 [1983]; Pedro M. DeLeon, Jr., 35 ECAB 487 [1984].

The Board noted that the Federal Employees' Compensation Procedural Manual of the Office provides: "Scheduled Awards and Calculations of Impairment: The phrase 'permanent disability' in 5 U.S.C 8107 (a) is interpreted to mean 'permanent physical impairment.' The same standards for evaluating such impairment are applied in all cases. The MA [medical adviser] shall in all cases document his/her calculations to show how he/she arrived at the percentage of impairment, *incorporating all preexisting impairments of the scheduled member* . . ." Raymond E. Gwynn, 35 ECAB 247 [1983].

The Board found that the Office improperly calculated the amount of appellant's schedule award in that it failed to incorporate the preexisting impairment of the left knee. The Office medical advisers erred by not following the procedures established by the Office in calculating scheduled awards. The 25 percent impairment estimate of the Board-certified physicians constituted the weight of the medical evidence. Raymond E. Gwynn, 35 ECAB 247 [1983].

The case was not in posture for decision and must be remanded for further development. Both the Board-certified family practitioner and an internist reported degenerative changes in appellant's right knee and evidence of a meniscal tear of long duration. Although the family practitioner did not provide any supporting rationale, he did report that appellant's "history, subsequent physical findings, and operative findings certainly suggest that his pathology is secondary to the injury sustained in 1969." The family practitioner estimated appellant's permanent impairment of the right lower extremity as 25 percent. It was unclear from the record why the Office referred appellant to an internist before asking the family practitioner for an explanation of his estimate. Further, there was an apparent conflict in medical opinions concerning the causal relationship between appellant's condition and the March 3, 1969 employment injury. The Board also noted that the Office medical consultant did not assign anything for pain and appellant's other subjective complaints as reported by the above-mentioned physicians. Moreover, he did not take into consideration appellant's preexisting degenerative changes which both doctors reported. The Board further noted that the Office's consultant acting in the stead of a medical adviser was required by the Office's procedures to document his calculations to show how he arrived at the percentage of impairment, which calculations were to incorporate "all preexisting impairments of the scheduled member." He offered no explanation as to why the degenerative changes were not considered in the calculation. The Board found that there was a conflict in medical opinion regarding the percentage of permanent impairment of appellant's right lower extremity which necessitated referral to an impartial specialist for resolution pursuant to 5 U.S.C. section 8123(a). On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to an impartial Board-certified orthopedic surgeon, for a rationalized medical opinion as to appellant's permanent impairment of the right lower extremity resulting from the March 3, 1969 employment injury, taking into account all *preexisting* impairments of the leg. Pedro M. DeLeon, Jr., 35 ECAB 487 [1983].

RETROACTIVITY, 1949 AMENDMENTS

The Board found that appellant was not entitled to a schedule award for a permanent partial impairment of his right leg causally related to his 1944 employment injury. When appellant sustained his injury in 1944, there were no statutory provisions for a schedule award. The present schedule contained in section 8107 of the FECA was enacted on

October 14, 1949. Where the injury resulted in total and permanent loss or loss of use of a specified member, the schedule was made retroactive to injuries which occurred on and after January 1, 1940. However, where the injury resulted solely in less than total permanent loss of use of the member, the schedule was made retroactive only to injuries which occurred on or after October 14, 1949. As appellant's injury occurred in 1944 and there was no evidence that its permanent effect was a total loss of use of his right leg, a schedule award may not be made. Roosevelt Whiteside, 35 ECAB 790 [1984].

RETROACTIVITY, 1974 AMENDMENTS

The FECA provides for payment of schedule awards for a permanent loss of use of certain specified anatomical members or functions of the body. For an injury which occurred prior to September 7, 1974 a schedule award is not payable for the loss of use of a part of the body not specifically enumerated in the Act. The lung is not one of the members of the body so specified. Wheeler Morris, 35 ECAB 939 [1984]; Anderson Reynolds, 35 ECAB 957 [1984].

The FECA was amended effective September 7, 1974, authorizing a schedule award for loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary." Pursuant to regulations the Office has provided for a schedule award for a lung impairment. However, the 1974 amendments specifically state that this provision is applicable only to an injury or death occurring on or after the date of enactment, September 7, 1974. This amendment was therefore inapplicable to appellant's condition because his exposure to the asbestos causing his pulmonary condition ceased prior to the effective date of the 1974 amendment. Wheeler Morris, 35 ECAB 939 [1984]; Anderson Reynolds, 35 ECAB 957 [1984]; John Clement, 35 ECAB 959 [1984]; Joaquin Souza, 35 ECAB 977 [1984].

SUBROGATION, THIRD PARTY RECOVERY (Section 8132)

Section 8132. "Adjustment after recovery from a third person. If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of the liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the cost of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury. No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to the minimum, and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States. Gustina Nicholas (Patricia Nicholas), 35 ECAB 291 [1983].

The Board found that the Office properly determined its credit under 5 U.S.C. section 8132. In addition, appellant and her attorney were informed that the Office would use the credit amount of $6,743.79 to offset any future accruing compensation benefits before it would make payments to her. The terms of section 8123 are specific as to what must be charged against the proceeds of a third party recovery and neither the Office nor the Board has authority to enlarge or modify the terms of the Act. Gustinas Nicholas (Patricia Nicholas), 35 ECAB 291 [1983].

TEETH INJURIES

Section 10.406 of title 20 of the CFR provides for furnishing repairs to and replacement of natural teeth, false teeth, and other prosthetic dental devices damaged by an injury in the performance of duty. Section 8101(5) of the FECA and the regulations enacted for the proper administration thereof, make it clear that the "damage or destruction [must be] incident to a personal injury requiring medical services." There is no provision in the Act for reimbursement for lost, damaged or destroyed personal property affected by an employment injury. The Board has consistently held that artificial dentures, being removable, constitute personal property and that their loss may not be charged against the compensation fund. Alan J. Ginglardi, 35 ECAB 874 [1985].

Appellant was not entitled to payment for replacement of his denture damaged in an employment injury. The evidence established that the damage was not to appellant's natural teeth, "fixed" false teeth, or to his jaw structure which required a change in his denture. Instead, the damage was to a removable denture which is considered the personal property of the owner. Therefore, appellant was not entitled to reimbursement for its replacement. Alan J. Ginglardi, 35 ECAB 874 [1985].

TERMINATION OF COMPENSATION

IN GENERAL

FECA Program Memorandum No. 77, dated May 9, 1983, provides with regard to the application of 5 U.S.C. section 8106, as follows: "Where there is a written offer of employment which specifies duties and physical limitations, it is sufficient to determine that the offer is suitable to the claimant's disabled condition and made in good faith. It is not necessary, before applying 5 U.S.C. 8106 for a refusal to accept the position, to ascertain whether this work is reasonably available in the open labor market, or to compute a compensation rate based on the salary of the offered job. The Office should prepare a compensation order, the findings of which shall include a description of the offered work, that it was suitable to the employee's disabled condition, and that it reflected the employee's capacity to earn wages. Herbert R. Oldham, 35 ECAB 339 [1983].

The Board found that the Office improperly found that it could suspend appellant's compensation until he cooperates with vocational rehabilitation effort. In its April 15, 1983 order suspending compensation, the Office recognized that section 8113 allows it to reduce future benefits based on probable earning capacity when there has been a failure to undergo vocational rehabilitation without good cause. However, the Office erroneously concluded that this also was a basis for suspension. The Board modified the Office's order to delete the failure to undergo vocational rehabilitation as a proper basis for suspension. Ernie Chavez, 35 ECAB 479 [1983].

The Board found that the Office improperly terminated appellant's compensation effective May 19, 1983 and improperly declared an overpayment for the period March 26 through May 18, 1983. The March 25, 1983 duty status from a Board-certified orthopedic surgeon, upon which the Office relied to terminate appellant's compensation and to declare an overpayment, did not indicate that appellant could return to work as a carpenter, the job he held when injured. It concluded that appellant could perform light duty work. He also stated that appellant could cause further injury by not wearing gloves. However, he did not state, as the Office contended, that appellant could return to work as a carpenter with no restrictions other than wearing gloves. The medical evidence therefore indicated that appellant was still partially disabled. Herbert L. Baker, 35 ECAB 944 [1984].

REFUSAL TO ACCEPT SUITABLE WORK

The Board found that the Office improperly determined appellant was not entitled to compensation under 5 U.S.C. section 8106(c)(2) on the ground that he refused to accept suitable work when offered to him. To justify such action, the Office must show that the work offered was suitable. The Office failed to make that showing in this case. The employing establishment failed to describe the specific physical requirements of the job which was offered appellant. Although the employing establishment enumerated the duties to be performed by appellant in the position of automotive equipment dispatcher, the

Board has held that the physical requirements of the duties also needed to be described. Nor did the evidence of record indicate that the requirements of the position offered appellant were reviewed to determine whether that the duties were within his physical capability. In addition, the hearing representative improperly rejected appellant's claim for refusing to accept the automotive equipment dispatcher position offered by the employing establishment in 1978. There was no evidence that the position remained available to appellant as of the effective date of the decision in 1982. On remand the Office should request that the employing establishment describe the physical requirements of the duties of the position offered appellant. The Office should also verify that the position is still available and offered to appellant. The Office should further develop the case record by requesting that the employing establishment furnish appellant's work and leave records and describe the duties he performed between the time he returned to work in January 1977 and his retirement in January 1979. The Office should then prepare a statement of accepted facts and refer appellant to an orthopedist to enumerate in a rationalized report the residuals, if any, of the 1976 employment injury and address the work restrictions which result from those residuals. Thomas W. Bell, 35 ECAB 150 [1983].

FECA Program Memorandum No. 77, dated May 9, 1983, provides with regard to the application of 5 U.S.C. section 8106, as follows: "Where there is a written offer of employment which specifies duties and physical limitations, it is sufficient to determine that the offer is suitable to the claimant's disabled condition and made in good faith. It is not necessary, before applying 5 U.S.C. 8106 for a refusal to accept the position, to ascertain whether this work is reasonably available in the open labor market, or to compute a compensation rate based on the salary of the offered job. The Office should prepare a compensation order, the findings of which shall include a description of the offered work, that it was suitable to the employee's disabled condition, and that it reflected the employee's capacity to earn wages. Herbert R. Oldham, 35 ECAB 339 [1983].

The case was not in posture for decision and must be remanded. The Office found appellant was not entitled to compensation under 5 U.S.C. section 8106(c)(2) on the ground that he refused to accept suitable work when offered to him. However, to justify such action, the Office must show that the work offered was suitable. The Office failed to make that showing in this case. While the medical evidence of record indicated that appellant is capable of returning to limited duty employment, the employing establishment failed to describe the physical requirements of the position of modified distribution clerk. It is well-established under Board precedent that in order for the Office to meet its burden of showing that the work offered was suitable, both the job duties and the physical requirements of the position offered appellant were reviewed by a physican to detemine whether the duties were within his physical capability. On remand, the Office should request that the employing establishment describe the physical requirements of the position offered appellant. The Office should also verify that the position is still available and offered to appellant. Herbert R. Oldham, 35 ECAB 339 [1983].

Section 8106(c) of the Act provides, "A partially disabled employee who . . . (2) refuses or neglects to work after suitable work is offered is not entitled to compensation." David Smith, 35 ECAB 536 [1984].

The Board found that the light-duty position offered by the employing establishment on November 20, 1980 was suitable in that it met the physical restrictions or work tolerance limitations set forth by appellant's attending physician. Appellant refused the offer on the ground that he was hospitalized for x-rays on December 8, 1980. However, this hospitalization was not recommended by his attending physician, nor was there any evidence that a hospitalization for x-rays would necessitate a recuperative period preventing acceptance of a light-duty position. Although a Board-certified family practitioner stated that appellant's degenerative disc disease and post-traumatic arthritis prevented his performing "any work activities," he offered no opinion on how these conditions were related to appellant's 1969 employment. David Smith, 35 ECAB 536 [1984].

The Director of the Office filed a motion on January 11, 1984 to remand the case on the ground that the Office had reconsidered its policies in connection with the proper application of 5 U.S.C. Section 8106(c)(2), as now set forth in FECA Bulletin No. 83-51, issued October 24, 1983. He indicated that the Office had failed to notify appellant that it had reviewed the evidence to find that the job offered to him was suitable and that appellant had not been advised that monetary benefits under theAct would be terminated if he refused to accept the job. The Director requested that the Board set aside the April 4, 1983 compensation order and remand the case to the office for reinstatement of appellant's compensation benefits. The Board granted the motion. Ralph Trevino, 35 ECAB 1181 [1984].

The concept of wage-earning capacity should not be confused with a situation where compensation is terminated for refusal of an employee to accept suitable work offered to him; such a determination is governed by section 8106(c) of the FECA and the principles applicable to it. The Office did not follow the established procedures for determining appellant's employment-related loss of wage-earning capacity, confusing those procedures with the principles of section 8106(c). William H. Goff, 35 ECAB 581 [1984].

The Board found that the Office failed to make a showing that the work offered was "suitable" within the meaning of section 8106(c)(2). The Board noted that the position descriptions for the nursing assistant position offered appellant and the clinical technician I position he currently holds did not contain adequate descriptions of the physical requirements of the positions. The medical consultant, therefore, did not have sufficient information upon which to base his opinion that appellant was capable of performing the duties of the nursing assistant. On remand, the Office should obtain from the employing establishment a description of the physical requirements of the position offered appellant. The Office should also verify that the position is still available and offered to appellant. Following such further development as is deemed necessary, the Office should issue a *de novo* decision. Mark Oxley, 35 ECAB 608 [1984].

The Board noted that FECA Bulletin No. 83-51, dated October 24, 1983, sets forth detailed procedures to be followed by the Office in suitable work cases. The Office may wish to consider the applicability of these procedures to the case at hand. Mark Oxley, 35 ECAB 608 [1984].

The Office properly determined that appellant was not entitled to compensation subsequent to April 23, 1981 under 5 U.S.C. section 8106(c)(2) on the ground that he refused suitable work offered to him by the employing establishment. On remand, at the request of the Office, the employing establishment submitted a detailed description of the duties required by the light duty classroom work it had offered appellant. Upon reviewing these job requirements, a Board-certified orthopedic surgeon concluded that they were consistent with the physical restrictions he had placed upon appellant. With this job description together with the medical opinion before it, the Office properly determined that the employing establishment had offered appellant suitable work. In further support of this conclusion was appellant's testimony during the June 6, 1983 hearing in which he admitted that his physical condition did not preclude him from performing the light duty classroom work made available to him by the employing establishment. Edward D. Given, 35 ECAB 700 [1984].

The concept of wage-earning capacity should not be confused with a situation where compensation is terminated for refusal of an employee to accept suitable work offered to him; such a determination is governed by section 8106(c) of the FECA and the principles applicable to it. The Office failed to follow the established procedures for determining appellant's employment-related loss of wage-earning capacity, confusing those procedures with the principles of section 8106(c). The Office had rejected appellant's claim for a loss of wage-earning capacity, on the ground that he "had no loss of wage-earning capacity as a result of the work injury and is barred from receipt of such compensation under the provisions of 5 U.S.C. section 8106(c)(2)." An accompanying memorandum made part of the decision by reference indicated that appellant "was provided work within the physical limitations imposed by his work injury, at no loss of wages. He voluntarily chose to retire from that work." In accordance with the concept of wage-earning capacity described above, when the Office makes a medical determination of partial disability and of the specific work restrictions, the claimant's case record should be evaluated for a loss of wage-earning capacity determination. Jess L. Green, 35 ECAB 893 [1984].

The Board noted that the actions of the Office in this case were not consistent with the procedures set forth in FECA Bulletin No. 83-51 issued October 24, 1983 which contemplate a prospective approach to the use of section 8106(c)(2) of the Act and which require that the Office determine that a position offered is suitable and inform the employee of this and of the consequences of refusal of the position prior to the employee's decision to accept or refuse the offered position. John Otis Dixon, 35 ECAB 906 [1984].

The Board remanded the case because the Office failed to follow its policy regarding 5 U.S.C. 8106(c)(2) as set forth in Bulletin No. 83-51. The Board noted that in the *Ralph Trevino* case, the Director of the Office filed a motion to remand the case on the ground that the Office had reconsidered its policies in connection with the proper application of 5 U.S.C. section 8106(c)(2), as now set forth in FECA Bulletin No. 83-51, issued October 24, 1983. He indicated that the Office had failed to notify appellant that it had reviewed the evidence to find that the job offered to him was suitable and that appellant had not been advised that monetary benefits under the Act would be terminated if he refused to accept the job. The Director requested that the Board set aside the decision in that case and remand it to the Office for reinstatement of appellant's compensation and further review under FECA Bulletin 83-51. Carlotta J. Quackenbush, 35 ECAB 1185 [1984].

The Board concluded that FECA Bulletin 83-51 contemplates a retroactive application to those cases where "all benefits were terminated." FECA Bulletin 83-51 requires "that the *Office* determine that a position offered is suitable and inform the employee of this and of the consequences of refusal of the position prior to the employee's decision to accept or refuse the offered position." (emphasis added) At the very most, appellant was made aware by the employing establishment (and her private rehabilitation consultant) that the employing establishment considered the offered position to be suitable, and that her refusal would result in the termination of her compensation. However, this notice by the employing establishment is not by the adjudicating agency and therefore is insufficient. It does not satisfy the procedures set forth in the Bulletin, and is in conflict with prior statements made by the Director in reference to this Office's responsibility to give notice before invoking 5 U.S.C. section 8106(c)(2). In both *Trevino* and *Cervantes*, the Director made a motion to remand, stating that "The *Office* failed to notify appellant that it had reviewed the evidence and had concluded that the job was suitable. Further, the *Office* failed to notify appellant that monetary benefits would be terminated if she refused to accept the job." (emphasis added) The Director's present contention is contrary to the language of the Bulletin, his prior statements on this subject, and the decisions of the Board, and was therefore without merit. Carlotta J. Quackenbush, 35 ECAB 1185 [1984].

REFUSAL TO SEEK SUITABLE EMPLOYMENT

Section 8106(c) states, in pertinent part: "A partially disabled employee who (1) refuses to seek suitable work . . . is not entitled to compensation." Thomas J. Boland, 35 ECAB 569 [1984].

The Board found the Office improperly determined that appellant did not "seek suitable work" pursuant to 5 U.S.C section 8106. Following the Board's previous remand, the Office referred appellant for an opinion on whether appellant was disabled for his job on January 9, 1979 due to his employment-related knee condition. Based on that Board-certified orthopedist's report and an Office medical adviser's September 8, 1982 recommendation, the Office determined appellant could not perform the duties of the job and began a loss of wage-earning capacity determination. The Office then notified appellant on March 3, 1983 that, in order to receive compensation for a loss of wage-earning capacity, he was required to "seek and not refuse suitable employment." He replied in his March 8, 1983 letter that the "idea of seeking further employment was never considered" after he retired on disability on January 8, 1979, but that he would attempt to do so from then on. His further correspondence showed that he was making regular contacts with the state employment service to obtain employment. The Office's March 3, 1983 letter was the first notification appellant received that he would be required to seek suitable employment in order to qualify for compensation for a loss of wage-earning capacity. At no time did appellant refuse to seek suitable employment. His prior inaction was during a period when the issue of disability was still being adjudicated and such inaction during such period cannot be interpreted as a refusal within the scope of section 8106. The case was remanded for a determination of appellant's loss of wage-earning capacity commencing January 9, 1979. Thomas J. Boland, 35 ECAB 369 [1984].

As to whether appellant should have sought suitable work pursuant to section 8106(c)(1) of the FECA the Board noted that section states, in pertinent part: "A partially disabled employee who (1) refuses to seek suitable work . . . is not entitled to compensation." The Office informed appellant in a January 1983 letter that he would be informed by his attending physician when he was no longer totally disabled. In another January 19, 1983 letter the Office instructed appellant that when he was no longer totally disabled he "must seek employment suitable to [his] improved condition . . ." Appellant contended that his doctor did not inform him that he was capable of performing light duty work, a contention which was not contradicted by the evidence of record. Under these circumstances it was improper to find that appellant refused "to seek suitable work." Herbert L. Baker, 35 ECAB 944 [1984].

TIME LIMITATIONS

IN GENERAL (See also continuation of pay, time limitations)

The FECA, section 8122, as amended in 1974, states that "An original claim for compensation for disability or death must be filed within 3 years after the injury or death." Subsection (b) of this section adds that in latent disability cases, this time limitation does not begin to run until the claimant is aware, or reasonably should have been aware, of a relationship between his employment and his injury. Robert K. Besley, 35 ECAB 263 [1983].

Section 8118 of the FECA provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title." The latter section provides that written notice of injury shall be given "within 30 days." The context of section 8122 makes clear that this means within 30 days of the injury. Patricia J. Kelsesky, 35 ECAB 549 [1984].

The Board found that appellant timely filed his claim with respect to the smoke inhalation incident in January 1976. The record indicated appellant had filed a CA-1 form (notice of traumatic injury and claim for compensation) "based on an incident of smoke inhalation" on January 8, 1976. Although the original claim form was apparently destroyed, the memorandum to the file concerning the incident indicated that it was timely filed. Thus, the issue became whether the pulmonary condition claimed was causally related to the January 1976 inhalation incident or incidents. The case was remanded for development on this issue. Duane G. Saunders, 35 ECAB 1115 [1984].

MANDATORY LIMITATIONS (Pre 1974, Five year)

The Board found that appellant's claim for an emotional disorder was not filed within the five-year period of limitation applicable to this case. In this case appellant was aware of his emotional condition and its relationship to factors of his federal employment in 1962. Since appellant's last day of exposure to the implicated factors of employment was on April 19, 1963, the time limitation began to run on that date. The section of the Act applicable to this case provides that the claim for compensation must be filed within five years from the date when the period of limitations began to run. This requirement is a maximum mandatory one which may not be waived regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed time. The period of limitation began to run on April 19, 1963. Since appellant's claim was not filed until May 23, 1983 it is barred by the five-year mandatory time limitation provision. Pedro Laguer, 35 ECAB 981 [1984].

The Board found that appellant did not file his claim for an alleged 1970 or 1971 back injury within the applicable time limitation provision of the Act. Appellant alleged that his disability which resulted from a back injury occurred in December 1970 or October 1971. Therefore, the time for filing with respect to the alleged back injury began to run at the time of the injury. The five-year time limitation applicable to this case is a maximum, mandatory limit which may not be waived regardless of the reasons for or circumstances surrounding the failure to file within the prescribed time. There was no indication that appellant filed a claim at any time prior to March 14, 1983. Since the time limitation began to run on appellant's claim for a back injury in October 1971 at the latest, he failed to file within the applicable time limitation provision of the Act. Duane G. Saunders, 35 ECAB 1115 [1984].

MENTAL INCOMPETENCE

The Board found that the Office properly refused to waive the one-year time limitation applicable to this case. Appellant first asserted she was afraid to file a claim because classified information could be involved and because the employee's body might have to be exhumed to establish causal relation. She later indicated the delay in filing was due to her reliance on her husband's cousin to prepare a claim. The Board found that these circumstances did not represent the requisite of diligence to justify waiver. Other evidence submitted related to appellant's assertion that she could not file within the one-year period because of her emotional condition following her husband's death. Most of this evidence was nonmedical, consisting of statements from appellant's nieces, the employee's cousin, and a former coworker. The only statement from a physician was that of a family friend who stated appellant was an "occasional patient" of his in the early 1970s. He opined that appellant was severely depressed for about a year after the employee's death, which "could explain" her failure to file a timely claim. An Office medical consultant stated that the doctor's statement was not sufficient to establish she was incompetent to manage her affairs after the employee's death and that he could not "medically support her failure to timely file her claim" for more than half a year. The Board found that the evidence was insufficient to establish an emotional condition that justified appellant's failure to file a claim for more than three and one-half years after the employee's death. Although it is not necessary to show technical incompetence in order to justify waiver of the one-year period, the medical evidence must establish that appellant's emotional condition was so severely incapacitating as to prevent her from filing a claim. Such evidence has not been presented in this case. Aurora Palalay (Richard P. Palalay), 35 ECAB 1078 [1984].

SUFFICIENT CAUSE (Pre 1974, One year/Five year)

In order to establish "sufficient cause or reason" to justify waiver, appellant must show she prosecuted the claim with that degree of diligence which an ordinarily prudent person would have exercised in protecting his rights under the same or similar circumstances. Aurora Palalay (Richard P. Palalay), 35 ECAB 1078 [1984].

The Board found that the Office properly refused to waive the one-year time limitation applicable to this case. Appelant first asserted she was afraid to file a claim because classified information could be involved and because the employee's body might have to be exhumed to establish causal relation. She later indicated the delay in filing was due to her reliance on her husband's cousin to prepare a claim. The Board found that these circumstances did not represent the requisite of diligence to justify waiver. Other evidence submitted related to appellant's assertion that she could not file within the one-year period because of her emotional condition following her husband's death. Most of this evidence was nonmedical, consisting of statements from appellant's nieces, the employee's cousin, and a former coworker. The only statement from a physician was that of a family friend who stated appellant was an "occasional patient" of his in the early 1970s. He opined that appellant was severely depressed for about a year after the employee's death, which "could explain" her failure to file a timely claim. An Office medical consultant stated that the doctor's statement was not sufficient to establish she was incompetent to manage her affairs after the employee's death and that he could not "medically support her failure to timely file her claim" for more than half a year. The Board found that the evidence was insufficient to establish an emotional condition that justified appellant's failure to file a claim for more than three and one-half years after the employee's death. Although it is

not necessary to show technical incompetence in order to justify waiver of the one-year period, the medical evidence must establish that appellant's emotional condition was so severely incapacitating as to prevent her from filing a claim. Such evidence has not been presented in this case. Aurora Palalay (Richard P. Palalay), 35 ECAB 1078 [1984].

THREE YEAR LIMITATION (1974 amendments)

The FECA, as amended in 1974, section 8122, states that "An original claim for compensation for disability or death must be filed within 3 years after the injury or death." Subsection (b) of this section adds that in latent disability cases, this time limitation does not begin to run until the claimant is aware, or reasonably should have been aware, of a relationship between his employment and his injury. Robert K. Besley, 35 ECAB 263 [1983].

Appellant stated that he became aware of a relationship between his employment and his hearing loss "on or about August 1, 1978." Therefore, the time limitation began to run on that date. Since his claim was not filed until November 24, 1981, the Board found that the claim was not filed within the applicable three-year time limitation period. Robert K. Besley, 35 ECAB 263 [1983].

Appellant's claim would be regarded as timely under 5 U.S.C. section 8122(a)(1) if his "immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death." The Board found that there was no evidence of record to establish that appellant's "immediate superior" had such knowledge. Robert K. Besley, 35 ECAB 263 [1983].

Appellant's claim was barred by the three-year time limitation provision of the FECA. The Board found that appellant was aware or reasonably should have been aware of a possible relationship between her leg varicosities condition and factors of employment no later than the 1975 effective date of her disability retirement. This was evidenced by appellant's statement in her 1981 letter to the Office that a "few months" before her retirement, "I began to feel the force and effect of the job assigned to me, the tear and wear of prolonged exposure to such aggravating factors." Therefore, appellant's claim filed on November 9, 1979 was not filed within the three years from the date the time limitation period began to run. Manuela B. Galang, 35 ECAB 816 [1984].

The FECA places responsibility upon the claimant to file a timely claim for any condition he believes was caused or aggravated by his employment. The 1974 amendments to the Act, at section 8122, included changes to the time limitation provision which apply to all injuries after September 7, 1974. Section 8122(a) of the amended Act requires that a claim must be filed "within 3 years after the injury or death." Subsections (1) and (2) contain exceptions to this requirement, allowing a claim to be considered even if not filed within the three-year period where the immediate superior had actual knowledge of the injury within 30 days or if written notice of injury was given within 30 days. William C. Cardenas, 35 ECAB 971 [1984].

The Board found that appellant's claim was not filed within the three-year period of limitation provided by 5 U.S.C. section 8122 as amended in 1974. In the case of occupational disease the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his impairment and his employment. Where the employee continues in the same employment, after such awareness, the time limitation begins to run on the date of his last exposure to the implicated employment factors. Under the circumstances of the present case, the Office properly determined that the time limitation commenced to run no later than May 26, 1976, the date of appellant's examination by a Board-certified pulmonary specialist. Appellant's exposure ended by March 15, 1976. The evidence established that appellant was aware by March of 1976 of his asbestos exposure at work and his May 1976 examination made him aware, or should reasonably have made him aware, of the possible relationship between his pulmonary condition and his employment. There the time limitation began to run on that date. His claim was not filed within the applicable three-year time limitation period. Appellant's claim would still be regarded as timely under 5 U.S.C. section 8122(a)(1) if his "immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death." The evidence failed to establish such knowledge. William C. Cardenas, 35 ECAB 971 [1984].

WHEN TIME BEGINS TO RUN, DISEASE OR LATENT INJURY

In a claim based on an allegation of occupational disease, the time limitation of the FECA begins to run when the employee becomes aware, or reasonably should have been aware, of a possible relationship between her condition and her employment. In situations where the exposure to the implicated employment factors continues after such knowledge, the time for filing begins on the date of the employee's last exposure to such factors. Manuela B. Galang, 35 ECAB 816 [1984]; Pedro Laguer, 35 ECAB 981 [1984]; Joseph A. Cruz, 35 ECAB 1085 [1984].

The Board found the case was not in posture for decision on the issue of whether appellant's claim for compensation was timely filed. The Office found that since appellant was hospitalized in September 1977 for pleural effusion he reasonably should have been aware at that time that he had an asbestos-related condition. However, an August 25, 1982 report indicated that appellant was treated at that time for complications of pneumonia. There was no indication that appellant was informed that he was hospitalized or being treated for an asbestos-related condition. In June 1978, appellant was examined by the Bay Area Asbestos Surveillance Project. The only report of record from that examination was a February 2, 1979 letter to appellant stating that there was a questionable abnormality on his chest x-ray. The doctor made no statement describing the abnormality nor indicating that the abnormality was possibly caused by asbestos. The lack of detail was not sufficient to put appellant on notice that he had a possible asbestos-related condition. The x-rays performed by a radiologist four years later showed bilateral pleural thickening compatible with asbestos exposure and an irregular mass in the left lung which was either post-inflammatory or neoplastic. Either of these x-rays' findings may have been the abnormality referred to in 1979. On remand, the Office should request statements from appellant and the physicians who treated him on when appellant was first informed that his pulmonary condition might be causally related to asbestos exposure. Joseph A. Cruz, 35 ECAB 1085 [1984].

WHEN TIME BEGINS TO RUN, HEARING LOSS

The case was not in posture for decision on the issue of whether appellant's claim for hearing loss was timely filed. The Office correctly pointed out that where exposure to noise at work causes an adverse effect on an employee's hearing, every such exposure constitutes a new injury. When a claim is filed for a loss of hearing, the claim covers all employment exposures which occurred up to the filing of the claim. If the employee continues to be exposed to noise at work subsequent to the filing of such claim and he believes the additional exposure has caused an increase in his loss of hearing, he must file another claim for the additional injury in order to secure benefits for the increased loss. The Office relied on appellant's statement that he first became aware of his hearing loss and its relationship to his employment in 1963, and applied the principle that where the employee became aware of a possible relationship between his hearing loss and his employment while still employed and his noise exposure continued thereafter, the time limitations began to run on the date of his last exposure. The Office, therefore, determined that the time limitation began to run on October 22, 1969 when appellant retired. However, while appellant stated that he became aware of the relationship between his hearing loss and his employment in 1963 and the record indicates that he was aware of the relationship at least by July 1, 1964, he had timely filed a claim in 1964 and received compensation for his loss in 1965. Appellant wore a hearing aid until he broke it in 1981. At the time of the evaluation for a new hearing aid in July 1981, it was indicated by the audiologist that appellant had sustained additional hearing impairment since his last evaluation. It was the additional hearing loss for which appellant filed the claim in May 1982. On remand the Office should, therefore, make a determination as to when appellant became aware of the increased hearing loss. The time limitation should begin to run from that date to determine whether or not the claim was timely filed. Charles E. Moore, 35 ECAB 876 [1984].

WHEN TIME BEGINS TO RUN, TRAUMATIC INJURY

In the case of traumatic injury, the time for filing a claim begins to run on the date of injury. Duane G. Saunders, 35 ECAB 1115 [1984].

VENOUS CONDITIONS

The case was not in posture for decision due to a conflict of medical opinion concerning whether the December 5, 1978 employment injury caused a temporary or permanent aggravation of appellant's venous condition of the leg. The Office medical adviser who reviewed the case noted there was a conflict of medical opinion and stated that the venogram results supported one doctor's opinion that the effects of the employment injury were temporary. While the second doctor's apparent unawareness of the venogram results somewhat diminished the weight of his report, the report still had sufficient weight to create a conflict. On remand, the Office should refer appellant to an appropriate Board-certified impartial specialist for a rationalized opinion concerning whether the 1978 employment injury caused a temporary or permanent aggravation of appellant's underlying condition. If the specialist believes the employment injury caused only a temporary aggravation, he or she should state when the aggravation ceased. The specialist should address whether the employment injury caused a permanent aggravation of the underlying condition and whether there are permanent residuals of the employment injury, including an increased sensitivity to reinjury and reinfection, which prevent appellant from continuing in his usual employment. Wayne D. Hackney, 35 ECAB 718 [1984].

VOCATIONAL REHABILITATION

The Board found that the Office improperly found that it could suspend appellant's compensation until he cooperates with a vocational rehabilitation effort. In its April 15, 1983 order suspending compensation, the Office recognized that section 8113 allows it to reduce future benefits based on probable earning capacity when there has been a failure to undergo vocational rehabilitation without good cause. However, the Office erroneously concluded that this also was a basis for suspension. The Board modified the Office's order to delete the failure to undergo vocational rehabilitation as a proper basis for suspension. Ernie Chavez, 35 ECAB 479 [1983].

WAGE-EARNING CAPACITY, LOSS OF

IN GENERAL

The Board has pointed out that ability to earn, rather than wages actually received, is the test of wage-earning capacity. As the Board stated in the *Tietze* case, "Wages or actual earnings after injury should not be confused with 'wage-earning capacity'; and while the wages earned after injury often may reasonably reflect the ability of the individual to earn, they do not always reflect such ability, as for example, if the employer should because of generosity, special need, or other similar reason pay the employee the same wage as he received at time of injury and thus pay more than employee's capacity would warrant . . ." Appellant contends on appeal, as he did before the Office, that his hearing loss precluded him from obtaining a state license to drive trucks. This contention, if proven, would show a loss of wage-earning capacity, as the general test is whether his work-related impairment prevents him from engaging in the kind of work he was doing when injured. There was, however, no evidence in support of his contention that he cannot obtain a state license to drive trucks. As appellant has the burden of proving a loss of wage-earning capacity, he should be given an opportunity to submit evidence supporting his contention, which would consist of evidence such as the hearing requirements for the state license needed or a rejection due to his hearing loss of an application for such a license. If appellant submits such evidence, it should be reviewed by a physician for an opinion whether appellant's work-related hearing loss physically disqualifies him or renders him incapable of performing the duties of a truck driver. Clifford W. Krippendoff, 35 ECAB 215 [1983].

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. Charles D. Thompson, 35 ECAB 220 [1983]; Ernest Donelson, 35 ECAB 503 [1984].

If the medical evidence establishes that the residuals of an employment-related impairment are such that, from a medical standpoint, they prevent the employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. Maurice E. Anderson, 35 ECAB 277 [1983]; Elise H. Daniel, 35 ECAB 359 [1983]; Joseph C. Sanderson, 35 ECAB 864 [1984].

The Board in *James L. Hearn*, stated the following: "Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, where . . . the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment." Laymon C. Christie, 35 ECAB 389 [1983].

The circumstances involved in the *Hearn* case are to be distinguished from those in the recent case of *Dennis L. O'Neill*. There the employment factors caused a permanent loss of hearing. The hearing loss was not of a type that entitled the employee to a schedule award under the Office's standardized procedures. However, there was medical evidence that the hearing loss was of such nature that further exposure to the employment factors would constitute a grave danger to appellant physically, and that therefore he no longer could continue in such employment. The Board found that if development of the medical evidence established that the employee's employment-related hearing condition prevented him from returning to his employment, he would be entitled to compensation for any resulting loss of wage-earning capacity. The important distinction between the *O'Neill* case and the *Hearn* case is that employment factors there, unlike here, caused a permanent impairment; that case was remanded to determine whether the impairment resulted in a loss of wage-earning capacity. In contrast, the Board found that the employment factors in the present case did not cause permanent residuals that adversely affected appellant's wage-earning capacity. The adverse effect here was due solely to the employee's underlying physical condition. Laymon C. Christie, 35 ECAB 389 [1983].

With regard to appellant's contention that he is considered totally disabled under Civil Service retirement provisions, it is pointed out that the Civil Service Retirement Act defines "disabled" as "totally disabled . . . for useful and efficient service in the grade or class of position last occupied by the employee . . ." and has no application under the FECA. Under the latter statute, even though an employee is unable to perform the duties of another position for which he is qualified, he is not totally disabled if he has the capacity to perform the duties of another position for which he is qualified. A determination made for disability retirement is not determinative of the extent of physical impairment or loss of wage-earning capacity for compensation purposes under the FECA. Billy G. Sinor, 35 ECAB 419 [1983].

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his usual employment, his age and vocational qualifications, and the availability of suitable employment. Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd-lot position or one not reasonably available on the open labor market. William H. Goff, 35 ECAB 581 [1984].

The concept of wage-earning capacity should not be confused with a situation where compensation is terminated for refusal of an employee to accept suitable work offered to him; such a determination is governed by section 8106(c) of the FECA and the principles appplicable to it. The Office did not follow the established procedures for determining appellant's employment-related loss of wage-earning capacity, confusing those procedures with the principles of section 8106(c). William H. Goff, 35 ECAB 581 [1984].

The Board found that the case was not in posture for decision. The Office had referred appellant to a Board-certified neurosurgeon for evaluation. Appellant refused to undergo the examination and the Office made a loss of wage-earning capacity determination. The proper procedure in a case in which there is an obstruction of a medical examination is for the Office to consider the imposition of 5 U.S.C. 8123(d) which provides: "Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee." Once the obstruction ceases, the Office can further develop the evidence with respect to a loss of wage-earning capacity. Arthur Leral, 35 ECAB 1184 [1984].

ACTUAL EARNINGS

The case was not in posture for decision on the issue of whether appellant had a 25 percent loss of wage-earning capacity. The Office, in its initial loss of wage-earning capacity decision, based its determination on appellant's actual wages for six hours a day, 30 hours a week. The testimony at the hearing disclosed, however, that appellant actually worked only five hours a day. The hearing representative therefore modified the Office's decision, finding that the evidence showed that she was capable of working six hours a day as a general clerk. By basing the decision on appellant's capacity to earn wages rather than on her actual earnings, the hearing representative also was required to determine whether the position of general clerk was reasonably available within appellant's commuting area. The Board has held that the position selected for determining wage-earning capacity must be one reasonably available in the open labor market. It is improper to make such a determination based on one position. The case will be remanded for further development. If the evidence establishes that appellant's actual wages do not fairly and reasonably represent her wage-earning capacity, the Office should determine if appellant is capable of performing a position in the open labor market reasonably available within her commuting area. After further action as it may find necessary, the Office should issue a *de novo* decision. Sandra Foster, 35 ECAB 183 [1983].

The Board found that further development was needed on the issue of whether appellant had sustained a loss of wage-earning capacity. The fact that the employing establishment allowed appellant to continue working at his regular job and wages, despite its knowledge of his hearing loss, did not show that appellant had no loss of wage-earning capacity due to his hearing loss. The Board has pointed out that ability to earn, rather than wages actually received, is the test of wage-earning capacity. As the Board stated in the *Tietze* case, "Wages or actual earnings after injury should not be confused with 'wage-earning capacity'; and while the wages earned after injury often may reasonably reflect the ability of the individual to earn, they do not always reflect such ability, as for example, if the employer should because of generosity, special need, or other similar reason pay the employee the same wage as he received at time of injury and thus pay more than employee's capacity would warrant . . ." Appellant contends on appeal, as he did before the Office, that his hearing loss precluded him from obtaining a state license to drive trucks. This contention, if proven, would show a loss of wage-earning capacity, as the general test is whether his work-related impairment prevents him from engaging in the kind of work he was doing when injured. There was, however, no evidence in support of his contention that he cannot obtain a state license to drive trucks. As appellant has the burden of proving a loss of wage-earning capacity, he should be given an opportunity to submit evidence supporting his contention, which would consist of evidence such as the hearing requirements for the state license needed or a rejection due to his hearing loss of an application for such a license. If appellant submits such evidence, it should be reviewed by a physician for an opinion whether appellant's work-related hearing loss physically disqualifies him or renders him incapable of performing the duties of a truck driver. Clifford W. Krippendorf, 35 ECAB 215 [1983].

The Board found that the Office properly determined appellant's loss of wage-earning capacity for the period from November 3, 1973 to January 20, 1976. While the evidence established that appellant was disabled for his position of electronics mechanic because of his employment-related hearing loss, there was no evidence that he was totally disabled during the period from November 3, 1973 to January 20, 1976. The Office properly determined that appellant's actual wages beginning January 20, 1976 were a proper measure of his wage-earning capacity, as there was no evidence that these earnings did not fairly and reasonably represent his wage-earning capacity. Because the evidence (discussed in the Board's prior decision) showed there was no essential change in appellant's medical condition between November 3, 1973 and January 20, 1976, it was proper for the Office to use appellant's actual wages beginning January 20, 1976 as the basis of his wage-earning capacity from November 3, 1973 to January 20, 1976. Dennis L. O'Neill, 35 ECAB 620 [1984].

The evidence did not establish that appellant sustained a loss of wage-earning capacity after September 9, 1982 due to the permanent effects of the employment injuries. The Office properly based appellant's wage-earning capacity on the position he had been holding since April 23, 1978. The record showed that his actual earnings in that position were greater than the current wages of the position he was holding when injured. He therefore had no loss of wage-earning capacity. Edward T. Campbell, 35 ECAB 624 [1984].

The evidence did not support the Office's finding that appellant had no loss of wage-earning capacity after February 23, 1983 because of a change in his actual earnings. The Office had not met its burden of establishing a material change in the nature and extent of appellant's injury-related condition or that he had been retrained or otherwise vocationally rehabilitated or that the original loss of wage-earning capacity was erroneous. The Office based its original wage-earning capacity determination on appellant's actual earnings as a mail flow controller. There was no evidence of record to demonstrate a change in appellant's capacity to earn wages in the job determined to represent his earning capacity. The Office improperly found that appellant had no loss of wage-earning capacity and terminated appellant's compensation solely on his current actual earnings exceeding those of the position he held when injured. Ernest Donelson, 35 ECAB 503 [1984].

MODIFICATION OF AWARD

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of justifying such modification of an award is upon the Office. Charles D. Thompson, 35 ECAB 220 [1984]; George E. Roth, 35 ECAB 773 [1984].

The weight of the evidence failed to establish that appellant had more than a 32 percent employment-related loss of wage-earning capacity effective November 5, 1981 based on his capacity to perform the duties of a personnel worker. To justify a modification of an established loss of wage-earning capacity, one of the following must occur: (1) a material change in the nature and extent of the injury-related condition; (2) the employee has been retrained or otherwise vocationally rehabilitated; or (3) the original determination was, in fact, erroneous. Since neither of the first two possibilities was applicable, appellant's contention must be that the original determination was erroneous. There was no evidence in the record, however, which demonstrated that the Office's June 25, 1974 decision was erroneous. The Office carefully considered appellant's work restrictions, chose the position of personnel worker as the position which suited his capabilities, and verified the reasonable availability of the position within appellant's commuting area. There was no evidence in the record which demonstrated that appellant was not capable of performing the position, nor was there any evidence demonstrating that the position was not available. Charles D. Thompson, 35 ECAB 220 [1983].

The Office had not met its burden of justifying a reduction of compensation. There was an unresolved medical conflict concerning whether appellant was able to perform the duties of Watchman I. In addition to this unresolved conflict, the Board noted that the position description relied on by the Office both in its original loss of wage-earning capacity determination effective October 13, 1978 and its second such determination effective January 28, 1982 was taken from the 1965 edition of the *Dictionary of Occupational Titles* and may be out-of-date. The Board also noted that the Office, before issuing its "new decision" on February 4, 1982 which reduced appellant's compensation effective January 28, 1982 based on its finding that the position of Watchman I reasonably represented appellant's wage-earning capacity, failed to contact the state employment service to determine whether the position was reasonably available to appellant in his commuting area. The only inquiry made to the state employment service was in September 1978, several years before the February 1982 Office decision. On remand, the Office should consider whether the position chosen as representing appellant's wage-earning capacity based on a 1965 job description is out-of-date. If so, the Office should choose another position as representing appellant's wage-earning capacity and determine current reasonable availability and wage rates for the position. The Office should prepare a new statement of accepted facts and refer appellant and the case record to an appropriate Board-certified impartial specialist. The Office should request the specialist to set forth appellant's work restrictions due to residuals of his employment injury and any preexisting conditions and that he or she address in a rationalized opinion whether appellant can perform the duties of the chosen position and if so, for how many hours a day. Edward L. Havener, 35 ECAB 268 [1983].

The Board found that the case was not in posture for decision on the issue of whether appellant had no loss of wage-earning capacity after March 9, 1983 due to his February 13, 1975 employment injury. It was unclear from the case record whether the employing establishment would reclassify appellant as a linesman, his position at the time of injury which the Board-certified orthopedic surgeon to whom the Office referred appellant believed appellant capable of performing. Subsequent to the injury he had been classified as a groundsman, a less strenuous position at a lower rate of pay. The case will be remanded to the Office to secure information from the employing establishment as to whether its medical restriction against climbing is still valid and for any recent medical evaluation it may have made of him. The Office should furnish the employing establishment with a copy of the Board-certified orthopedic surgeon's most recent report and request a statement on whether the employing establishment regards appellant as physically capable of performing the duties of the position he held when injured. Kenneth S. Walker, 35 ECAB 475 [1983].

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the *capacity* to earn and not on actual wages lost. Ernest Donelson, 35 ECAB 503 [1984].

The evidence did not support the Office's finding that appellant had no loss of wage-earning capacity after February 23, 1983 because of a change in his actual earnings. The Office had not met its burden of establishing a material change in the nature and extent of appellant's injury-related condition or that he had been retrained or otherwise vocationally rehabilitated or that the original loss of wage-earning capacity was erroneous. The Office based its original wage-earning capacity determination on appellant's actual earnings as a mail flow controller. There was no evidence of record to demonstrate a change in appellant's capacity to earn wages in the job determined to represent his earning capacity. The Office improperly found that appellant had no loss of wage-earning capacity and terminated appellant's compensation solely on his current actual earnings exceeding those of the position he held when injured. Ernest Donelson, 35 ECAB 503 [1984].

The Board found that the Office in its decision incorrectly determined that its prior decision, which found that appellant's employment-related hearing loss resulted in a loss of wage-earning capacity, was erroneous. The Board noted that appellant retired on disability effective May 23, 1972, based on the 1972 report of an employing establishment physician, who stated that appellant was disabled for work due to "tinnitus severe" and that the tinnitus interfered with appellant's ability to concentrate, thereby preventing him from reviewing records and other documents as required by his job. In essence, appellant was found to be disabled for his former position due to his employment-related hearing loss. Although appellant's disability retirement was based on an employment-related hearing loss, the evidence of record did not show that he was totally disabled for all types of work, nor did he contend that he was; therefore, he did have a wage-earning capacity. However, the record did not support the Office's finding that appellant's employment with the State's Attorney's Office was comparable to his position with the employment establishment. In fact, the record revealed quite the opposite. Not only was the salary incomparable to that which appellant received prior to retirement, his assignments and duties were not as complex, and appellant could basically report to work and perform his duties at his own convenience since the State's Attorney empathized with his "physical handicap", i.e., his tinnitus, and allowed him "a great deal of latitude" as a consequence. The Office had not justified modification of its loss of wage-earning capacity determination. George E. Roth, 35 ECAB 773 [1984].

ODD-LOT RULE

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his usual employment, his age and vocational qualifications, and the availability of suitable employment. Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd-lot position or one not reasonably available on the open labor market. William H. Goff, 35 ECAB 581 [1984].

OTHER WORK, INABILITY TO PERFORM, OBTAIN PROMOTIONS

Appellant's contention on appeal that he was entitled to compensation because the limited duty position at the employing establishment offered no opportunity for transfer or advancement is unavailing. The Board has stated that ". . . a contention, or even a showing, that the employee was precluded by reason of his physical impairment from applying for or obtaining a specific position or that he might have obtained other positions which would have paid more wages than he was able to earn in the work performed when injured or in the work he performed after the injury, is not proof of a loss of wage-earning capacity." Billy G. Sinor, 35 ECAB 419 [1983].

Appellant argued that he has suffered a significant loss in career earnings potential as a result of the injuries to his right knee. He stated that the injuries prevented him continuing in a job that offered a 20-year law enforement retirement and the payment of a 25 percent pay allowance. He further stated that his former colleagues have surpassed him in overall earnings potential. The Board has long held that the fact that an injury might prevent an employee from obtaining promotions or increased earnings does not establish a loss of wage-earning capacity. Edward T. Campbell, 35 ECAB 624 [1984].

PREEXISTING IMPAIRMENTS

The Board found that this case was not in posture for decision on the issue of appellant's loss of wage-earning capacity. The Board-certified surgeon who supplied a work tolerance report to the Office, indicated that appellant had only a partial ability to perform certain activities and that he could work eight hours a day. He qualified his evaluation of work restrictions by noting that he only considered appellant's groin condition and not any restrictions due to his arteriosclerotic peripheral vascular disease. A second Board-certified surgeon and appellant's attending physician reviewed the job description for the position of cashier and concluded that appellant would be unable to perform the required duties due to his accepted condition and preexisting disabilities. Appellant, along with the case record and statement of accepted facts, should be referred to a Board-certified specialist for an opinion on whether appellant had any preexisting condition unrelated to his employment, and if so, the doctor should set forth the work limitations imposed by these conditions as well as the accepted left hernia condition. The augmented case record should then be reviewed by the Office medical adviser and a loss of wage-earning capacity specialist for selection of a job within the described work limitations. The Office should then issue a *de novo* decision on appellant's loss of wage-earning capacity. Johnny R. Robison, 35 ECAB 493 [1984].

In determining loss of wage-earning capacity where residuals of an accepted employment-related condition prevent an employee from performing his regular duties, physical ailments which preexisted the accepted condition must be taken into consideration when selecting a job for purposes of determining wage-earning capacity. Johnny R. Robison, 35 ECAB 493 [1984].

REASONABLE AVAILABILITY

The case was not in posture for decision on the issue of whether appellant had a 25 percent loss of wage-earning capacity. The Office, in its initial loss of wage-earning capacity decision, based its determination on appellant's actual wages for six hours a day, 30 hours a week. The testimony at the hearing disclosed, however, that appellant actually worked only five hours a day. The hearing representative therefore modified the Office's decision, finding that the evidence showed that she was capable of working six hours a day as a general clerk. By basing the decision on appellant's capacity to earn wages rather than on her actual earnings, the hearing representative also was required to determine whether the position of general clerk was reasonably available within appellant's commuting area. The Board has held that the position selected for determining wage-earning capacity must be one reasonably available in the open labor market. It is improper to make such a determination based on one position. The case will be remanded for further development. If the evidence establishes that appellant's actual wages do not fairly and reasonably represent her wage-earning capacity, the Office should determine if appellant is capable of performing a position in the open labor market reasonably available within her commuting area. After further action as it may find necessary, the Office should issue a *de novo* decision. Sandra Foster, 35 ECAB 183 [1983].

The Office had not met its burden of justifying a reduction of compensation. There was an unresolved medical conflict concerning whether appellant was able to perform the duties of Watchman I. In addition to this unresolved conflict, the Board noted that the position description relied on by the Office both in its original loss of wage-earning capacity determination effective October 13, 1978 and its second such determination effective January 28, 1982 was taken from the 1965 edition of the *Dictionary of Occupational Titles* and may be out-of-date. The Board also noted that the Office, before issuing its "new decision" on February 4, 1982 which reduced appellant's compensation effective January 28, 1982 based on its finding that the position of Watchman I reasonably represented appellant's wage-earning capacity, failed to contact the state employment service to determine whether the position was reasonably available to appellant in his commuting area. The only inquiry made to the state employment service was in September 1978, several years before the February 1982 Office decision. On remand, the Office should consider whether the position chosen as representing appellant's wage-earning capacity based on a 1965 job description was out-of-date. If so, the Office should choose another position as representing appellant's wage-earning capacity and determine current reasonable availablity and wage rates for the position. The Office should prepare a new statement of accepted facts and refer appellant and the case record to an appropriate Board-certified impartial specialist. The Office should request the specialist to set forth appellant's work restrictions due to residuals of his employment injury and any preexisting conditions and that he or she address in a rationalized opinion whether appellant can perform the duties of the chosen position and if so, for how may hours a day. Edward L. Havener, 35 ECAB 268 [1983].

Case was not in posture for decision on the issue of whether the position of telephone solicitor fairly and reasonably represented appellant's wage-earning capacity. A conflict in medical opinions necessitating referral to an impartial specialist existed as to whether appellant was capable of traveling to work. The Board further noted that since the Director of the Office conceded on previous appeal that appellant's ability to travel should be considered when making a loss of wage-earning capacity determination, which would include consideration of the "type and duration of travel that appellant is capable of performing," reasonable availability of the services on a daily basis within appellant's commuting area in 1979 and presently should have been included in the loss of wage-earning capacity determination. On remand, the Office should obtain a detailed, rationalized medical opinion as to whether appellant is capable of performing the duties of a telephone solicitor; if so, whether she is capable of performing the duties on a full-time or part-time basis; and whether she is capable of performing the duties outside of the home. Further, should the specialist conclude that appellant is capable of traveling from her home to perform the duties of a telephone solicitor, the Office should then assess whether transportation services are reasonably available to appellant on a daily basis within her commuting area to transport her to and from work, taking into consideration the current costs of such services. Mary F. Dudley, 35 ECAB 350 [1983].

The Board found there were deficiencies in the Office's loss of wage-earning capacity determination requiring further development. The worksheet calculating wage-earning capacity pursuant to *Shadrick* was not in the case record. In addition, the Office made a finding that the position of clerk was reasonably available where the injury was sustained. Appellant moved to Nevada and the Office should have determined whether the selected position was reasonably available in Nevada. Anthony Oliveira, 35 ECAB 990 [1984].

REMAND FOR DEVELOPMENT

The Board found that further development was needed on the issue of whether appellant had sustained a loss of wage-earning capacity. The fact that the employing establishment allowed appellant to continue working at his regular job and wages, despite its knowledge of his hearing loss, did not show that appellant had no loss of wage-earning capacity due to his hearing loss. The Board has pointed out that ability to earn, rather than wages actually received, is the test of wage-earning capacity. As the Board stated in the *Tietze* case, "Wages or actual earnings after injury should not be confused with 'wage-earning capacity'; and while the wages earned after injury often may reasonably reflect the ability of the individual to earn, they do not always reflect such ability, as for example, if the employer should because of generosity, special need, or other similar reason pay the employee the same wage as he received at time of injury and thus pay more than employee's capacity would warrant . . ." Appellant contended on appeal, as he did before the Office, that his hearing loss precluded him from obtaining a state license to drive trucks. This contention, if proven, would show a loss of wage-earning capacity, as the general test is whether his work-related impairment prevented him from engaging in the kind of work he was doing when injured. There was, however, no evidence in support of his contention that he cannot obtain a state license to drive trucks. As appellant has the burden of proving a loss of wage-earning capacity, he should be given an opportunity to submit evidence supporting his contention, which would consist of evidence such as the hearing requirements for the state license needed or a rejection due to his hearing loss of an application for such a license. If appellant submits such evidence, it should be reviewed by a physician for an opinion whether appellant's work-related hearing loss physically disqualifies him or renders him incapable of performing the duties of a truck driver. Clifford W. Krippendorf, 35 ECAB 215 [1983]

The Office had not met its burden of justifying a reduction of compensation. There was an unresolved medical conflict concerning whether appellant was able to perform the duties of Watchman I. In addition to this unresolved conflict, the Board noted that the position description relied on by the Office both in its original loss of wage-earning capacity determination effective October 13, 1978 and its second such determination effective January 28, 1982 was taken from the 1965 edition of the *Dictionary of Occupational Titles* and may be out-of-date. The Board also noted that the Office, before issuing its "new decision" on February 4, 1982 which reduced appellant's compensation effective January 28, 1982 based on its finding that the position of Watchman I reasonably represented appellant's wage-earning capacity, failed to contact the state employment service to determine whether the position was reasonably available to appellant in his commuting area. The only inquiry made to the state employment service was in September 1978, several years before the February 1982 Office decision. On remand, the Office should consider whether the position chosen as representing appellant's wage-earning capacity based on a 1965 job description is out-of-date. If so, the Office should choose another position as representing appellant's wage-earning capacity and determine current reasonable availability and wage rates for the position. The Office should prepare a new statement of accepted facts and refer appellant and the case record to an appropriate Board-certified impartial specialist. The Office should request the specialist to set forth appellant's work restrictions due to residuals of his employment injury and any preexisting conditions and that he or she address in a rationalized opinion whether appellant can perform the duties of the chosen position and if so, for how many hours a day. Edward L. Havener, 35 ECAB 268 [1983].

Case was not in posture for decision on the issue of whether the position of telephone solicitor fairly and reasonably represented appellant's wage-earning capacity. A conflict in medical opinions necessitating referral to an impartial specialist existed as to whether appellant was capable of traveling to work. The Board further noted that since the Director of the Office conceded on previous appeal that appellant's ability to travel should be considered when making a loss of wage-earning capacity determination, which would include consideration of the "type and duration of travel that appellant is capable of performing," reasonable availability of the services on a daily basis within appellant's commuting area in 1979 and presently should have been included in the loss of wage-earning capacity determination. On remand, the Office should obtain a detailed, rationalized medical opinion as to whether appellant is capable of performing the duties of a telephone solicitor; if so, whether she is capable of performing the duties on a full-time or part-time basis; and whether she is capable of performing the duties outside of the home. Further, should the specialist conclude that appellant is capable of traveling from her home to perform the duties of a telephone solicitor, the Office should then assess whether transportation services are reasonably available to appellant on a daily basis within her commuting area to transport her to and from work, taking into consideration the current costs of such services. Mary F. Dudley, 35 ECAB 350 [1983].

Well-reasoned medical reports indicated that appellant's asthma was directly caused by factors of her employment, and that the continued existence of such factors prevented her from returning to her job as a nurse. The medical evidence of record therefore did not support the conclusion that appellant had an underlying condition of asthma which was temporarily aggravated by factors of her employment and that such aggravation ceased when she stopped work. The evidence is, rather, consistent with the principle enunciated by the Board in *O'Neill*. Although appellant could not return to the nursing job she held when she was injured, the medical evidence of record indicated that she was not totally disabled from gainful employment. Medical evidence revealed that when away from the precipitating factors at work, appellant was apparently able to function normally. The Office should determine appellant's loss of wage-earning capacity as of the date she stopped work. It should request a work tolerance limitations form noting both the physical and environmental restrictions under which appellant could work. The Office should then select a job consistent with those restrictions and have an Office medical adviser give his opinion as to whether appellant could have performed the selected position as of the date in 1979 she stopped work. Elise H. Daniel, 35 ECAB 359 [1983].

The Board found that the case was not in posture for decision on the issue of whether appellant sustained any disability after August 13, 1981 causally related to his February 1979 employment-related myocardial infarction. The January 24, 1982 report of a Board-certified cardiologist established that as a result of the October 1974 employment-related infarction appellant sustained a permanent impairment of his ventricular function, i.e. ventricular muscle. The cardiologist stated that as a result of the permanent damage to the ventricular muscle, appellant would have "the reduced ability of the myocardium to meet future stress and his significant coronary artery disease." An Office medical consultant described the permanent residual, loss of ventricular function, as follows: "There is an area of the left ventricle which does not contract which represents a dead, scarred area of the left ventricle, a consequence of the infarction. This does not appear to be a disabling factor although theoretically it could be. It appears that the disabling factor at this time is angina pectoris and that Mr. Christie does not exercise to the point of developing symptoms which could be explained on the basis of damage to his left ventricle from the 1974 infarction." In light of the principles enunciated in the *Hearn* and *O'Neill* cases, the Office should have determined whether as a result of the employment-related, permanent loss of ventricular function together with the preexisting coronary artery disease, appellant could perform the duties of a teacher supervisor, the position he held when he sustained the employment injury. On remand, the Office should take note of appellant's work restrictions described in the January 24, 1983 medical report and then determine whether appellant's employment-related, permanent loss of ventricular function and his preexisting coronary artery disease prevented him from performing the duties of a teacher supervisor. If appellant is prevented from returning to his former employment, the Office should make a determination with respect to appellant's wage-earning capacity. Laymon C. Christie, 35 ECAB 389 [1983].

The FAA medical certification letters submitted by appellant in support of his request for reconsideration were sufficient to require further development of the evidence by the Office. Such further development was especially important in light of the fact that the Office did not request a work tolerance evaluation of appellant from his attending physician. The case was remanded so that the Office may obtain a work tolerance evaluation from appellant's physician, who should also be requested to provide an opinion on whether appellant, in light of his physical limitations and any medications he may be taking for his employment-related condition, is capable of performing the duties of a commercial airplane pilot and, if so, whether on a full or part-time basis. The Office should then ascertain from the FAA whether appellant is physically and otherwise qualified for such position. Upon further development of the case record deemed necessary, the Office shall recalculate appellant's loss of wage-earning capacity and issue a *de novo* decision. Gerald A. Maher, 35 ECAB 508 [1984].

The Board found that further development was necessary on the issue of whether appellant's exposure to airborne contaminants at work caused periods of employment-related disability from January 1980 to November 1981 when appellant worked for the employing establishment at a lower pay rate and at a lower grade than he had previously enjoyed. Appellant attributed this reduction in his pay rate during this period to his restriction by the employing establishment from performing all the duties of his position due to his pulmonary condition. If it is shown that his restriction was due to an employment-related condition, he would have an employment-related loss of wage-earning capacity during the period. The reasons for his reduction in pay rate during this period were not revealed in the case record, although it did show that appellant was transferred in January 1980 due to the ending of the Minuteman missile silo upgrading project and that during this period he was restricted by the employing establishment, based on medical evidence available at that time, from working in areas where he would be exposed to certain airborne contaminants. On remand the Office should determine, through contact with the employing establishment, the reason for appellant's reduced pay rate during the period from January 1980 to November 1981. Gene Collins, 35 ECAB 544 [1984].

The medical evidence established that appellant contracted an asbestos-related condition due to factors of his federal employment, but that he was not totally disabled therefrom. The Office failed, however, to consider any loss of wage-earning capacity which may have resulted from an asbestos-related condition, as a result of inability to continue working in an environment such as that of appellant's former position. The description of appellant's former position indicated that he would have sustained such exposure if he continued in that position. Thus, while the evidence showed that appellant was not totally disabled from work, it indicated that the residuals of his employment-related condition may have prevented him from continuing his former position. This case should be distinguished from one involving a temporary aggravation of a preexisting condition. In such a case, the underlying condition is not caused by employment factors; any aggravation of the condition by employment factors is compensable only as long as it lasts. No compensation benefits are payable after the aggravation ceases, even though the employee cannot return to his former position. However, where, as here, the condition is itself employment related, compensation benefits may be payable if the impairment prevents the employee from engaging in the kind of work he was doing when injured. Joseph C. Sanderson, 35 ECAB 864 [1984].

The Board found that appellant's wage-earning capacity was improperly determined. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his usual employment, his age and vocational qulifications, and the availability of suitable employment. Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd-lot position or one not reasonably available on the open market. This generally would exclude a position in federal service. The concept of wage-earning capacity should not be confused with a situation where compensation is terminated for refusal of an employee to accept suitable work offered to him; such a determination is governed by section 8106(c) of the FECA and the principles applicable to it. The Office failed to follow the established procedures for determining appellant's employment-related loss of wage-earning capacity, confusing those procedures with the principles of section 8106(c). The Office had rejected appellant's claim for a loss of wage-earning capacity, on the ground that he "had no loss of wage earning capacity as a result of the work injury and is barred from receipt of such compensation under the provisions of 5 U.S.C. section 8106(c)(2)." An accompanying memorandum made part of the decision by reference indicated that appellant "was provided work within the physical limitations imposed by his work injury, at no loss of wages. He voluntarily chose to retire from that work." In accordance with the concept of wage-earning capacity described above, when the Office makes a medical determination of partial disability and of the specific work restrictions, the claimant's case record should be referred to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, which fits the employee's capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of prevailing wage rate and availability in the open labor market should be made through contact with the state employment service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity. Jess L. Green, 35 ECAB 893 [1984].

The Board found there were deficiencies in the Office's loss of wage-earning capacity determination requiring further development. The worksheet calculating wage-earning capacity pursuant to *Shadrick* was not in the case record. In addition, the Office made a finding that the position of clerk was reasonably available where the injury was sustained. Appellant moved to Nevada and the Office should have determined whether the selected position was reasonably available in Nevada. Anthony Oliveira, 35 ECAB 990 [1984].

RESIDUALS OF EMPLOYMENT-RELATED IMPAIRMENT/SUSCEPTIBILITY TO FUTURE INJURY

If the medical evidence establishes that the residuals of an employment-related impairment are such that, from a medical standpoint, they prevent the employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. Maurice E. Anderson, 35 ECAB 277 [1983]; Elise H. Daniel, 35 ECAB 359 [1983].

Well-reasoned medical reports indicated that appellant's asthma was directly caused by factors of her employment, and that the continued existence of such factors prevented her from returning to her job as a nurse. The medical evidence of record therefore did not support the conclusion that appellant had an underlying condition of asthma which was temporarily aggravated by factors of her employment and that such aggravation ceased when she stopped work. The evidence was, rather, consistent with the principle enunciated by the Board in *O'Neill*. Although appellant could not return to the nursing job she held when she was injured, the medical evidence of record indicated that she was not totally disabled from gainful employment. Medical evidence revealed that when away from the precipitating factors at work, appellant was apparently able to function normally. The Office should determine appellant's loss of wage-earning capacity as of the date she stopped work. It should request a work tolerance limitations form noting both the physical and environmental restrictions under which appellant could work. The Office should then select a job consistent with those restrictions and have an Office medical adviser give his opinion as to whether appellant could have performed the selected position as of the date in 1979 she stopped work. Elise H. Daniel, 35 ECAB 359 [1983].

It is a well-settled principle of workers' compensation law that if the medical evidence establishes that the residuals of an employment-related condition are such that, from a medical standpoint, they prevent the employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. The problem in the instant case was whether the residuals of the employment did, in fact, prevent appellant from continuing to perform the duties of his position. As in any other type of similar situation, this determination is primarily medical in nature and is in the realm of medical evidence. Joseph C. Sanderson, 35 ECAB 864 [1984].

According to the Federal (FECA) Procedure Manual: "When an employee has suffered a work-related injury which results in permanent residuals there may be disability for work when medical evidence establishes that further exposure to the implicated employment conditions would endanger the employee's health, although the residuals of the injury taken alone might not be disabling. Since exposure to asbestos dust generally results in permanent and irreversible changes in the pulmonary system, in those cases where a diagnosis of asbestos-related disease occurs without disabling pulmonary impairment, or without disability due to associated symptomatology, medical evidence may be submitted which indicates that continued employment in a certain job (or certain work environment) is contraindicated. That is, a treating physician may find an individual 'disabled' for continued normal employment because his job requires (or may place him in an environment which includes) continued exposure to asbestos dust. *** If continued exposure at any level is contraindicated by medical evidence and if the employing agency cannot certify that the normal employment will take place in an environment that conforms to such level, the claimant will be entitled to compensation for loss of wage-earning capacity if reassignment to a safe work environment results in reduced wages or if no such work is available." Joseph C. Sanderson, 35 ECAB 864 [1984].

RETROACTIVE DETERMINATIONS

The Board found that as of September 21, 1981, the date of a Board-certified orthopedic surgeon's examination, appellant had no more than a 67% employment-related loss of wage-earning capacity based on his ability to perform the duties of a cashier. In his narrative report, the doctor addressed only appellant's current back condition, not what his work tolerance limitations were as of February 28, 1980. The doctor's report was therefore not sufficient to justify the Office's loss of wage-earning capacity determination retroactive to that date. Cyril J. Zinner, 35 ECAB 365 [1983].

The Board found that the Office properly determined appellant's loss of wage-earning capacity for the period from November 3, 1973 to January 20, 1976. While the evidence established that appellant was disabled for his position of electronics mechanic because of his employment-related hearing loss, there was no evidence that he was totally disabled during the period from November 3, 1973 to January 20, 1976. The Office properly determined that appellant's actual wages beginning January 20, 1976 were a proper measure of his wage-earning capacity, as there was no evidence that these earnings did not fairly and reasonably represent his wage-earning capacity. Because the evidence (discussed in the Board's prior decision) showed there was no essential change in appellant's medical condition between November 3, 1973 and January 20, 1976, it was proper for the Office to use appellant's acutal wages beginning January 20, 1976 as the basis of his wage-earning capacity from November 3, 1973 to January 20, 1976. Dennis L. O'Neill, 35 ECAB 620 [1984].

Decisions of the Employees' Compensation Appeals Board

U.S. Department of Labor
Raymond J. Donovan, Secretary
Employees' Compensation Appeals Board

Members of the Board:
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Margaret Pallansch, Member
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October 1, 1983 — September 30, 1984

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[1] Docket numbers are assigned on a fiscal year basis. Thus 84-1 was the first case filed in fiscal year 1984, which commenced on October 1, 1983.

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[1] Docket numbers are assigned on a fiscal year basis. Thus 84-1 was the first case filed in fiscal year 1984, which commenced on October 1, 1983.

In the Matter of REGINALD J. ADAMS *and* DEPARTMENT OF THE NAVY, ALAMEDA NAVAL AIR STATION, Alameda, Calif.

Docket No. 83-1307; Submitted on the Record;
Issued October 5, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly rejected appellant's claim on the ground that he did not establish fact of injury in the performance of duty.

Appellant, then a 24-year-old sheetmetal worker, filed a claim on September 30, 1981, alleging that on July 30, 1981 he developed "soreness in shin and left hip" from working on a bench "with a slanted foundation." On July 30, 1981, Dr. Hugh J. Lenahan, an employing establishment physician, referred appellant to Dr. William C. Popik, a Board-certified family practitioner, for examination and treatment. Dr. Lenahan stated on the referral form that "sitting on unlevel bench for past 3 days has caused pain in left hip and left leg." Dr. Popik examined appellant on July 30, 1981 and stated in an undated attending physician's form report that appellant gave him a history of pain in the left back, groin, and leg for two days. He diagnosed a left groin strain. In a September 24, 1981 attending physician's report, Dr. Popik stated appellant gave him a history of working on a sloping bench and straining the "left groin area." He stated he found "left testicle pathology" but in responding to the question asking what his diagnosis was, he stated there was "no significant evidence of pathology."

Appellant received continuation of pay from July 31 through August 9, 1981, for August 17, August 27, August 31, September 1 and 21, and from September 24 through October 23, 1981. He was on military leave from September 6 through 19, 1981. In a statement later submitted to the Office of Workers' Compensation Programs, appellant stated that he continued to experience pain in the left hip and leg while on military leave, for which he took medication prescribed by Dr. Popik.

Dr. Popik referred appellant to Dr. DeWitt B. Gifford, a Board-certified neurosurgeon, for examination and evaluation. Dr. Gifford examined appellant on September 30, 1981 and stated the following in an October 2, 1981 report:

> "On examination this is a healthy appearing young man who does appear in significant distress at this time. The spine is straight with

> a limited range of motion of both flexion and lateral bending on a voluntary basis. There is no significant spasm or loss of the normal lumbar lordosis. There is some sciatic notch tenderness on the left. Straight leg raising gives rise to pain on the left at 90 degrees. There is severe cross straight leg raising pain at 70 degrees on the right. Motor examination reveals weakness of toe standing on the left with atrophy of the left gastrocnemius which is gross. There is one half inch difference in the calf circumference. Deep tendon reflexes revealed a diminished left knee jerk. The remainder of the reflexes are intact. Sensation is intact throughout.
>
> "This patient is very puzzling. His history does not suggest the onset of a ruptured disc and yet he has mechanical findings of a severe degree on the straight leg raising test which suggest a free fragment in the canal. In addition, he has significant neurological deficit on the left which is mixed in terms of the findings. While we would expect from this that he might have the free fragment over the body of L–4 on the left, however, I would also be concerned about the possibility of intrinsic tumor or something of the sort. In any case, I referred him for initial studies for x-rays of the lumbar spine, and CT [computerized tomography] scan of the lumbar spine. ***"

Dr. Gifford stated as follows in an October 10, 1981 report:

> "His CT scan shows evidence of a herniated disc at the 3–4 level. There is some bulging of the 4–5 disc as well but I do not think this is clinically significant. This is consistent with his symptoms and findings to some extent.
>
> "I discussed with him the possibility of surgical discectomy for his pain. He does, however, have symptoms involving .the Swan root as well in regard to weakness and atrophy of his gastrocnemius muscle. In addition, I am concerned that the cross straight leg raising test, while strongly positive and most suggestive of disc rupture, is, nonetheless, unusual at the L3-4 level. Accordingly, I recommended to Mr. Adams that before doing any definitive surgery, I would recommend Metrizamide myelogram to confirm the diagnosis of a herniated disc at 3–4 and to exclude other problems."

In a report filed with the Office on October 15, 1981 the employing establishment stated that when appellant first went to the employing establishment dispensary on July 30, 1981, he gave July 27, 1981 as the date of injury, and that later it "was changed" to July 30.

On an attending physician's form report dated October 28, 1981, Dr. Popik stated that a CT scan revealed "disc herniation at L3–4, L4–5" and he diagnosed a "lumbar disc herniation." He answered "yes" to the question whether he believed this condition was related to the history of injury by appellant of "back pain and leg pain developed while standing on uneven floor at work."

Dr. Popik referred appellant to Dr. Robert N. Mitgang, a neurosurgeon, for additional examination and evaluation. Dr. Mitgang stated the following in an October 29, 1981 report:

> "*** The patient has had pain in his left leg coming on rather steadily after he had had a number of job changes working as an aircraft mechanic at the Naval Air Station some time toward the end of July 1981. There were apparently a number of rather insidious episodes of back and leg pain, and he eventually went to see the physician on base, and then was sent to Doctor Popik. He later returned to his job and had more trouble, and at that point Doctor Popik was evidently out of town and he saw another physician and he was given a prescription by that person for Indocin. At about that time he was due to go on a two week cruise for his reserve training and had a physical exam because of his difficulties. He stated that he passed that exam, went on the cruise, and during that time had some problems with his back. He was taken off the ship and eventually found his way to the carrier *Ranger*, at which point he had further trouble because he was a passenger in an airplane which required a hook landing on the deck and apparently he was jarred as a result of that. Despite all these problems he made it back to his regular work, although he still had some difficulty. Because he was still having problems he was referred to Doctor DeWitt Gifford, and after Doctor Gifford's evaluation he was asked to get a CT scan of his spine done. . . .
>
> "The patient has a history of having vague low back problems in that he thinks he may have been seen at one time at the VA Hospital because of this. He was on active duty in the Navy working as a boiler technician from about 1972 to 1974. He had no problems other than a head injury, at which time he was unconscious and subsequently had some tooth extractions and sinusitis."
>
> * * *
>
> "CLINICAL IMPRESSION: This patient has clinical evidence of a mild radiculopathy probably centered on the L5 root on the left. The CT scan done on October 2nd . . . shows bulging of the disc between 3–4 and 4–5, and to a lesser extent between L5 and the sacrum. I have no doubt that there is some discogenic disease, and as I stated above, there has been some radiculopathy. I do not think this patient is a surgical candidate, at least not at this time. . . ."

By letter dated November 13, 1981, the Office informed appellant there was "no factual evidence" indicating that he injured his lower back, right hip, or testicular area on July 30, 1981. The letter stated that appellant should "more completely describe" his injury and submit descriptions of the injury from witnesses. The letter also asked whether Dr. Popik's notes indicated any lower back, right hip, or testicular pain "immediately following the injury." Copies of Dr. Popik's notes submitted on December 22, 1981 showed that at Dr. Popik's initial examination of appellant on July 30, 1981, appellant complained of pain in the left groin, leg, hip, and testicle, accompanied by tenderness in the left iliac crest, and that on August 5, 1981 appellant continued to have pain in the left hip and thigh.

An Office medical adviser reviewed the case record, including a statement of accepted facts, and stated in a December 11, 1981 report that the medical evidence did not support with rationale that appellant's "discogenic disease lumbar spine with HNP [herniated nucleus pulposus] L3–4, L4–5" could be caused by the "alleged factors of employment."

By compensation order dated February 4, 1982, the Office rejected appellant's claim for compensation on the ground that appellant had "failed to discharge his burden of proof in establishing that he sustained a traumatic injury at work on July 30, 1981, as alleged."

Dr. Popik subsequently submitted the following report, dated February 12, 1982:

> "Reginald Adams was seen by me in my office 2/10/82 and has asked me to write the following letter of clarification. The following statements are my current opinions regarding his case.
>
> "(1) When Mr. Adams was originally seen by me on 7/30/81, he stated that he experienced his groin and back pain after standing on a sloping floor at a workbench. My physical exam was directed towards a strain injury or hernia. This history did not suggest a disc injury at the time, and I did not specifically search for this.
>
> "(2) Mr. Adams brought me letters yesterday, stating that he and other workers moved a 300 pound bench in July. Mr. Adams had not told me prior to yesterday that this vigorous physical activity had occurred.
>
> "(3) If Mr. Adams did, in fact, participate in moving this bench, it is entirely possible that the disc injury actually occurred in July. Mr. Adams' presenting symptoms when seen by me on 7/30/81 would be entirely consistent with an early disc injury. Had he related this event to me, I would have specifically tested for disc injury. I do not know why he did not mention this event—one can only assume that the incident slipped his mind."

Appellant requested reconsideration by letter dated February 16, 1982. He submitted as new evidence a copy of Dr. Popik's February 12, 1982 report and statements by four coworkers that in July 1981 they witnessed appellant help move a bench weighing about 300 pounds, and that appellant later began complaining of leg and hip pain. Two of the statements mentioned that after helping move the bench, appellant was assigned to an area where the floor was slanted, and that appellant's complaints of pain began after that.

By letter of February 25, 1982, the Office requested appellant to explain why he did not report his injury from moving the bench or why he did not tell Dr. Popik about moving the bench until February 10, 1982. He was also asked to describe in more detail the injury from working on the slanted foundation and describe his back problems experienced while on the cruise and airplane flight during military leave, mentioned by Dr. Mitgang in his report.

By report dated March 5, 1982, Dr. Popik stated that appellant had been able to return to light duty work since January 1, 1982, with the limitation that he not lift over 20 pounds or engage in prolonged standing. On an Office form report of termination of disability submitted October 29, 1982, the employing establishment stated that appellant was on leave without pay from October 30, 1981 through April 14, 1982 and that he returned to work on April 15, 1982.

In response to an Office request that the employing establishment comment on the witnesses' statements, appellant's former supervisor submitted an August 12, 1982 statement concerning appellant's injury. He stated that he was on vacation during the time in question,[1] but that his "investigation after the fact" revealed that appellant did participate in moving a bench in July 1981. He stated that "the bench slid a short distance on the floor and on one side each leg was lifted a distance of $1^{3}/_{4}$" and shimmed for level." He did not comment about appellant's working on a slanted foundation, but he did state that appellant completed a training period on July 31, 1981 and was sent to the "next shop."

On August 25, 1982, appellant's attorney submitted a statement by appellant giving a history of his back pain. He stated that he first noticed pain in his left hip and leg after being relocated to the area in the shop where the foundation was slanted. When he saw Dr. Popik on July 30, 1981, Dr. Popik did not "inquire about previous work activities nor did I consider the day before when I felt fatigue towards the end of the shift after two coworkers . . . and myself moved the work bench." Appellant stated, "All I knew on 7/30/81 was that I was encountering [extreme] physical impairment since being relocated on the slanted foundation." He stated that after he received the Office's February 4, 1982 compensation order, he began his own "investigation" and discovered that he had helped move the bench on July 29, 1981, and that after being relocated the next day he began to complain to coworkers about the pain he was experiencing from working on the slanted foundation. In response to the Office's February 25, 1982 letter, he also discussed the back problems experienced during military leave. He did not state whether the "hook landing" on the aircraft carrier jarred his back.

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[1] The Supervisor's replacement was one of the four witnesses who prepared a statement about appellant helping move the bench.

The Office referred the entire case record to Dr. Jerome Goldstein, a Board-certified neurologist and an Office medical consultant, for evaluation and report on whether appellant's condition as described in Dr. Popik's February 12, 1982 report was casually related to "conditions of employment," when total disability ceased, whether "aggravation is involved," and if so, whether aggravation was permanent or temporary.

In an October 27, 1982 report, Dr. Goldstein summarized the medical reports in the case record and stated as follows:

> "The claimant does have discogenic disease proven by CT scan. Dr. Popik's letter of 12 February 1982 is an attempt to correct the history which was given initially by the claimant. Initial history given by the claimant in no way accounts for his discogenic disease. Moving a 300-pound bench could account for the discogenic disease. However, the veracity of the history remains in question at this time. It must be determined whether the claimant did actively participate in moving the bench, and whether he did experience any symptoms at that time, or whether there were any other circumstances entering into this case."

In a March 10, 1983 memorandum, an Office claims examiner recommended that modification of the February 4, 1982 compensation order be denied because fact of injury in the performance of duty had not been established. He stated that it was "clear" that appellant helped move the bench, but stated "no injury was noted at that time, nor did [appellant] seek immediate medical attention." He stated it was also established by the statements of two witnesses and a "third party" (presumably appellant's former supervisor) that the moving of the bench occurred more than two days before July 30, 1981. The claims examiner stated that "further doubt" is created by the great delay in reporting the incident. He also stated that Dr. Mitgang's report suggests appellant sustained back trauma while on military duty, which appellant "neither confirmed nor denied," and that it was only after military duty that a "neurological deficit was reported."

By compensation order dated April 11, 1983, the Office denied modification of its decision of February 4, 1982 on the ground that the evidence submitted in support of the request for reconsideration was "insufficient to warrant modification."[2]

The Board finds that the employment incident of moving a bench occurred on or about July 29, 1981 as alleged. The Board further finds that the case is not in posture for decision with respect to the issue of whether appellant's disability was causally related to the employment incident.

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[2] The Board notes that the claims examiner's memorandum upon which the compensation order was based accepted that an incident of moving the bench at work did occur. It is clear, therefore, that the issue before the Office was one of causal relationship between appellant's disability and the employment incident, rather than one of fact of injury, as indicated in the claims examiner's memorandum. See *Richard G. Butzbach*, 34 ECAB 1562.

The record establishes that appellant sought medical attention soon after experiencing pain, and that on July 30, 1981 when he was first examined by Dr. Popik, a Board-certified family practitioner, he complained of pain in the left hip, leg, groin, and testicle, and Dr. Popik found tenderness in the left iliac crest. After the finding of a herniated disc by Dr. Gifford, a Board-certified neurosurgeon, Dr. Popik stated in his February 12, 1982 report that appellant's "presenting symptoms" on July 30, 1981 were "entirely consistent with an early disc injury," and that it is "entirely possible" that a disc injury occurred in July if appellant participated in moving the 300-pound bench.

Dr. Goldstein, a Board-certified neurologist and an Office medical consultant, also stated that moving the bench "could account" for the discogenic disease, and that it should be determined whether appellant "actively" participated in moving the bench and whether he experienced any symptoms at the time. The claims examiner's March 10, 1983 memorandum stated that it was "clear" that appellant helped move the bench. Therefore, under the circumstances the case record should be further developed to determine whether appellant's disability is causally related to the incident of helping move the bench.

On remand, the Office should request the employing establishment to furnish information concerning how far the bench was moved, how many people assisted, how much the bench actually weighed, and the date it was moved. The Office should also secure the available employing establishment medical records for appellant. It should request a reasoned opinion from Dr. Mitgang, a neurosurgeon, concerning whether the "hook landing" appellant made while on military leave caused or contributed to his discogenic disease.

The Office should then refer the case record and detailed statement of accepted facts to an appropriate medical specialist for a reasoned medical opinion on the issue of whether appellant had any disability causally related to moving the bench at work. Following such further development as it deems appropriate, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated April 11, 1983 is hereby set aside and the case remanded for further proceedings consistent with this decision of the Board.

In the Matter of DONALD MILLER *and* DEPARTMENT OF THE ARMY, ARRAD COM, Dover, N.J.

Docket No. 83-1454; Submitted on the Record;
Issued October 6, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant has more than 10 percent loss of use of his right leg for which he received a scheduled award.

On March 24, 1978 appellant, then a 41-year-old engineer, filed a notice asserting that on February 27, 1978 he felt pain in his lower back as a result of "bending, twisting, and lifting of metal parts." He lost no time from work due to this incident until the period April 7-13, 1978.

An April 18, 1978 attending physician's form report completed by Dr. Arthur Tiger, a Board-certified orthopedic surgeon, diagnosed "lumbar sacral strain" based on his April 6, 11, and 18, 1978 examinations of appellant.

On August 25, 1978 appellant filed a notice alleging a recurrence of disability on August 20, 1978. An August 7, 1978 attending physician's report completed by Dr. Stephen P. Lasser, an associate of Dr. Tiger and a Board-certified orthopedic surgeon, diagnosed "Recurrent: Low Back Derangement."

The Office of Workers' Compensation Programs accepted that appellant had sustained a "lumbar sacral strain" as a result of the February 20, 1978 employment injury.

On December 13, 1978, Dr. Tiger submitted the following report:

> "This letter will confirm that Donald Miller had surgery on his lower back in August 1978, with a second herniated lower lumbar disc removed which was impinging a nerve going down into his right lower extremities. I have been following the patient in my office and he was last seen on November 30, 1978.
>
> "The patient still has significant complaints of pain and discomfort in his right leg and has objective evidence of straight leg raising on the right being positive to 50° and a diminished right ankle jerk. He is undoubtedly disabled at this time and undoubtedly will be permanently disabled. Mr. Miller can only do light activities of a normal nature for no more than four hours a day."

On May 7, 1979 the Office referred appellant to Dr. Tiger for an updated examination. Dr. Tiger submitted the following May 17, 1979 report:

> "Would you please note that Donald Miller first came under my care for a back problem in 1976. He had pain and discomfort in his back as well as numbness of his right leg. As a result of this a workup was performed at St. Clare's Hospital and in June 1976 a large herniated 5–1 disc was removed.
>
> "Postoperatively, the patient did well but had significantly slow recurrence of his symptoms. His situation was excessively exac-

> erbated by a specific on-the-job accident of 2/27/78 which occurred while he was at work as an engineer at ARRADCOM. On this date while bending over some metal parts that were located just above ground level he felt pain in his back which went down into his right lower extremity. As a result of this pain he came back under my care and was eventually admitted to Dover General Hospital in September 1978. A myelogram was performed by Dr. Inoa, a neurosurgeon of Dover, N.J. A herniated disc with almost complete block of the 4–5 and 5–1 level was found and removed.
>
> "Postoperatively, Mr. Miller is recuperating. He still has significant pain and numbness going from his back to his right leg although this is significantly diminished over his preoperative symptomatology. He still is unable to work. He has limitation of the lower lumbar spine and in my opinion, the patient is permanently disabled from his usual and normal occupation as an engineer at ARRADCOM."

In a letter to Dr. Tiger dated October 3, 1979 the Office described the concept of loss of wage-earning capacity and requested Dr. Tiger to complete a work tolerance evaluation form. Dr. Tiger submitted an October 11, 1979 form which indicated that appellant was capable of full-time employment in a position requiring full lifting up to 10 pounds, partial lifting up to 20 pounds and partial sitting up to eight hours.

Appellant returned to work on November 21, 1979 and claimed a schedule award for "a partial loss of the use of [his] right leg, right arm, and lower back." An Office medical adviser reviewed the medical evidence of record and recommended referral of appellant for an orthopedic and neurologic evaluation.

On April 16, the Office referred appellant, his case record and a statement of accepted facts to Dr. Robert V. Holman, a Board-certified orthopedic surgeon, for examination and evaluation of appellant's upper and lower extremities "correlated with the American Medical Association Guidelines."

Dr. Holman examined appellant on May 12, 1981 and reported the following:

> "This man sustained injury to his lower back at work on February 27, 1978 which was diagnosed as a lumbosacral sprain and he was out of work from April 7, 1978 to April 13, 1978.
>
> "He apparently had pain in the lower part of the back radiating into the right lower extremity in August of 1978 and had surgical excision of disc in the right lower back on April 23, 1978 performed by Dr. Inoa and Dr. Tiger. Apparently both levels at the L–4–5 and L–5–S–1 interspaces were explored.
>
> "He returned to his work on November 21, 1979 and he was discharged from further care that time. He has continued to perform work in a lighter job with the Government.

"He had a previous back injury in 1976 and was hospitalized by Dr. Tiger at St. Clare's Hospital in Danville. He had surgery performed on the lower part of the back in June of 1976 with excision of L–5 S–1 disc on the right side. He returned to his work after a two month period and worked continuously up until the episode of February 27, 1978.

"He has presently pain in the lower part of the back on long standing and walking. He wears a corset when he does some work around the house. He has discomfort radiating into the right lower extremity. The right leg has a heavy feeling. There is numbness in the foot and toes. He has occasional sharp pain over the outer aspect of the right calf evident on walking.

"He has discomfort in the right arm and the arm feels heavy and not natural. There is some numb feeling in the right arm.

"He is presently 45 years of age, he is left handed. The right bicep and forearm measures one-half inch less than the left with no atrophy evident. He moves his fingers well. There is free motion of the shoulder. He complains of slight diminished sensation in the entire right arm but feels the pin without difficulty. The bicep and tricep jerks are depressed but equal.

"There is a healed longitudinal scar in the lower area with some tenderness in the lumbosacral region. Motion of the trunk on the pelvis is limited in flexion to two-thirds normal. There is tightness in the lower part of the back. Lateral bending and extension show a defect on the extreme. There is no tenderness or spasm in the lower part of the back. Straight leg raising is complete bilaterally. The knee and ankle jerks are barely perceptible but equal. Thigh and calf circumference is equal. There is no weakness in the foot. He has diminished sensation to pin prick over the lateral aspect of the right calf and foot and down over the dorsum of the foot including all five toes.

"X-rays of the lumbosacral spine were taken in the office at this time. There is evidence some residual pantopaque in the subarachnoid space down in the region of the sacrum. There is a wide laminectomy at the L–5 S–1 level and a right sided laminectomy at the L–4–5 level. Narrowing of the lumbosacral interspace with spurring posteriorily is evident. Also there is narrowing of the interspace at the L–4–5 posteriorily.

"This man has the residuals of surgery on the lower part of the back with disc excision with good result but there is residual disability in the right lower extremity. I do not detect any orthopedic abnormality in his right arm. His lower back condition is considered as being related to the episode of February 27, 1978. There may be a small residual from the 1976 injury with surgery. I do not see any need for any therapy.

"There is no evidence of disability in the right upper extremity. If the right lower extremity was to be given a schedule loss, I would feel it would approach 20% of the leg."

The Office also referred appellant to Dr. Daniel Carlin, a Board-certified neurologist of professorial rank, who submitted the following November 22, 1981 report based on an October 5, 1981 examination:

> "At this time, straight leg raising is performed to 90 degrees but with discomfort. There is some lumbosacral tenderness at the L5 to L4 area. There is no evidence of weakness. He is able to walk well on his heels or his toes. There is decreased sensation in the L5 and S1 dermatomes on the right side. The right ankle jerk is definitely decreased when compared to the left. He sits well and can raise his extremity to 90 degrees but he is not able to bend at the hip more than 45 degrees when standing.
>
> "The diagnosis at this time is residual signs of an L4–L5 and an L5–S1 radiculopathy. I would say that this is solely due to the injury which he sustained on February 27, 1978. I see no conditions not solely related to that injury. A description of the residual permanent injury is stated above. There is no evidence of a right upper extremity problem at the time that I examined him.
>
> "I estimate that the precentage of permanent functional loss is 30%. His maximum improvement was probably six weeks after the surgery."

An Office medical adviser reviewed these reports and noted the following:

> "Claimant had been referred for impartial orthopedic to Robert V. Holman, M. D. who examined May 12, 1981 and submitted a 2-page report next day. He reviewed the history of laminectomy in 1976 and of back pain when bending at work 1978 followed by 2nd laminectomy. He found that clmt. was left-handed and there were no findings referable to the R.U.E. [right upper extremity] where pain had been claimed. Lower back scars were recorded, straight leg raising complete bilaterally, sensory deficit lateral aspect right calf and dorsum of foot, ankle jerks equal but diminished both legs. He found no impairment of R.U.E. and suggested 20% for R.U.E. sensory impairment but did not show how that estimate was calculated. His findings were essentially the same as those of Dr. Carlin bearing in mind that one examiner was an orthopedic surgeon and the other a clinical neurologist.
>
> "Both of the impartial reports should be accepted as conclusive of mild impairment of the right lower extremity as a consequence of the aggravated back condition which precipitated the radiculopathy.
>
> "Recommend schedule award of 10% for R.L.E. [right lower ex-

tremity] over extremity as calculated above in accordance with A.M.A. Guidelines."

The medical adviser indicated that there was a five percent loss of use of the leg due to mild impairment of sensation related to the peroneal nerve and a five percent loss due to a decrease of ankle jerk involving the sural nerve.

On September 21, 1982 the Office issued appellant a schedule award for a 10 percent permanent partial loss of use of his right leg, to run for the period October 5, 1981 to April 24, 1982.

Appellant requested a hearing before an Office representative which was held on January 26, 1983. He also submitted a February 1, 1983 report by Dr. Tiger which concluded that appellant has "a permanent partial disability of 45% of total."

The Office hearing representative issued a decision on April 27, 1983, finalized on April 29, 1983, affirming the September 21, 1982 schedule award.

The Board finds that the case is not in posture for decision.

The Office medical adviser, relying on the findings reported by Drs. Holman and Carlin, recommended a 10 percent permanent impairment of appellant's right leg which was less than that estimated by Dr. Holman. The Office should request Drs. Carlin and Holman to provide an evaluation using the AMA *Guides to the Evaluation of Permanent Impairment*, setting forth the specific findings used to determine the impairment rating. The Office, after any further development deemed necessary, shall then issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated April 27, 1983 and September 21, 1982 are set aside and the case remanded for further development in accordance with this decision and order of the Board.

In the Matter of THOMAS W. BELL *and* DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Okla.

Docket No. 83-1045; Submitted on the Record;
Issued October 6, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to compensation after January 26, 1979 for the reason that he refused to accept suitable work.[1]

On March 2, 1976 appellant, then a 50-year-old sheet metal mechanic, filed a notice alleging he sustained an injury to his left hip and elbow on March 1, 1976 when he slipped on hydraulic fluid at work and fell on his left side. He did not stop work at that time.

Appellant was treated on September 9, 1976 by Dr. William N. Harsha, a Board-certified orthopedic surgeon, for progressive discomfort in the left knee. In a report dated October 15, 1976 Dr. Harsha stated he had performed a left knee arthrogram on September 10, 1976 and diagnosed degenerative disease of a meniscus with a tab-tear of the midsection of the meniscus. On November 29, 1976 the physician performed an arthrotomy and left knee meniscectomy and reported post-operative diagnoses of marked chondromalacia and debridement of the patella. Dr. Harsha released appellant to return to light duty employment on January 10, 1977 subject to a lifting restriction of 15 pounds and restrictions on climbing, squatting, and prolonged standing.

Appellant returned to work on January 10, 1977.

On March 21, 1977 Dr. Harsha released appellant with a "normal knee without any permanent disability." However, in a report dated February 6, 1978 he reported that appellant had developed significant chondromalacia of the distal pole of the left patella which was subsequently treated by injections of hydrocortisone.

In a subsequent report dated May 31, 1978 Dr. Harsha stated:

> "His physical examination is pretty much as I have previously reported with roughness on flexion, extension maneuvers along the medial jointline and underneath the patella. No ligamentous instability is noted. The valgus stressing produces discomfort also. He is to return back to work with instructions to limit full flexion, repeated knee bending type of activity. He should also avoid rough ground walking, ladder climbing, slick surfaces. I expect him to have some discomfort but he can safely return to work. He wants to return to work and there is no orthopedic reason why he should not."[2]

By letter dated June 6, 1978 the Office of Workers' Compensation Programs accepted appellant's torn left medical meniscus as causally related to the employment injury of March 1, 1976.[3]

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[1] The original file in this case was lost and the record was reconstructed with copies of documents furnished by the employing establishment.

[2] The case record does not contain appellant's work or leave records from the employing establishment to verify the dates when appellant worked or describe the duties he performed upon his return to work.

[3] On December 6, 1979 the Office notified appellant that it would only be responsible for medical treatment related to his left knee condition. However, on September 19, 1980 the Office accepted that he sustained an injury to his left arm and hip and authorized medical treatment for those conditions.

In October of 1978 the employing establishment offered to reclassify appellant as an automotive equipment dispatcher. The written position description set forth the duties of the position; however, it listed none of the physical demands required by the job. On October 6, 1978 appellant declined the proffered position and on October 31, 1978 he signed the following statement: "I understand that a declination of this offer will terminate any and all further placement efforts at this grade or lower graded position."

Appellant retired on a civil service disability on January 26, 1979 and claimed compensation on that date.[4] In support of his claim, a November 9, 1978 report of Dr. Harsha was submitted to the Office, stating:

> "[Appellant] has returned. He presents himself today with a multiplicity of complaints. He informs me that he is being retired the latter part of November of this year and that he wants 'to be sure' that it gets on his record each of the areas that were injured in his March 1976 accident. He recites at that time, again, that he slipped on some hydraulic fluid and fell injuring his low back and those areas between his thighs, which have remained painful. Since that time he has also had recurrent pain practically all the time, he says, in the lumbar and lumbosacral area. He also has pain at the base of the neck extending up into the back of the neck, into the head with daily occipital and top headache. He has pain radiating towards the back and top of the left shoulder with a numb, sore, achy sensation all the time and this is aggravated by increasing activity. He is right handed. He states that these are all in addition to the injury to his left knee for which surgery was carried out. The left knee continues to bother him. He cannot kneel on it with pain felt on the inner aspect of the knee. It buckles occasionally and his left elbow has remained constantly sore with what he feels to be a loose body in the left elbow at the point of the table, etc. He will get an electric shock, numb sensation going towards the thumb. The base of the left thumb is tender also at times.
>
> "He says he has been able to function pretty well at work. It is just that all these areas bother him quite often . . . He has had no other treatment other than the treatment through this office. He feels he does have a generalized arthritic condition that was made worse by his on-the-job accident in 1976. He did have an accident in 1975 and one later in 1975, which is when I first saw him. He was having trouble even before that with some stiffness and pain about the low back, neck and shoulder girdle areas but this was

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[4] On June 9, 1979 appellant received a schedule award for a 15 percent permanent loss of use of the left lower extremity. The award was for 43.2 weeks of compensation for the period of August 4, 1976 through June 2, 1977. Appellant has not appealed from the award and it is not an issue before the Board at this time.

mostly right shoulder pain at that time and now it is largely left shoulder pain."

* * *

> "Diagnosis: Progressive degenerative disease, arthritic type disease of the spine, more symptomatic in the neck and low back at this time and of the left knee and probably also involving the left elbow area. The symptoms he has are consistent with the physical findings. The effects of the accident, accepting his history, would be one of an aggravating insult to these several areas superimposed upon preexisting, perhaps asymptomatic or at least less symptomatic, disease. His treatment will remain the same. He is to stay with his exercise regime and on regular doses of Aspirin which seem to hold him fairly well. He is able to function pretty well at work and does seem to be fairly well motivated."

In subsequent progress reports dated November 7 and 27, 1979 Dr. Harsha indicated that appellant continued to complain of recurrent cricks in the neck and shoulder girdle area, headaches, and of pain to both knees. He also noted that appellant was working on his farm and submitted a work restriction form which stated that appellant was capable of walking, standing, crawling, kneeling and repeated bending for four-hour periods.

The Office obtained appellant's medical records from the employing establishment which indicated that he had been treated for chronic arthritis to the left side of his body as early as 1955. In a report dated September 20, 1956 Dr. Robert L. Hamilton noted "[a]rthritis, generalized but much worse on the left side of the body, arms, legs, ankle and knee with edema at times."

On February 5, 1981 Dr. Harsha examined appellant and submitted a medical report, stating:

> "I believe [appellant] could start back to part-time work. He is in that category of individual that has been away from work a substantial period of time and working back, for say four hours a day, for a period of several weeks slowly increasing his work time is realistic. Also the general nature of his problem is such that periodic absence from work due to flare-ups of symptoms is to be expected. He should avoid any one fixed position; prolonged sitting or prolonged standing. He can sit, stand, walk for one to two hours a day intermittently. As to lifting he can pick up a load with infrequent forward bending up to 10-15 pounds using his back; if he has to use his arms unsupported out in front of him I doubt if he could tolerate anything more than five pounds or less. He has good dexterity of his hands, but should not use his hands for pull, push, twist types

> of activity over his shoulder levels. Ideally he would have a job where the arms were supported at least part of the time on a table or bench. He has good dexterity of his feet. He has trouble with twisting his head back or forth and using his arms out in front of him at the shoulder girdle level, and driving a vehicle, for instance, would be contraindicated for this reason. He is a very insecure, depressed person but he is improving in this regard. Ideally he would work in an environment that is supportive of his self-image and in a nonpressured, nondeadline type of environment with minimal criticizing present."

Dr. Harsha also submitted a work tolerance limitation form indicating that appellant had partial capacity for walking, bending, lifting and standing for one hour, with no squatting, climbing, kneeling or twisting.

By compensation order dated May 5, 1982 the Office found that appellant was offered suitable employment on October 6, 1978 which he had declined and, therefore, he was not entitled to compensation under section 8106(c)(2) of the Federal Employees' Compensation Act.

Appellant, through his representative, requested a hearing before an Office hearing representative, which was held on December 15, 1982. Appellant submitted a May 26, 1982 report from Dr. Harsha. The physician reported that x-rays of appellant's cervical spine showed generalized degenerative disease with a "complete collapse now of C6-7 with anterior osteophytosis that nearly bridges in that area." Dr. Harsha opined that appellant's disabilities were causally related to the trauma of his employment injury.

In a decision dated March 10, 1983 and finalized March 11, 1983 the hearing representative affirmed the May 5, 1982 compensation order finding that Dr. Harsha's report of May 31, 1978 had outlined appellant's work restrictions and that he had declined an offer of suitable work which was based upon his physical capabilities.

The Board finds that the case is not in posture for decision and must be remanded to the Office for further development.

The Office found appellant was not entitled to compensation under 5 U.S.C. section 8106(c)(2) on the ground that he refused to accept suitable work when offered to him. However, to justify such action, the Office must show that the work offered was suitable. The Office failed to make that showing in this case.

The hearing representative based his decision on the employing establishment's October 1978 offer of employment and stated that appellant had been found capable of performing the position of automotive equipment dispatcher. This finding was based on Dr. Harsha's May 31, 1978 report which stated that appellant was able to return to work "with instructions to limit full flexion, repeated knee bending type of activity," and should avoid rough ground walking, ladder climbing and slick surfaces.

Furthermore, the employing establishment failed to describe the specific physical requirements of the job which was offered appellant. Although the employing establishment enumerated the duties to be performed by appellant in the position of automotive equipment dispatcher, the Board has held that the physical requirements of the duties also need to be described.[5] Nor does the evidence of record indicate that the requirements of the position offered appellant were reviewed to determine whether that the duties were within his physical capability.

In addition, the hearing representative improperly rejected appellant's claim for refusing to accept the automotive equipment dispatcher position offered by the employing establishment in 1978 because there was no evidence that the position remained available to appellant as of the effective date of the decision in 1982.[6]

On remand the Office should request that the employing establishment describe the physical requirements of the duties of the position offered appellant. The Office should also verify that the position is still available and offered to appellant. The Office should further develop the case record by requesting that the employing establishment furnish appellant's work and leave records and describe the duties he performed between the time he returned to work in January 1977 and his retirement in January 1979. The Office should then prepare a statement of accepted facts and refer appellant with the statement and case record to an impartial Board-certified orthopedist to enumerate in a rationalized report the residuals, if any, of the March 1, 1976 employment injury and address the work restrictions which result from those residuals. The specialist should also give a rationalized opinion concerning whether the position offered appellant is consistent with his work restrictions. After such further development the Office should make a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated May 5, 1982 and March 10, 1983 are reversed and the case is remanded for further action in accordance with this decision.

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[5] *Liller Mark*, 33 ECAB 1656.

[6] *Liller Mark*, *supra*; *Hattie H. Chambliss*, 34 ECAB 453.

In the Matter of ANNIE P. ERBY *and* U. S. POSTAL SERVICE, POST OFFICE, Oakland, Calif.

Docket No. 83–1470; Submitted on the Record;
Issued October 7, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no disability commencing April 20, 1981 causally related to an August 27, 1973 employment injury.

This is the second appeal in this case.[1] The prior decision sets forth the background and history of the case. In that appeal, the Board reversed the May 22, 1978 and January 6, 1979 decisions of the Office of Workers' Compensation Programs which had determined appellant's loss of wage-earning capacity as a general clerk. The Board found that while the evidence established that appellant was not totally disabled for the period beginning October 16, 1975 and that she was able to perform the duties of a general clerk, the Office had failed to determine properly whether the position of a general clerk was reasonably available within appellant's area of residence. The case was remanded for further development and a *de novo* decision.

On remand, an Office loss of wage-earning capacity specialist confirmed through the state employment service that general clerk positions were reasonably available within appellant's commuting area "on September 25, 1975 and is still available at the present time." By decision dated October 17, 1979 the Office informed appellant that the loss of wage-earning capacity rating originally established effective October 16, 1975 was reinstituted as of that date.

On November 14, 1979 appellant received authorization to obtain medical treatment from Dr. Harold J. Eisenberg, a Board-certified orthopedic surgeon. In a report dated December 15, 1979 the doctor indicated that he saw appellant December 4, 1979 complaining of neck and low back pain and obtained a history from her which denied having previous neck or back problems prior to the August 27, 1973 employment injury. He referred appellant for examination to Dr. Franklyn C. Hill, a Board-certified neurologist, who stated in a report dated June 4, 1980, as follows:

> "Her neurological examination today is entirely within normal limits except for in the upper extremity where the biceps and radial reflexes are reduced in bulk in the bicep and bracheo—radialis muscles. This is not an overwhelming finding however and I can detect no true muscle weakness. She has numbness or hypalgesia to pinprick over the left upper limb which extends from the C3 dermatome diffusely down the arm to involve the entire left pectoral region by sparing the posterior wall of the axilla."

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[1] *Annie P. Erby*, 30 ECAB 1380.

By letter dated January 22, 1981 the Office advised Dr. Eisenberg that it had accepted only appellant's lumbosacral sprain as a result of her employment injury and requested a report on how her neck and arm conditions were related to the employment injury. In a report dated January 30, 1981 Dr. Eisenberg stated:

> "The history as given to me by the patient was that at the time of the accident she had immediate low back pain with neck pain developing within the next 24 hours. She also indicated no previous neck problems. It is true that the extent of degenerative changes seen on x-ray in her cervical spine indicates that these degenerative changes were developing prior to injury. However, it is very common for degenerative changes to be present without symptoms until aggravation by an injury such as that described by the patient.
>
> "It is also true, in my experience, that patients with chronic low back problems easily develop symptoms in previously asymptomatic areas of the spine which are subject to preexisting degenerative disease. Therefore, it is my opinion that her cervical symptoms are related to the accident of 1973."

By letter dated March 10, 1981 appellant was notified by the employing establishment of a rehabilitation program designed to return injured workers to work. On April 7, 1981 she was offered the position of a full-time distribution clerk which she accepted on April 8, 1981. Appellant returned to work on April 20, 1981.

On June 22, 1981 appellant filed a claim alleging that the 1973 employment injury had caused disability from April 30 to June 5, 1981. On August 19, 1981 the Office referred appellant to Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon, for an opinion on whether her neck and arm conditions were related to the injury of August 27, 1973 and whether the residuals of the injury had resolved. In a report dated September 15, 1981 Dr. Simpson stated:

> "Review of the above extensive records indicates that this individual filed a claim relating lower back symptomatology following an incident in 1973. There is no mention of any cervical symptomatology in the extensive medical records until several years later when examining physicians noted the cervical symptomatology. This reviewing physician would not accept a causal relationship between the lifting of the mail sacks in August of 1973 and the subsequent cervical symptomatology first mentioned by physicians in 1977.
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> "The review of the medical records indicates a paucity of positive physical findings regarding the lower back symptomatology. Dr. Gregersen notes a slight decrease in lumbosacral motion with forward flexion of 70/90 and extension of 20/30. There is no mention of any reflex or sensory change in the lower extremities.

> "The medical records would support that this individual sustained a straining incident to the thoracolumbar spine in the incident of August of 1973. Medical rationale—orthopedic rationale—would support that the straining incident would have resolved in a matter of weeks to months at most. Certainly by December 1, 1973, as per Gary Gregersen, M.D.'s report, the claimant was at least capable of returning to light work. In addition to the diagnosis of lumbosacral strain, the medical records would support a radiographic diagnosis of degenerative disk disease of the lumbosacral spine—nonindustrial in etiology; support a radiographic diagnosis of degenerative disk disease—cervical spondylosis, and a possible diagnosis of lower motor neuron lesion—left upper extremity—nonwork-related. Diagnosis of a chronic old residual poliomyelitis affecting the left upper extremity has also been suggested but not established.
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> "Further treatment as a result of the August 1973 lifting incident does not appear to be indicated as per the review of the medical records. This individual may benefit from further treatment and diagnostic studies in reference to her neck and upper extremity problem, but, again, the neck and upper extremity symptomatology does not appear to be related to the accepted work-related incident of August 1973."

To resolve the conflict in the medial opinion evidence between Drs. Eisenberg and Simpson, the Office referred appellant, together with the case record and a statement of accepted facts to Dr. Vernon R. Dennis, a Board-certified orthopedic surgeon. In a report dated May 26, 1982 Dr. Dennis stated that appellant gave a history of having had a sudden onset of pain between the shoulder blades after tossing mail on April 15, 1982. The doctor commented:

> "The examinee's current complaints of neck, low back, and bilateral thigh symptoms are the result of degenerative joint disease. There are reflex and sensory changes, as well as pain and numbness, in the left upper extremity which are quite likely the result of left cervical nerve root irritation. No swelling was noted in either of her feet; I have no explanation for the complaint of pain and swelling of her feet; these symptoms have been present only quite recently and surely are not related to the injury of August 1973.
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> "She has subsiding interscapular symptoms, the result of a lifting injury at work about six weeks ago. I accept no residual from this injury, subjectively or objectively; the symptoms in this area do not impair her ability to carry out the work that she was doing at the time of the incident on April 15, 1982.
>
> "Although no x-rays taken at approximately the time of the injury in August 1973 were available for review, it is a medical probability that if she sustained a spraining injury to her low back, it quite

likely would have aggravated underlying degenerative arthritic changes in that area. The reason for allegedly increasing low back pain in the several months following the injury of August 1973 is not evident. I also have no explanation for her inability to perform any type of work from about December 1973 until April 1981. It is a reasonable medical probability that the effects of the described spraining injury would have subsided completely within six to twelve months and would not have resulted in gradually increasing low back and thigh symptoms as she alleges.

"The more reasonable medical explanation for the increasing symptoms in her low back and thighs would be the natural progression of the underlying condition. In other words the symptoms in her low back, 'hips', and thighs are currently the result of degenerative joint disease in the lumbar spine. The effect of the incident of August 1973 has long since completely subsided and her current symptoms are the result of the natural progression of preexisting degenerative arthritis. In other words, she has recovered from the effects of the injury of August 1973.

"With regard to her neck and upper extremity complaints, it is noted that there is no mention of symptoms or diagnoses referable to these areas until the time of Dr. Mitgang's examination in October 1974 and this was '. . . that her shoulders and arms and hands often seem weak.' Dr. Mitgang also noted that the deep tendon reflexes were normal and symmetrical in the arms and that strength was excellent including the hands and arms. His diagnosis referred to the low back only. At the time of the current examination the examinee reported, when asked by the undersigned, that her neck and upper back symptoms began 'some time in 1975.' In the report of Dr. Lee (April 1976) a description of the injury in August 1973 was given, and this was followed with the statement 'The patient states that her real difficulty really began in August of 1975 when she began to have various pains all over her body. . . . She complains of neck weakness and pain and swelling. She states that at times every joint in her body feels painful and swollen.' Contrary to the statements of the examinee given to physicians at later dates, it is certain that there were no significant neck or upper extremity symptoms prior to about October 1974, but the neck and upper back symptoms, as well as the upper extremity symptoms, came on, as a reasonable medical certainty, some time in 1975, at least 16 months and more likely 24 months after the injury of August 1973. It is clear that there is no causal relation between the injury of August 1973 and the symptoms in her neck or upper extremities.

"Responding to your specific question, none of the examinee's disability after April 20, 1981, is the result of the August 27, 1973 injury. She needs ongoing conservative medical care for cervical

> spondylosis, lumbar degenerative joint disease, as well as her lupus erythematosis and the reported hypertension, none of which would be related to the injury of August 1973."

On July 7, 1982 an Office consultant specializing in orthopedic surgery reviewed the case record and concurred in the report of Dr. Dennis.

By compensation order dated August 27, 1982 the Office determined that appellant had no disability after April 20, 1981 causally related to the August 27, 1973 employment injury.

On January 7, 1983 appellant requested reconsideration of the Office decision. In support thereof she submitted the December 3, 1982 report of Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, who diagnosed chronic degenerative arthritis of her lumbar spine and chronic cervical disc disease which "back condition appears to be related to the injury dated August 27, 1973, as she was having no problem prior to that time, and the accident which occurred flared up a preexisting but quiescent arthritic condition and she has had problems with her back since that time."

On February 13, 1983 the Office orthopedic consultant reviewed Dr. Swartz's report and stated as follows:

> "This claimant's original reports have been reviewed. In my initial I.M.E. Review of Dr. Dennis' report, I agreed with him that the claimant sustained a low back strain as a result of her 1973 work injury, but that the effects of the injury had resolved and that her current low back and cervical spine problems were due to natural progression of degenerative disease, and not work related.
>
> "In reviewing this claimant's initial medical reports, she did have pain in her low back prior to her work injury in early 1973, and also she had x-rays of her back which were said to be normal. Thus, the claimant did have symptoms suggesting preexisting low back problems prior to her work injury. Dr. Dennis felt that the claimant sustained a straining-type injury to her low back. As such, the effects of such a soft tissue injury should have been resolved within 12 months after the work injury. I do not believe that Dr. Swartz presents any new evidence to support a causal relationship between her current low back condition and her original work injury. He states that the claimant did not have any symptoms prior to her work injury in 1973, but the initial medical records clearly indicate that she had preexisting symptoms. I believe that Dr. Dennis' opinion is still valid, and that this claimant probably had resolution of the effects of her injury within about 12 months after the work injury, and that her current low back condition is due to nonindustrial natural progression of underlying spine disease. This is also based in part upon the original type of injury and evaluation in 1973.

"Dr. Swartz seems to base his conclusion that the claimant's cervical spine problems are in part related to her industrial injury, because in 1981 Dr. Eisenberg stated that the claimant did have some symptoms in her neck within 24 hours after the work injury. However, none of the original medical reports substantiate neck complaints. The claimant's own history indicates that her neck symptoms did not begin until some time in mid 1975. In addition, there is no clear history that the claimant actually sustained any trauma to her cervical spine or neck at the time of her original 1973 work injury. Therefore, I do not believe that Dr. Swartz' opinion is justified, but agree with Dr. Dennis that the claimant's cervical spine condition at the current time is unrelated to her 1973 work injury.

"In conclusion, Dr. Swartz seems to base his judgment on several facts which do not seem to be correct, the first being that the claimant had no preexisting low back symptoms prior to 1973, and the original medical reports indicate that she did, and also that she had some neck pain in 1973 after the work injury, although none of the original medical reports indicate any neck pain. Therefore, I believe Dr. Dennis' opinions and conclusions still stand."

By compensation order dated May 3, 1983 the Office denied appellant's application for review of the August 27, 1982 decision finding that the evidence submitted was not based on an accurate history of her claimed condition and was not sufficient to warrant further review.

The Board finds that the weight of the medical evidence fails to establish that appellant had any disability subsequent to April 20, 1981 causally related to her August 27, 1973 employment injury.

The weight of the medical evidence of record is represented by the thorough opinion of Dr. Dennis, a Board-certified orthopedic surgeon and the impartial specialist selected in this case. He examined appellant, reviewed the case record and medical reports, and concluded that her current disabilities were not related to the August 27, 1973 employment injury. In regard to her lumbar condition, Dr. Dennis stated that her back sprain should have resolved within 6 to 12 months following injury and that her current symptoms were the result of the natural progression of her underlying degenerative joint disease. With regard to appellant's neck and arm complaints, Dr. Dennis diagnosed cervical spondylosis unrelated to the 1973 low back sprain. The opinion of Dr. Dennis is also supported by that of Dr. Simpson who attributed appellant's current disability to her underlying degenerative disc disease and cervical spondylosis and not to the 1973 employment injury. In addition, the Office orthopedic consultant concurred in the opinion that appellant's disability is unrelated to her federal employment.

While the reports of Drs. Eisenberg and Swartz lend some support for appellant's claim, neither physician gave an adequate medical rationale for their conclusion that appellant's current disability was related to her 1973 employment injury, nor did either physician indicate the factors of appellant's federal employment which had caused her disability. In situations where there exist opposing medical reports and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if well-rationalized and based upon a proper factual background, must be given special weight.[2] Dr. Dennis' opinion that appellant's current disability is unrelated to her federal employment constitutes the weight of the medical evidence.

The August 27, 1982 and May 3, 1983 decisions of the Office of Workers' Compensation Programs are affirmed.

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[2] *Nyla J. Baillio*, Docket No. 83-1188, issued August 5, 1983; *Emiliano Torres*, 34 ECAB 1614.

In the Matter of JAMES G. VENABLE *and* DEPARTMENT OF THE ARMY, ARMY MISSILE COMMAND, Redstone Arsenal, Ala.

Docket No. 83-1538, Submitted on the Record;
Issued October 7, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's disability commencing May 30, 1980 is causally related to his exposure to carbon monoxide in his employment.

This is the second appeal in this case.[1] The prior decision sets forth the background and history of the case. In that appeal, the Board set aside the August 7, 1981 decision of the Office of Workers' Compensation Programs hearing representative which affirmed a January 2, 1981 Office compensation order which had found that appellant had not met his burden of proving that the disability for which he claimed compensation was causally related to his employment. The Board however found that the factual and medical evidence of record required further development and directed the Office to obtain a statement from appellant (with an opportunity for employing establishment comments) on his smoking history and on his activities on May 30, 1980, the date he claimed disability; to obtain the neurologist's consultation report referred to by appellant's attending physician in his January 7, 1981 report; and based on such augmented record, refer appellant, together with a statement of accepted facts and the case record, to a medical specialist for an opinion on which, if any, of appellant's conditions was caused, aggravated, accelerated, or precipitated by his exposure to carbon monoxide, and, if any of these conditions were considered causally related, for an opinion on the period of disability caused by such work-related condition. Thereafter, the Office was instructed to issue a *de novo* decision.

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[1] *James G. Venable*, Docket No. 81-1931, issued November 5, 1981.

On remand, the Office obtained a statement from appellant dated February 8, 1982 in which he stated:

> "The following statement is furnished per your request concerning my activities on May 30, 1980.
>
> "The day started as a normal weekday with inspection of vehicles from a pit. It was [a] cold, rainy day and the doors of the shop were closed. The vehicles were running while I was inspecting them from the pit. I inspected approximately 20-25 gas burning vehicles and approximately five-six diesel buses. The ventilation was poor in the building. After lunch, I became nauseated and hurting in the chest and head. At the end of the day, I went home very sick. The next day I went to the doctor.
>
> "My history of smoking is as follows: I have smoked an average of one pack a day for approximately 30 years. I have smoked different brands of cigarettes during this period."

On April 8, 1982 the Office notified the employing establishment of appellant's statement and gave it an opportunity for comment. By memorandum dated April 13, 1982 the employing establishment responded that its records indicated that appellant had worked eight hours on May 30, 1980, but that the number of vehicles inspected could not be verified. The memorandum accepted appellant's estimation of the number of vehicles as reasonable.

On July 8, 1982 the Office notified the employing establishment that there was a inconsistency between the number of vehicles reported by appellant and the 12 vehicles the employing establishment had previously reported as being inspected for the entire week of May 26 to 30, 1980, as noted in the prior decision. In a response dated July 26, 1982 the employing establishment stated the following:

> "a. Mr. Venable signed off on 12 inspections from 26 through 30 May 80.
>
> "b. 42 inspections were performed in Mr. Venable's work area from 26 through 30 May 80.
>
> "c. Six inspections were performed in Mr. Venable's work area on 30 May 80, they were not signed by him." [2]

The Office also secured a copy of the report of Dr. Lynn B. Boyer, a

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[2] The employment establishment also noted that no work was performed on May 26, 1980 as it was a holiday.

Board-certified neurologist's, examination of appellant dated September 26, 1980, as directed by the Board. In the report the physician stated:

> "Mr. Venable appears to have a mixed headache syndrome or vascular tension type of headache. The possibility of this being secondary to carbon monoxide exposure is certainly a valid assumption. Although I do not have the levels of carboxyhemoglobin that you have measured, I understand that it was 17 at one time. Usually headaches can occur in the 10 to 20 range but are much more common in the 20 to 30 range. I have told Mr. Venable that I find no evidence of any permanent neurological sequela but that certainly his headaches could be triggered by carbon monoxide exposure and he should work in an environment with adequate ventilation. His headaches have indeed improved since he has been off from work. He has been on quite a few different analgesics but at the present time feels that he can get along on a combination of Tylenol and Aspirin. I plan no further definitive neurological studies.
>
> "Present Illness: Mr. Grady Venable is a 54-year-old . . . man from Scottsboro, Alabama who has worked with the U.S. Army at Redstone Arsenal for the last 22 years as an automobile inspector. He states that for the last two or three years he has been having severe headaches in a band-type of distribution across the frontal and temporal regions going around into his neck area. On May 31, 1980 he states that he really got 'sick' in that he developed chest pains, pains in his arms, nausea and vomiting and extreme headache. Five days after this his carboxyhemoglobin apparently was measured by Dr. Hood and was 17 percent. This later was measured as ten and more recently as six. It is noted that the patient smokes about a pack of cigarettes daily."
>
> * * *
>
> "Diagnostic Impression: 1. Mixed headache syndrome; 2. Rule out carbon monoxide exposure.
>
> "Comments and Recommendations: As stated carboxyhemoglobin levels of less than ten percent usually produce no clinical effects. Chronic cigarette smokers usually develop three to eight percent concentrations. I have asked Mr. Venable to work in conditions of proper ventilation."

From the information submitted, the Office prepared a statement of accepted facts which it referred, together with appellant and the case record, to Dr. Robert A. Serio, a Board-certified internist specializing in pulmonary disease. In a report dated March 4, 1983 the physician stated:

> "I am enclosing a copy of my history and physical exam regarding Mr. Venable. Specifically, I see no evidence of any gall bladder

disease. The problem that was mentioned was that the gall bladder failed to visualize an oral cholecystogram which is not unusual at all; however, on a subsequent cholecystogram according to the records that were included, there was adequate visualization without any significant problem. Patient has no physical findings suggesting any cardiac impairment at present. There is some circumstantial evidence, carbon monoxide can be associated with ischemic heart disease, however, it is usually based on a more chronic exposure such as the carbon monoxide that is inhaled with cigarettes. Mr. Venable does have a fairly significant carboxyhemoglobin level even at present in spite of the fact that he is not working in a high risk area. I would tend to think that this is related to his tobacco consumption. I do feel that the carboxyhemoglobin level was elevated as a factor of his employment in the vehicle inspection area, however this should be a transient type phenomena and when the patient is removed from the environment there should be no long term sequela; but again I cite that there is some circumstantial evidence that chronic oral level carbon monoxide poisoning maybe caused some impairment but this again has not been documented."

Dr. Serio attached a copy of his notes from appellant's physical examination on February 4, 1983 in which he reported the following laboratory findings:

> "Resting arterial blood gases revealed a pH of 7.44, a PCO2 of 28 and a PO2 of 95. Oxygen saturation was 86.1 percent with a carboxyhemoglobin of 7.8 percent. Following exercise the blood gases were pH of 7.36, PCO2 of 29 and a PO2 of 100. Complete Blood Count revealed a white count of 13,800 with 43 percent polys, 29 percent lymphs, 5 percent monos, 23 percent eosinophils. Hemoglobin was 14.4 grams with a hematocrit of 42.8 percent. Mean corpuscular volume was elevated 105. The antinuclear antibody was negative. The rheumatoid latex was also negative."

On April 14, 1983 an Office medical adviser reviewed the record, reviewed the medical opinion of Dr. Serio, and concluded that appellant's heart and gall bladder conditions were not causally related to or aggravated by the factors of his federal employment.

By compensation order dated May 26, 1983 the Office rejected appellant's claim finding that he had no disability causally related to his employment.

It is a well-settled principle of workers' compensation law that where factors of employment cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where as in the present case, the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[3]

The Board finds that as of May 30, 1980 the date appellant stopped work, the medical evidence established that his working environment produced a temporary aggravation of his blood carboxyhemoglobin level. Dr. Charles Hood, an internist and appellant's attending physician, hospitalized appellant from June 3 to 6 and June 17 to 27, 1980 with abdominal discomfort, headaches and a carbon monoxide blood level of 12 percent. Dr. Hood indicated that while appellant had a preexisting elevated level of carbon monoxide in his blood due to his cigarette smoking, appellant's level was higher than that expected with cigarette smoking alone. He reported that appellant's blood level dropped after being off the job to a value of 10.5 percent on June 19, 1980, eight percent on June 24, 1980 and six percent by July 8, 1980. Dr. Hood concluded that appellant's exposure to carbon monoxide at work produced his symptoms. Dr. Boyer, the Board certified-neurologist who examined appellant, stated that carboxyhemoglobin levels of less than ten percent usually produce no clinical effects and concluded that appellant's headaches were triggered by his carbon monoxide employment exposure. He noted that appellant's headache syndrome was a temporary neurological sequela secondary to the carbon monoxide exposure. He anticipated no permanent residuals.

The Board finds that the weight of the medical evidence establishes that as of June 24, 1980, the date that Dr. Hood reported appellant's blood carbon monoxide level was eight percent, the temporary aggravation of appellant's condition had ceased, leaving no permanent residuals.

On February 4, 1983, appellant was examined by Dr. Serio, a Board-certified specialist in pulmonary diseases, who found appellant's resting carboxyhemoglobin level to be 7.8 percent which, he noted, was significant due to the fact that appellant no longer worked in a high risk exposure area. Dr. Serio concluded that appellant's high resting level of blood carbon monoxide was due to his tobacco consumption. He examined the case record and stated that although appellant's carboxyhemoglobin level was temporarily elevated during the period of his employment, "this should be a transient type phenomenon and when the patient is removed from the environment there should be no long term sequela." For this reason appellant is entitled to appropriate compensation from May 30, 1980 (the date his disability began) to June 24, 1980, (the date Dr. Hood reported appellant's blood concentration of carbon monoxide returned to its resting level). The medical reports do not show that appellant had any permanent residuals after his exposure to carbon monoxide at work had ceased and his blood concentration returned to the value reported as normal in light of his tobacco consumption.

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[3] *James L. Hearn*, 29 ECAB 278.

The decision of the Office of Workers' Compensation Programs dated May 26, 1983 is hereby affirmed insofar as it finds that there were no permanent residuals of appellant's condition after June 24, 1980 causally related to his employment. The decision is remanded to the Office for payment of appropriate compensation due to a temporary aggravation of appellant's condition from May 30, 1980 to June 24, 1980.

In the Matter of ALBERT E. HERMANN, JR. *and* U.S. POSTAL SERVICE, BUSTLETON STATION, Philadelphia, Pa.

Docket No. 83–1379; Submitted on the Record;
Issued October 13, 1983

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's fall at work on March 20, 1982 was sustained in the performance of duty within the meaning of the Federal Employees' Compensation Act.

On March 27, 1982 appellant, a 39-year-old letter carrier, filed a notice of traumatic injury which occurred on March 20, 1982. In the space for describing how the injury occurred, appellant stated "passed out injured knee." In the space for identifying the nature of the injury, appellant stated "unknown." In stating why he did not file the notice within two working days a note in a different handwriting stated "carrier was readmitted to I.C.U. [intensive care unit] at hospital."

In an April 17, 1982 form report, Dr. Angelo DiBello, a Board-certified family practitioner, stated in the space provided for a history of appellant's injury, "Had syncope episode while delivering mail 3/20/82 and fell hurting right knee." The doctor diagnosed hypoglycemia and synovitis of the right knee. He related appellant's disability to the history that was given. He indicated that he first treated appellant for his injury on March 20, 1982. He also indicated that appellant was hospitalized from March 21 to March 31, 1982 for syncope. In response to an inquiry by the employing establishment, Dr. DiBello, in a May 2, 1982 note, stated:

> "Mr. Albert Herrmann was primarily hospitalized for nonjob-related illness. However his right knee continues to bother him and I have referred him to Dr. Joseph Toland, III."

The employing establishment, in a May 4, 1982 letter, controverted appellant's claim on the ground that his disability was due to a nonjob-related illness rather than his knee injury. The employing establishment stated that appellant claimed a knee injury on March 20, 1982 but was hospitalized for a nonwork-related condition the same day.

The Office of Workers' Compensation Programs, in a May 12, 1982 letter, requested from appellant a detailed description of exactly what happened on March 20, 1982. The Office also asked, "What caused your loss of consciousness, and against what did you strike your knee? Has there been a prior history of this form of malady?"

Appellant, in response, stated that a May 24, 1982 report from Dr. DiBello covered the cause of his loss of consciousness. In answer to the second question, he stated "In falling knee struck concrete edge of steps and became lodged between rise of step and flat surface of step—having full weight of body on top." He indicated there had never been a prior history of "this form of malady."

Dr. DiBello, in his May 24, 1982 report, stated:

> "The above-named individual, Mr. Albert Herrmann, while serving mail 3-20-82 had syncopal episode and fell sustaining injury to right knee when it struck concrete step.
>
> "The etiology of the fall is indeterminate but a 6-hour glucose tolerance test revealed hypoglycemia at 4 hours. The E.E.G. [electroencephalogram] was also somewhat abnormal."

Dr. Joseph J. Toland, III, a Board-certified orthopedic surgeon, submitted a May 1, 1982 progress note in which he stated:

> "Patient was well until 3-19-82 when while serving mail as an employee of U.S. Postal Office, had a seizure. Never had one before. A bystander told him his right knee was flexed and was bent up under his body. He now has a clicking sensation in his knee, right, when he goes up the stairs. When he attempts to go down, it doesn't bother him. It has become swollen.
>
> "The situation of the knee has not changed, especially when he puts weight on it. The patient has not returned to work because of his knee and because the family doctor wants to observe him a little longer because of his cerebral situation.
>
> "He is taking Dilantin and has to get a Dilantin blood level today. He has severe headaches, something he never had prior to this time.
>
> "Examination shows no fluid in the knee at this time. The knees measure equally. Cruciates and collaterals appear to be normal. A little tenderness over the medial meniscus of the right knee, but the major tenderness is over the insertion of pes anserinus, medial side of the tibia just below the knee joint."

In a June 22, 1982 form report Dr. DiBello reiterated the history of injury he had given before. He diagnosed synovitis of the right knee, hypoglycemia and synocope of unknown etiology. He stated that appellant was able to resume light-duty work as of June 21, 1982 with restrictions of no lifting over 25 pounds and no excessive walking.

The Office, in a July 7, 1982 compensation order, denied appellant's claim on the ground that appellant's disability was caused by an idiopathic fall and therefore did not occur within appellant's performance of duty.

Appellant requested a hearing before an Office hearing representative. At the October 5, 1982 hearing appellant testified that on March 20, 1982 he was squatting to deliver mail through a mail slot in a door. When he rose, he felt a sharp pain extending from his right waist down the front of his leg. He stated that the severity of the pain threw him off balance, causing him to fall into a railing with his head against a storm door and his right knee wedged between the front and the back of the step. He tried to get up but could not move his leg and came down on top of it. Appellant stated that the severe pain was all he could recall until the rescue squad came. He indicated that the rescue squad performed several tests including an E.E.G. which were all negative. He was then taken to a hospital where further tests were conducted including a second E.E.G. with negative results. He was then released from the hospital. Appellant further testified that the next day, at the evening meal, he passed out. He was taken to the hospital and placed in the intensive care unit. Appellant stated that he had never experienced a similar loss of consciousness. He specifically denied that he had similar symptoms the day before when he fell while delivering mail.

Appellant's attorney submitted at the hearing a report by appellant's supervisor dated March 20, 1982 which had been prepared for the employing establishment concerning the March 20, 1982 incident. The supervisor stated that he had received a call that a letter carrier had collapsed. He immediately went to the scene and found appellant "laying with his head elevated by a patron's knee." The supervisor reported that the rescue squad administered an E.E.G. and indicated all vital signs were normal. The supervisor observed that appellant was incoherent. He was taken to the hospital where Dr. DiBello conducted more tests. These test were also negative. Appellant was then released from the hospital and instructed to see his own physician.

After the hearing, appellant submitted affidavits from two eyewitnesses. In describing the March 20, 1982 incident, one stated that she and her family returned home and found appellant lying on the front step with his head and shoulder against the door. At the time, he was being treated by the rescue squad. The other eyewitness stated:

> "On Saturday, March 20, 1982 at approximately 11:15 a.m., as I was walking to my car I heard someone yell and looking up I saw our mailman (Al) holding his leg and then spinning around resulting into his falling into a railing and a storm door and down the steps. When I got to Al I noticed he was in severe pain with his knee and leg twisted under his body between the steps. He tried to get up but couldn't get any weight on his right leg. I told him to lay there until the rescue squad came and had him rest his back against my legs while I was standing behind him. Al asked me to have someone call his supervisor at the Bustleton Station. When the rescue squad completed their tests they took Al to the Nazareth Hospital."

The hearing representative, in a February 2, 1983 decision, found that the preponderance of the evidence on file indicated that appellant's fall was idiopathic and therefore not covered by the Federal Employees' Compensation Act. He found that the only evidence in support of appellant's version of the incident was his own statement at the hearing and a witness' statement submitted after the hearing. He stated that appellant's statement conflicted with his statement on the notice of injury form and, since it was given six months after the incident, was entitled to less probative value than the first one. The hearing representative found that the witness could not verify if appellant's fall was caused by a seizure or by getting up from a squatting position. The hearing representative therefore affirmed the Office's July 7, 1982 decision.

The Board finds that the case is not in posture for decision.

In *Gertrude E. Evans*[1] and *Martha G. List*[2] the Board stated that an injury resulting from an idiopathic fall is not within the coverage of the Act. The Board defined an idiopathic fall as a fall ". . . where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment . . ."[3] The Board indicated that such an injury was not compensable because it did not arise out of a risk connected with the employment. The Board, however, went on to point out that the mere fact that the cause of a particular fall cannot be ascertained, or the reason why it occurred cannot be explained, does not establish that it was due to an idiopathic condition. The Board indicated that this followed the general rule that an injury occurring on the industrial premises during working hours is compensable unless the injury is established to be within an exception to the general rule. In *List*, the Board held that if the record does not establish that the particular fall was due to an idiopathic condition, it must be considered as merely an unexplained fall, one which is distinguishable from a fall in which it is definitely proved that a physical condition preexisted the fall and caused the fall.[4]

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[1] 26 ECAB 195.

[2] 26 ECAB 200.

[3] 26 ECAB at 198, 204.

In *Evans*, the Board pointed out that the legal analysis of the case does not end with the determination that appellant's injury was caused by an idiopathic fall. Although a fall is idiopathic, an injury resulting from it is compensable if some job circumstance or working condition intervenes in contributing to the incident or injury. The Board cited as examples situations in which an employee, instead of falling directly to the floor, strikes a part of his body against a wall, a piece of equipment, furniture, machinery or some similar object.[5]

In the present case, the Office does not identify the evidence or give rationale for its conclusion that appellant's fall was idiopathic. Dr. DiBello indicated that the etiology of appellant's fall was undetermined. He and appellant stated that appellant did not have a similar fall prior to March 20, 1982. The evidence is unclear as to whether the fall was caused by a physical, nonoccupational condition. The case must therefore be remanded for further development on the issue of whether appellant's fall on March 20, 1982 was an idiopathic fall or an unexplained fall.

Should the Office on remand conclude that the fall was idiopathic, the claim cannot be rejected solely on that basis. Appellant testified that in his fall he hit a railing, a storm door and a set of steps. The Office should consider appellant's contention and determine whether any of these objects may be considered factors of employment.

On remand, the Office should further develop the case record to determine whether appellant hit any objects in his fall before striking the immediate supporting surface which may have caused or contributed to his injury. The Office should prepare a statement of accepted facts, including definitions of an idiopathic fall and an unexplained fall and a determination of whether appellant, in his fall, hit any intervening objects. The Office should then submit the statement to Dr. DiBello and Dr. Toland for an opinion on the cause of appellant's fall and injury. If they should determine that appellant's fall was idiopathic, these physicians should be asked whether his injury was caused or worsened by striking an object found by the Office to be a factor of the employment. After such further development as it deems necessary, the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs, dated July 7, 1982 and February 2, 1983, are hereby set aside and the case remanded for further action as set forth in this decision.

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[4] Contrast *Paul W. Johnson*, 9 ECAB 856 with *Rebecca C. Daily*, 9 ECAB 255, and *Wilford M. Smith*, 9 ECAB 254.

[5] 26 ECAB at 199.

In the Matter of ROBERT F. WALKER *and* TENNESSEE VALLEY AUTHORITY, BELLEFONTE NUCLEAR PLANT, Hollywood, Ala.

Docket No. 83-1301; Submitted on the Record;
Issued October 13, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether appellant has established that he sustained an injury in the performance of duty on July 16, 1982, as alleged.

On July 22, 1982 appellant, then a 41-year-old truck driver, filed a notice of injury alleging that on July 16, 1982 "we were parking a truck and he was lining up behind me (driver in another truck), and his brakes failed and he hit me and I went to having pains in my neck, back and right side."

Witness statements and an employing establishment accident report indicate that on July 16, 1982 the truck that appellant was driving was struck from behind by another truck.

A July 19, 1982 note by Dr. Rodolpho Villar states that appellant complained of pain in his lower back and recounted the July 16, 1982 incident. X-rays taken of appellant's thoracic and lumbar spine on July 22, 1982 were reported by Dr. Peter Harcy, a Board-certified radiologist, as revealing "minimal degenerative changes in the lower thoracic spine and minimal degenerative lipping of the lower lumbar vertebral bodies." A July 24, 1982 attending physician's form report completed by Dr. Villar noted the July 16, 1982 incident, diagnosed "acute lumbosacral strain and mild degenerative arthritis of thoraco-lumbar spine" and marked "yes" to the question on causal relationship.

On July 29, 1982 Dr. Richard A. Bagby, Jr., a Board-certified orthopedic surgeon, submitted the following report:

> "On 7-16-82 had truck accident c/o of low back pain, right hand, finger gets numb & tingle.
>
> "S. 42 y/o truck driver working for TVA parking his 15 ton vehicle was hit from behind by a 35 ton vehicle with his vehicle being forced forward approx. 20 feet and the vehicle being struck twice and his being bumped against the dashboard. Subsequently developed thoracic pain and has been followed by Dr. Villar. He complains of numbness in the ulnar aspect of the right hand and a cramping sensation and drawing sensation in this area especially with certain back and neck motions.

> "P.M.H. Otherwise negative except for accidents in 1979 and also previously with cracked ribs. Denies other history of back pain or problems.
>
> "O. Weight 245 subjectively. Height 5'11" by estimation. Fair dorsolumbar spine motions. Moderate to minimal thoracic kyphosis. Subjective tenderness in the T-10 to T-6 region. Mildly limited cervical motion in all modes and he denies pain in this particular area. Full CSM of right upper extremity with full motor and sensory functioning and no clawing. Palpation of the elbow and brachial plexus is negative.
>
> "A. Possible T-spine injury with ulnar paresthesias.
>
> "P. Bone scan to rule out occult bony injury."

Appellant stopped work at the end of his shift on July 16, 1982 and returned to work on September 17, 1982. By compensation order dated January 20, 1983 the Office of Workers' Compensation Programs rejected appellant's claim for compensation on the ground that he had "not submitted any medical evidence setting forth an accurate history of the July 16, 1982 incident" and he had "not discharged the burden of proof in establishing fact of injury in the performance of duty."

The Board finds that on July 16, 1982 the truck appellant was parking was bumped from behind by another truck in the process of parking. At the time his truck was bumped appellant was standing on the running board in the process of leaving the cab. The evidence does not support that he fell or struck any objects as a result of the bumping incident or that his vehicle was pushed forward any measurable distance. However, the Board further finds that the case is not in posture for decision on the issue of whether appellant's claimed disability was causally related to that incident.

The statements by appellant, witnesses and the employing establishment establish that on July 16, 1982 the truck appellant was parking was bumped from behind by another truck. While there is medical evidence in support of appellant's claim that he was disabled as a result of this incident, the evidence is insufficient to meet his burden of proof particularly since the facts upon which it was based are not clear. However, the evidence, including the bumping incident and appellant's statement to Dr. Villar, is sufficient to require further development by the Office.

The case will be remanded to the Office for referral of appellant, along with the Board's findings on the July 16, 1982 incident and appellant's case record, to a Board-certified specialist for examination and opinion on whether appellant was disabled as a result of the July 16, 1982 incident and if so the period of disability. Upon further development of the case record as deemed necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated

January 20, 1983 is set aside and the case remanded for further development in accordance with this decision of the Board.

In the Matter of PATRICK L. DALLAIRE *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, Bay Pines, Fla.

Docket No. 83-1252; Submitted on the Record;
Issued October 14, 1983

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's viral encephalitis was causally related to factors of his employment.

On January 7, 1981 appellant, then a 34-year-old respiratory therapist, filed a claim for viral encephalitis which he attributed to repeated, close exposure to several patients with encephalitis. On December 12, 1980 appellant stopped work and was hospitalized under the care of Dr. David R. Leonard, a Board-certified internist, whose final diagnosis upon his discharge on December 22, 1980 was viral encephalitis.

In a January 15, 1981 report Dr. Leonard diagnosed "viral illness with encephalitis" and stated that appellant told him that he had been working around patients who had viral encephalitis. Dr. Leonard concluded that appellant's illness was "caused by his employment and exposure to infectious disease where he works," and recommended that he not participate further in patient care. Appellant returned to work on January 7, 1981 performing duties not requiring patient care.

Appellant's supervisor submitted a statement which described the duties of an inhalation therapy specialist, stated that this position "entails continuous (eight hours per day) contact with patients with a variety of acute/chronic diseases," and indicated that, to the best of the supervisor's knowledge, there were no documented cases of viral encephalitis at the hospital during November and December 1980. Dr. David N. Reifsnyder of the employing establishment, who is Board-certified in infectious diseases, stated in a February 11, 1981 letter that, of the charts he reviewed, one patient had a suspected, but not proven, clinical impression of encephalitis.

In response to a June 3, 1982 Office of Workers' Compensation Programs letter advising him that it was his responsibility to establish that patients he contacted had viral encephalitis, appellant submitted records of a patient identified as patient Gilbert, which included a death certificate showing the cause of this patient's death on September 22, 1980 as "Encephalitis due to listeria monocytogenes." The employing establishment verified that appellant came in contact with this patient on August 30, 1980 and September 8, 1980.

On October 15, 1982 the Office referred appellant, along with the case record and a statement of accepted facts, to Dr. Allen O. Smith, a Board-certified neurologist, for an opinion whether appellant's viral encephalitis was causally related to his exposure to the patient diagnosed as having encephalitis or to other factors of his employment.

In a report dated November 1, 1982 Dr. Smith stated:

> "I would very much doubt that the individual's apparent aseptic probable viral meningoencephalitis in December of 1980, which resulted in hospitalization at Morton Plant Hospital, was in any way related to his employment at the Bay Pines Hospital.
>
> "Moreover I would be particularly doubtful that it was in any way related to the illness of veteran Gilbert who subsequently died of a meningoencephalitis. This individual clearly was shown to have listeria monocytogenes, which is a bacterium and not a virus in blood and spinal fluid. Should Mr. Dallaire have had this bacterium in his spinal fluid, producing his meningoencephalitis, it is first of all probable that he would also have died; second, it is essentially certain that he would have had prominent changes in his spinal fluid and in all reasonable probability the organism would have been cultured from spinal fluid secretions or blood.
>
> "I would feel strongly, therefore, that the two illnesses are in no way related to or caused by each other, with one clearly being caused by a bacterium, listeria monocytogenes, and the second that in Mr. Dallaire being in all probability the result of a viral illness, which is relatively common in the population as a whole."

By a compensation order dated February 25, 1983 the Office rejected appellant's claim on the ground that he had not established the fact of injury in the performance of duty.

An award of compensation may not be based on surmise, conjecture, speculation, or on appellant's belief that his condition was caused by his employment. The mere fact that a condition manifests itself or is worsened during a period of employment does not raise an inference of causal relation between the two. Appellant has the burden of establishing by reliable, probative, and substantial evidence that his disability was causally related to specific employment incidents or to specified conditions of employment. To meet this burden he must submit rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.[1]

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[1] *Lawrence A. Meece*, 28 ECAB 87.

The Board finds the evidence does not establish that appellant's viral encephalitis was causally related to factors of his employment.

Dr. Smith, the Board-certified neurologist to whom the Office referred appellant and the case record, explained in detail why he considered appellant's viral encephalitis unrelated to the encephalitis of the patient from whom appellant alleged he contracted the disease. Although Dr. Leonard, a Board-certified internist, stated that appellant's illness was caused by his exposure to infectious disease at work, Dr. Leonard's opinion was based on a history, given to him by appellant, of exposure to patients with viral encephalitis. As Dr. Smith explained, the patient identified as having encephalitis with whom appellant had contact, had encephalitis caused by a bacterium, while appellant's encephalitis was the result of a viral illness.

The decision of the Office of Workers' Compensation Programs dated February 25, 1983 is hereby affirmed.

In the Matter of FAY LEITER, administratrix of the estate of SIMON ZUCKERMAN *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 83-1093; Submitted on the Record;
Issued October 14, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether the employee's October 17, 1969 fall was sustained in the performance of duty.

On October 17, 1969 a claim was filed on behalf of the employee, then a 47-year-old laborer, for a fall resulting in a head injury sustained while he was walking to his car at the end of the workday. He was taken to a hospital where he was examined by Dr. M. A. Schmutz, a general practitioner and general surgeon, who reported that the employee was found unconscious on the employing establishment premises, that x-rays revealed a linear fracture of the skull, and that the employee had a grand mal seizure while in the emergency room. On the same day, October 17, 1969, the employee was seen by Dr. Jay M. Levy, a Board-certified neurosurgeon, who stated that he could not tell "whether the patient is a victim of foul play with trauma, or whether he had a grand mal seizure, fell, struck his occiput and then had a subsequent grand mal here in the emergency room."

The employee was hospitalized from October 17, 1969 to November 15, 1969. He returned to his regular work on January 5, 1970. On January

5, 1970 the employee filed a claim form stating that on October 17, 1969 he was walking to his car at the end of his workday, and that he did not remember anything that happened before he awoke in the hospital.

On January 20, 1970 the Office of Workers' Compensation Programs advised the employee that the evidence did not establish that his October 17, 1969 fall was brought about by conditions of his employment. The Office requested additional evidence.

A report of an investigation made by the Office from March 17 to 20, 1969 was submitted. Attached to this report were statements from witnesses to the employee's October 17, 1969 fall. In an October 18, 1969 statement a pipefitter foreman stated that he first observed the employee getting onto his feet from the sidewalk, that the employee said he slipped and fell but was all right, and that he (the pipefitter foreman) left the employee and walked across the street but upon looking back saw the employee fall backwards and strike his head on the sidewalk. In a more detailed statement dated March 18, 1970 this witness stated that he first observed the employee "on his knees, getting up, as if he had fallen"; that there were no bruises or wounds apparent at that time; that the employee refused help and laid his head on his arms on a window sill; that he (the witness) began walking away, looked back after about ten feet and saw the employee "stiffen," fall straight backwards and strike his head on the sidewalk; that there was foam coming from his lips; and that he did not notice any appreciable tremors of the employee's hands or feet.

In a March 18, 1970 statement a pipefitter stated that he saw the employee rising on unsteady knees, that the employee leaned against the building, that the employee fell backwards and struck his head on the sidewalk as the pipefitter and pipefitter foreman were walking away, and that he noticed tremors of the employee's hands and feet, very labored and irregular chest movements on breathing, glazed and set eyes, and frothing from the lips.

In a March 18, 1970 statement the employee's supervisor stated that on the day prior to his October 17, 1969 fall the employee was very nervous and smoked cigarettes continually while working, and that, minutes before the October 17, 1969 fall, the employee told him that on the previous day, while walking to his car, he had had a dizzy spell and so much trouble with his legs that he could hardly make it to his car.

In an April 21, 1970 report Dr. Levy stated that appellant had experienced seizures secondary to his October 17, 1969 trauma and subsequent subarachnoid blood and skull fracture. In an April 22, 1970 report Dr. Schmutz stated "There was never any indication from physical or neurological examinations that [the employee] was epileptic past or present. The seizures that he experienced were secondary to and the direct result of his injury."

By a compensation order dated February 9, 1971 the Office rejected the employee's claim on the ground that the evidence did not establish that his injury was proximately caused by factors of his employment.

The employee requested a hearing before an Office hearing representative, which was held on June 15, 1971. The employee testified that he had no recollection of the October 17, 1969 fall or of what caused it, that he had no recollection of dizziness on October 16, 1969, that he had had no fainting spell before October 17, 1969, and that he had had eight seizures since October 17, 1969.

On December 1, 1971 the Office deputy medical director, a Board-certified surgeon, reviewed the record and stated that, in his opinion, the employee's fall was caused by a hypertensive crisis which resulted in hypertensive encephalopathy causing him to become dizzy and fall.

By a decision dated December 13, 1971 and made final on January 13, 1972 an Office hearing representative found that the medical evidence established that the employee's October 17, 1969 falls were due to a hypertensive crisis and were idiopathic, and that his injury and disability were not compensable because the falls were not proximately caused by his employment.

The employee requested reconsideration and submitted a June 7, 1972 report from Dr. Gary G. Kardos, a Board-certified internist, in which the doctor concluded:

> "[The employee] sustained significant head trauma on October 17, 1969, while leaving work from Mare Island. This culminated in his hospitalization with the ultimate findings of skull fracture, subarachnoid hemorrhage and post-traumatic seizures. Since that time he has had apparent seizures less than ideally controlled on anti convulsant medication. There is nothing available to me in this patient's medical history to suggest that he had seizures prior to his head injury. There is nothing in the medical history to suggest that this patient has had significant hypertension in the past or the present. Blood pressure documented at the time of his hospitalization from his head injury revealed a normal blood pressure prior to seizure activity and only moderate systolic elevation during extreme agitation. Thereafter the blood pressure was normal and the blood pressure was normal in the office today. The events relating to this individual's fall when leaving work are unclear and are not medically documented. There is absolutely nothing in this patient's medical file, history or current physical examination which would lead me to believe that hypertension could have caused his fall. There is no documentary evidence, in addition, to show that this patient had a cardiac arrhythmia or myocardial injury which could have caused dizziness and hence led to his fall. Thus, there is no documentary evidence available to me to give an adequate medical explanation for this patient's fall. I believe it to be medically unreasonable to

> conclude that this patient's dizziness was due to cardiovascular disease or hypertension since there is no evidence for sustained diastolic hypertension in this patient."

The Office deputy medical director again reviewed the record and stated that Dr. Kardos ignored the fact that the employee's last blood pressure reading before the October 17, 1969 fall was 164/110 on January 14, 1969. The Office deputy medical director recommended that the Office obtain further information on the employee's blood pressure since July 3, 1968 and on the medications he was taking.

On October 10, 1972 the Office requested that the employee submit such information. The Office obtained reports from a Veterans Administration hospital regarding the employee's hospitalization there from July 16, 1970 to August 11, 1970 and from November 16, 1970 to December 1, 1970. The earlier report's diagnoses included "chronic alcoholism"; the later one noted "a history of convulsive episodes due to alcoholic withdrawal" and the employee's statement "that he had stopped alcoholic intake about four months prior to admission because of his convulsive history."

The employee submitted a June 17, 1970 report from Dr. Schmutz stating that his injury "was not caused by or aggravated by his work," and a June 11, 1970 report from Dr. Levy stating:

> "It is my feeling that the seizures were a result of a head injury that caused a skull fracture, brain swelling and bleeding about the brain. I cannot further comment on the etiology of the trauma to the skull.
>
> "Since the patient had never had seizures prior to his admission to the hospital I see no reason to suspect that he had a grand mal seizure and then fell, suffering his head injury."

On May 2, 1973 the Office medical director reviewed the case record and stated that it did not confirm the etiology of the employee's fall but that the Veterans Administration reports brought in the possibility of a withdrawal reaction from alcohol. The Office medical adviser concluded that, whatever the etiology of the employee's fall was, it was not due to conditions of his employment.

In a July 17, 1973 report Dr. Schmutz stated that, to his knowledge, the employee was not on any medication from July 25, 1967 to October 17, 1969. The Office medical director reviewed the medical evidence and stated that he was still of the opinion that the employee's fall was idiopathic.

By a decision dated October 31, 1973 the Office found "that the injury [the employee] sustained on October 17, 1969 was due to an idiopathic fall that was not proximately caused by the conditions of his federal employment."

The employee appealed to the Board. On April 22, 1974 the Director of the Office filed a motion to remand the case, stating that he was persuaded that further evidentiary development was needed and that the Office's October 31, 1973 decision was premature. The employee's attorney was served with a copy of the motion to remand, but did not reply within the time allotted. On May 16, 1974 the Board issued an order setting aside the Office's October 13, 1973 decision and remanding the case to the Office "for additional development as necessary to be followed by a *de novo* decision." [1]

The Office requested additional evidence from the employee's attorney, but none was submitted. By a compensation order dated May 3, 1976 the Office found that the evidence did not establish that the employee's injury was proximately caused by factors of his employment.

The employee died on July 8, 1976. His death certificate showed the immediate cause of death as "coronary atherosclerosis, generalized, severe," and listed epilepsy as a significant condition contributing to death but not related to the immediate cause. The Office deputy medical director reviewed the record on November 15, 1977 and stated that he still considered hypertension the most likely cause of the employee's fall, that the death certificate's finding of coronary atherosclerosis raised a question of atherosclerosis of cerebral vessels as a factor in the October 17, 1969 incident, and that the autopsy report was needed. A copy of the autopsy report was obtained on July 24, 1981; included in the findings was epilepsy, by history, with bilateral frontal lobe adhesions.

The Office referred the case record to Dr. Roger Simon, who is Board-certified in neurology and internal medicine, with a request for a reasoned opinion on the most medically probable explanation of the employee's October 17, 1969 fall. In an April 29, 1982 report Dr. Simon reviewed the witnesses' statements and commented:

> "Thus, the descriptions of the fall by two eyewitnesses are quite specific in two points. First, the claimant had some prodromal problems prior to the fall which resulted in impaired ambulation and perhaps even increased nervousness and cigarette-smoking during the day, and, second, that the claimant 'stiffened,' causing him to fall in a rather rigid manner, resulting in a focal impact being directed at his head as he struck the ground. This clear description of stiffening prior to the fall is of significant diagnostic importance. It is clear that the stiffening is essentially restricted to two pathophysiologic processes: impaired perfusion of the brain, most likely from a cardiac arrhythmia in a time frame such as this, or the tonic phase of a seizure. Regarding the former possibility, the medical record contains a normal EKG [electrocardiogram] from the Vallejo

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[1] Docket No. 74-71.

Hospital where the claimant was taken, and although such an EKG does not eliminate the possibility of any cardiac event having happened some minutes or hours prior to the tracing, a normal EKG does not support such a diagnosis. The second possibility, i.e., that the stiffening was the tonic phase of a generalized tonic-clonic seizure is by far the most likely possibility. The fact that the claimant was described as having foam coming from his lips by Foreman Day, and a description by Maurice Gilbert that the claimant was 'frothing from the lips' and there were 'tremors of the hands and the feet,' and, lastly, that he was 'breathing with a very labored and irregular and spasmodic chest movement,' are highly typical descriptions of a generalized convulsion.

"When the patient arrived at Vallejo General Hospital, a typical major motor tonic-clonic seizure is described. Thus, there seems very little doubt that the fall in question (10/17/69) was actually a generalized seizure."

* * *

"Following the events of 10/17/69, the claimant continued to have intermittent seizures which were assumed to be posttraumatic. However, it seems clear that a seizure both preceded and caused the fall of 17 October 1969.

"Thus, the claimant would have had three seizures in a single day. Such a flurry of seizures is rather commonly seen not with epilepsy but with withdrawal reactions from chronic alcoholism. Such a possibility is mentioned in the Division of Hearings and Review's report dated 24 October 1973 ('The VA records showed a possibility of claimant having withdrawal reaction from alcohol'); in the report of Dr. Myers, Medical Director, 2 May 1973 ('He claimed he had stopped alcohol intake about four months prior to admission because of his convulsive history') and in the VA Hospital summary by Dr. Dial dated 12/1/1970 ('He had had a history of convulsive episodes due to alcohol withdrawal').

"Thus, in retrospect, the situation seems reasonably clear. The claimant has a seizure disorder, initially, perhaps, from alcohol withdrawal and later alcohol withdrawal and/or posttraumatic seizures, a seizure occurring while the claimant was standing causing him to stiffen in a tonic posture and strike his head. The remainder of the seizure with limb movement, labored respiration, and copious saliva about the mouth, occurred when the claimant had struck the ground. The diagnosis of posttraumatic epilepsy was inadvertently made by the claimant's treating physicians because the details of the statements of witnessess were not available to them. The only other reasonable scenario is that the stiffening and subsequent fall was related to a cardiac arrhythmia. We know that the claimant died of

> coronary artery disease just seven years later. For the reasons reviewed above, however, this scenario is less likely than that of multiple seizures.
>
> "One final point. There is a good deal of discussion in the record regarding the role of hypertension or hypertensive crisis or hypertensive encephalopathy causing the claimant's fall. Such a scenario is not applicable to this case, as has been argued by several others in the record."

By compension order dated January 27, 1983 the Office found that the additional evidence was not sufficient to warrant modification of its May 3, 1976 decision.

The Board finds that the evidence establishes that the employee's October 17, 1969 fall was due to an idiopathic condition.

It is a well-settled principle of workers' compensation law, and the Board has so held, that an injury resulting from an idiopathic fall—where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment—is not within the coverage of the Federal Employees' Compensation Act. Such an injury does not arise out of risk connected with the employment and it, therefore, is not compensable.[2]

However, as the Board has made equally clear, the fact that the cause of a particular fall cannot be ascertained, or that the reason it occurred cannot be explained, does not establish that it was due to an idiopathic condition. This follows from the general rule that an injury occurring on the industrial premises during working hours is compensable unless the injury is established to be within an exception to such general rule.[3]

The question of the cause of a fall like the one in the present case is a medical one. The report of Dr. Simon, who is Board-certified in neurology and internal medicine, establishes that the employee's fall was due to a seizure. Dr. Simon, in a well-rationalized report, explained in detail how he reached his conclusion, which was based largely on witnesses' accounts of the October 17, 1969 injury. Dr. Simon's conclusion was also based on, and is consistent with, the other medical evidence in the record.

Dr. Kardos, a Board-certified internist, stated that there was no documentary evidence to give an adequate explanation for the fall. Dr. Levy, a Board-certified neurosurgeon, stated that he saw no reason to suspect that the employee had a seizure and fell. These reports have less weight than that of Dr. Simon because Drs. Kardos and Levy do not show an awareness of the witnesses' accounts of the October 17,

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[2] *Gertrude E. Evans*, 26 ECAB 195.

[3] *Guadalupe Julia Sandoval*, 30 ECAB 1491 and cases cited therein.

1969 incident. Dr. Simon considered the witnesses' account of the employee stiffening before he fell to be "of significant diagnostic importance."

The decision of the Office of Workers' Compensation Programs dated January 27, 1982 is hereby affirmed.

NOTE: The Board denied reconsideration of this case on January 5, 1984.

In the Matter of SANDRA FOSTER *and* U. S. POSTAL SERVICE, POST OFFICE, Homestead, Fla.

Docket No. 83–1094; Submitted on the Record;
Issued October 17, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had 25 percent loss of wage-earning capacity.

On August 2, 1973 appellant, then a 37-year-old letter carrier, was knocked down by a German shepherd, landing on her back. Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, diagnosed coccydynia and stated that appellant would be disabled indefinitely. The Office of Workers' Compensation Programs accepted appellant's claim and began payment of temporary total disability compensation.

In a February 11, 1974 report Dr. Frank A. Stuart, an orthopedic surgeon, diagnosed acute lumbar strain, coccydynia and bilateral nerve root irritation. Dr. Stuart thereafter submitted periodic notes on his examination of appellant. In a July 17, 1974 note, Dr. Stuart stated that a myelogram did not reveal a defect but appellant continued to have considerable pain in her low back and leg. An August 14, 1976 report on a computerized tomographic examination indicated that the lumbar spine was normal.

In a July 19, 1976 form report Dr. Stuart indicated that appellant had a partial capacity to lift up to ten pounds. In a September 1, 1976 report, he repeated the lifting restriction and indicated that appellant had a limited capacity for walking, standing, sitting, stooping, kneeling, climbing, and repeated bending. In an April 6, 1979 form report, Dr. Stuart reiterated his prior description of appellant's work limitations and added that she was unable to work.

An Office medical adviser, in a November 15, 1979 letter, advised Dr.

Stuart that Office disability charts indicated that a lumbosacral strain should have resolved in six to eight weeks and coccydynia within two to five months. He requested Dr. Stuart to indicate whether appellant's current disability was a result of her employment injury and, if so, the current objective findings supporting his opinion with an explanation of how they were related to the employment injury. Dr. Stuart, in a January 7, 1980 office note, indicated:

> "[Appellant] . . . still has muscle spasm in the low back and pain radiating to the lower extremity, positive straight leg raising at 45° and a decrease of the ankle reflex and has all the signs and symptoms of protruding lumbar disc and her disability, problems and limitations are exactly the same resulting from her industrial accident of August 2, 1973."

The medical adviser, in an April 2, 1980 memorandum, indicated that Dr. Stuart did not give work limitations on certain activities. He therefore recommended that Dr. Stuart be requested to furnish the necessary information and that if the doctor did not respond within a reasonable time appellant be referred to another physician for an examination. The medical adviser commented that appellant had minimal findings and that it was reasonable to conclude that the work restrictions were unrealistic.

The Office, in an April 8, 1980 note, requested the information. Dr. Stuart did not respond directly to the note but submitted further office notes. The Office therefore referred appellant, together with the case record and a statement of accepted facts, to Dr. Paul A. Hinenburg, a Board-certified orthopedic surgeon.

Dr. Hinenburg, in a November 20, 1980 report, stated:

> "I did read the statement of accepted facts at the front of the case file. The shear volume of paperwork within the file precludes a close scrutiny of most of it. As far as the questions to be resolved: (1.) The patient, in my opinion, does have residual of the low back strain and coccydynia resulting from the injury incurred on the job 2 August, 1973; (2.) The diagnosis in this situation would be chronic lumbalgia causally related to patient's history of trauma, plus chronic coccydynia causally related to history of trauma. The medical rationale now is that the patient sustained a documented injury. Prior to the injury she did not have trouble and after the injury she did have trouble. The trouble appears to be permanent.
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> "(3.) Insofar as work tolerance is considered. I think the patient has sustained a permanent partial impairment to function of her body as a whole of from five to ten percent, but by no means think that the patient is permanently and totally disabled from carrying out any type of occupation. Whether or not she is fit for a job may, however, be dependent on the employer's rules and regulations."

The medical adviser, in a December 16, 1980 memorandum, stated that Dr. Hinenburg had not indicated that appellant had any objective evidence to support disability except obesity. He concluded that appellant's lumbar pain was probably due to postural abnormalities caused by obesity and not to a lumbosacral strain or coccydynia. He indicated that Dr. Hinenburg should be requested to clarify his opinion on these issues.

The Office, in a December 24, 1980 letter, asked Dr. Hinenburg if appellant's disability was due to obesity and, if so, what objective evidence indicated that she was still disabled due to the employment injury. Dr. Hinenburg, in a January 5, 1981 report, responded:

> "I feel that the pain being experienced by Mrs. Sandra Adele Foster relates to a traumatic disability of her lumbar spine causally related to the accident which occurred in August of 1973. I cannot be sure as to exactly what structure in the patient's spinal column has been damaged. I would suspect that on a statistical basis the organ most likely to be incriminated would be one of the lumbar intervertebral discs. There has subsequently occurred adaptive changes in the back relating to the permanent deformation of the disc which have reduced the functional capacities of the back by five to ten percent That is the reason that I feel that patient has a five to ten percent permanent partial disability of the lumbar spine which may be construed as five to ten percent permanent partial disability of the body as a whole. The pain which this patient experiences is undoubtedly aggravated by the substantial overloading of the damaged spinal column relating to the readily observed exogenous obesity. I do not feel that the pain that this patient experiences in her back, that is the chronic lumbalgia, is due to a postural abnormality which is in and of itself secondary to obesity; but rather that the obesity is aggravating the disabled spinal column. The major objective findings noted on physical examination are exogenous obesity and tenderness of the lumbar spine, not associated with any neurologic findings.
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> "The coccydynia has been present for some time and represents what I feel to be a pain pattern which cannot at this time be mitigated by the passage of futher time or by treatment. I think that the pain experienced by the patient in her coccyx is real, causally related to her history of trauma, and unlikely to be either verified or contradicted by any known diagnostic modality invasive or noninvasive."

In a February 19, 1981 form report, Dr. Hinenburg indicated that appellant could work intermittently for three hours while sitting or walking, for two hours while bending or standing, and for one hour while lifting. He also indicated that appellant could lift up to 20 pounds. He concluded that appellant could not work eight hours a day but could work six hours a day. He also noted that appellant could not operate a car, truck or other type of motor vehicle.

The employing establishment, in an August 25, 1981 letter, informed appellant that she was being considered for reinstatement. In an April 8, 1982 letter, the employing establishment offered appellant a position as a personnel clerk with restrictions. The employing establishment informed her that she would work from 9:30 to 2:30 p.m., five days a week. In an accompanying job description the employing establishment stated that appellant would sit for six hours a day with a 15 minute break at the end of the first three hours. In an official notice of personnel action, the employing establishment indicated that appellant was reemployed with the restriction of working six hours a day while sitting. Appellant accepted the offer and returned to work on April 12, 1982.

The Office, under the *Shadrick*[1] formulation, calculated appellant's loss of wage-earning capacity on the basis of her actual earnings for six hours a day and determined that appellant had a 25 percent loss of wage-earning capacity. In a June 3, 1982 decision the Office informed appellant that it had determined that she was no longer totally disabled and was capable of performing the duties of general clerk, which she had been performing since April 12, 1982.

Dr. Stuart, in an April 20, 1982 report, stated that appellant should not drive over 10 to 15 miles due to her low back condition and should avoid heavy lifting, prolonged standing, stooping and similar activities.

Appellant, through her attorney, requested a hearing before an Office hearing representative. At the October 27, 1982 hearing, appellant testified that she worked five hours a day. She stated that her supervisor informed her that the employing establishment had made an error in its letter and had intended to indicate the position offered was for six hours a day. Appellant testified that she refused to work an extra hour and the issue was never raised again.

The hearing representative, in a March 4, 1983 decision, found that appellant was capable of performing the duties of a general clerk and that the Office's decision was justified because appellant had been able to actually perform the job. However, he stated that the compensation for loss of wage-earning capacity was based on the loss of capacity to earn wages and not on the actual wages lost. He therefore affirmed the Office's June 3, 1982 decision.

The Board finds that the case is not in posture for decision.

The Office, in its initial loss of wage-earning capacity decision, based its determination on appellant's actual wages for six hours a day, 30 hours a week. The testimony at the hearing disclosed, however, that appellant actually worked only five hours a day. The hearing representative therefore modified the Office's decision, finding that the evidence showed that she was capable of working six hours a day as a general clerk.

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[1] *Albert C. Shadrick*, 5 ECAB 376.

By basing the decision on appellant's capacity to earn wages rather than on her actual earnings, the hearing representative also was required to determine whether the position of general clerk was reasonably available within appellant's commuting area. The Board has held that the position selected for determining wage-earning capacity must be one reasonably available in the open labor market.[2] It is improper to make such a determination based on one position.

The case will be remanded for further development. If the evidence establishes that appellant's actual wages do not fairly and reasonably represent her wage-earning capacity, the Office should determine if appellant is capable of performing a position in the open labor market reasonably available within her commuting area. After further action as it may find necessary, the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs, dated March 4, 1983 and June 3, 1982, are hereby set aside and the case remanded for further action in accordance with this decision.

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[2] 5 U.S.C. 8115.

In the Matter of AUDRAY UNICE BOGAN *and* U. S. POSTAL SERVICE, POST OFFICE, Oakland, Calif.

Docket No. 83-1164; Submitted on the Record;
Issued October 18, 1983

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant was disabled as a result of her November 22, 1972 employment injury after June 26, 1974, the date the Office of Workers' Compensation Programs terminated her compensation.

On November 22, 1972 appellant, then a 39-year-old laborer, injured her lower back when she slipped while walking up stairs at work. She stated on a claim form filed December 21, 1972 that her "leg gave away" and she "slipped backward a couple of steps." She continued working, thinking her back "would stop hurting." Appellant worked November 22 through 24, 1972. Her days off were November 25 and 26. She stopped work on November 27 and did not return. She received compensation for temporary total disability from November 27, 1972 through June 26, 1974.

Dr. James O. Johnston, a Board-certified orthopedic surgeon, stated on an Office attending physician's report dated January 11, 1973 that appellant was seen in a hospital emergency room on November 25, 1972 and that he first examined her on November 27. He diagnosed "probable protruded L–5 disc with S–1 root compression on the right side." He did not address whether this condition was related to the employment injury.

Dr. Johnston stated the following in a January 29, 1973 report:

> "[Appellant] was examined on January 25, 1973. At this time she stated that her injury of November 22, 1972, was industrial in origin. She stated she stumbled and twisted her back while she was reaching for a railing while going down the stairs at work. She did not actually fall and hit the stairs. She has been off work ever since. She had a prior industrial injury to her back evidently in 1971, but apparently did not miss work with this episode.[1]
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> "Today she states her back pain is still quite severe, and continues to radiate into the right leg. The ankle jerk is still absent on the right side; however, her straight leg raising is not nearly as positive as it was on her last visit. She is very obese.
>
> "IMPRESSION: This patient has a bona fide disability as a result of a S1 compression syndrome.
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> "X-rays of the lumbosacral spine were taken today which reveal evidence of a congenital defect at the lumbosacral area, with a well-developed transitional segment that represents a lumbarization of S1. She has very small foraminal outlets at this level, and there are moderately severe hypertrophic changes at this area, as a result of a preexisting congenital defect, and her long history of obesity.
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> "The industrial episode was probably a minor precipitating factor in regard to her total problem, but it seems quite obvious that her future prognosis is quite poor because of her extreme obesity and because of her congenital nature of her disability."

In a May 15, 1973 report Dr. Johnston stated that appellant's obesity was "her major problem," and that "[a]s long as she is unable to lose weight, she will probably never return to a gainful occupation again." He stated that "there is nothing further we can do in terms of orthopedic treatment of her obesity problem," and further stated that "her condition could be considered stable and stationary and is probably ready for a rating."

By letter dated October 2, 1973 the Office of Workers' Compensation Programs advised appellant's attorney that the condition accepted by the Office as causally related to the employment injury was "aggravation of congenital lumbosacral defect."

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[1] There is no documentation of an injury of that date in the case record, but records submitted by the employing establishment show that appellant gave notice on February 13, 1970 of straining her left side and leg while emptying a heavy trash container. She lost no time from work because of this injury.

Appellant was examined on March 8, 1974 by Dr. Norman L. Haugen, a general surgeon, who stated in a report of the same date that appellant continued to complain of back pain. He stated that "the problem" presented by appellant's obesity "has been discussed with her," but that the likelihood of her reducing "appears to be very slight and treatment of any sort will probably be of no help." He further stated that appellant "should be considered to be unemployable and it is doubtful that she ever will be a productive worker again."

Dr. Haugen examined appellant again on April 16, 1974 and stated as follows in an April 26, 1974 report:

> "*EXAMINATION* today is essentially as previously reported. She is a tremendously obese woman who appears to be in no distress. She has an excellent range of motion of her back, considering her obesity. She is able to bend forward so that her finger tips come within three or four inches of touching the floor. Other motions are probably normal for her. Straight leg raising is normal. There is no sign of sciatic irritation. There is no muscle atrophy, and reflexes are normally active and symmetrical.
>
> "The calves measure 14$^{1}/_{2}$/14$^{1}/_{2}$". The knees measure 15$^{1}/_{2}$/15$^{1}/_{2}$".
>
> "At this time she certainly should be considered to have attained maximum recovery from what appears to have been a very mild injury in November of 1972. She has made a good recovery. She is in no need of treatment for her minimal to mild subjective symptoms.
>
> "She is severely handicapped for any employment because of her gross obesity and her lack of education and skills. Because of these factors, she is probably unemployable and a prohibitive risk for any employer."

By letter dated June 14, 1974 the Office notified appellant that it was terminating her compensation for temporary total disability effective June 27, 1974. The letter stated that appellant had "the privilege of submitting any additional evidence, such as physician statements," if she disagreed with the decision.

On June 20, 1974 appellant submitted a March 5, 1974 statement by Dr. Haugen in which he informed the employing establishment that appellant was "probably completely unemployable permanently." Through her attorney, appellant submitted an August 2, 1976 report of Dr. Fred Blackwell, an orthopedic surgeon, which stated that appellant sustained a "lumbosacral strain and sprain" as a result of the employment injury[2] and would be totally disabled for an additional three to six months and would "not likely" make a complete recovery.

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[2] Dr. Blackwell's report was based on a history of injury on September 23, 1972, which is an incorrect date.

By letter of January 25, 1977 the Office notified appellant's attorney that the additional evidence was insufficient to warrant modification of the June 14, 1974 determination and that medical evidence "based on a complete knowledge of the medical history" was needed.

By letter dated February 23, 1977 appellant's attorney requested a hearing. The case record was transferred to the Office's Branch of Hearings and Review, where an Office hearing representative denied the request for hearing by letter of June 21, 1977 on the ground that the request had not been made within 30 days after the June 14, 1974 decision, as required by section 8124(b)(1)[3] of the Federal Employees' Compensation Act. The hearing representative stated that the case would be "scheduled for reconsideration" and that medical evidence establishing "a causal relationship between employment and disability" was required.

Through her attorney, appellant submitted a December 12, 1977 report of Dr. David D. Charmak, an orthopedic surgeon. The report states in part as follows:

> "PRESENT COMPLAINTS (As stated by the patient):
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> "Back: She has occasional pain and sometimes the back feels better with no pain. At times, she further states, the back feels terrible. The pain, when present, is constant. Lifting, bending and stooping causes increased pain. There is radiation of pain down both lower extremities, radiating to the heels. On coughing, sneezing, straining and jarring there is increased pain. Inclement weather causes increased pain, as does pushing and pulling, sitting and arising. She walks with an occasional limp and dressing may cause occasional pain. Ascending and descending stairs causes increased pain, especially ascending stairs. On walking and standing she has no complaints, her back does not hurt. However when the pain is present there is considerable increased pain on walking and standing . . ."
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> * * *
>
> "At the time of this examination on 8/24/77, the patient continues to have subjective complaints with reference to her back, as stated. From an objective orthopedic standpoint, local physical examination of the back and lower extremities reveals the patient to be rather obese, with a pendulous abdomen and buttocks, with large lateral fat pads; there appears to be some atrophy of the left thigh and calf. Otherwise, inspection was negative. On palpation, tenderness is elicited over the lumbosacral spine, with tenderness of both the right and left sciatic notches; spinal motions are limited and painful, as stated: measurements of the lower extremities reveal $1/2''$ difference between the right and left thighs; on signs and symptoms

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[3] 5 U.S.C. section 8124(b)(1).

relative to low back pathology, straight leg raising is to 80 degrees bilaterally and bilaterally positive. On neurological examination, there is a diminution of sensation of the right thigh and calf.

"It is felt that the subjective complaints are consistent with the injury sustained.

"X-RAY EXAMINATION: X-rays were submitted under date of 6/1/76 by Dr. Fred Blackwell and these were perused with the following findings: LUMBOSACRAL SPINE: There is a congenital defect, with slight spondylolisthesis.

"OPINION: In a view of the congenital defect of the lumbar area, it is felt that there was an aggravation of a preexisting condition. However, if it were not for the injury of 9/23/72,[4] Mrs. Bogan's syptoms would not have persisted up to the present time. Therefore, the industrial injury sustained on 9/23/72 precipitated her symptoms, causing pain and disability.

"It is felt that the condition is now permanent, stationary and ratable. Although treatment is not presently indicated, as a palliative and precautionary measure, should symptoms become worse in the future, she should be given the benefit of treatment . . ."

The Office medical director reviewed the case record and stated in an October 6, 1978 report that Dr. Charmak's report supported a causal relationship between appellant's employment injury and her disability, creating a conflict in the medical evidence which should be resolved by an impartial medical specialist.

By letter of January 23, 1980 to appellant's attorney, the Branch of Hearings and Review stated that the case was not in posture for hearing because the Office had not issued a "formal decision" on the merits and that it was returning the case record to the Office to resolve the conflict in medical opinion and issue a decision.

The Office referred appellant, along with the case record and a statement of accepted facts, to Dr. William B. Sheppard, a Board-certified orthopedic surgeon, on May 8, 1981. The Office stated the issue and questions to be answered as follows:

"The issue for determination is whether the claimant has any injury-related disability beyond 6/27/74.

"The questions to be resolved are:

1. Does the claimant have any injury-related conditions precipitated, accelerated, aggravated or proximately caused?

2. If so, state all injury-related diagnosis.

3. If the answer to Number 1 is yes, indicate whether the claimant has been disabled by reasons of injury-related conditions. If so, state whether the disability is for all gainful employment indicating the

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[4] The medical history given Dr. Charmak included an incorrect date of injury.

date when total disability ceased and the appropriate work limitations as of that date."

Dr. Sheppard submitted a May 19, 1981 report in which he set forth the history of injury, past medical history, results of physical examination, and a review of medical reports. He stated in part as follows:

"NEUROLOGICAL

"No definite abnormalities are noted on the neurological examination. Tendon reflexes are active and equal. Sensory perception seemed to be variable in the lower extremities but no segmental abnormalities are detected.

"X-RAYS

"X-rays of the lumbosacral spine were obtained May 19, 1981.

"The anteroposterior view shows five lumbar vertebrae. There seems to be a slight tilt toward the right but this may be positional. L5 is deeply set in the pelvis and the angle view reveals again that there is a tilt towards the right which seems to be a tilt of the sacrum. There is perhaps slight narrowing of the lumbosacral disc with some osteoarthritic spurring of L5 on each side and some sclerosis of the superior plate of L1.

"There are mild spurs on the anterior superior and inferior aspect of L4 and 5.

"Oblique views reveals no defects in the pars interarticularis.

"Anteroposterior, lateral and notch views of the right knee and an anteroposterior view of the left knee for comparison reveal no apparent difference in the appearance of the two knees.

"There is spurring of the tibial spine but no other evidence of significant degenerative changes. Tiny spurs are noted at the superior and inferior aspects of the articular surface of the right patella."

* * *

"SUMMARY AND COMMENTS

"The records indicate that she had back pain after lifting in 1970 and left leg symptoms.

"The left leg gave way on November 22, 1972. She does not know why the leg gave way.

"She did not fall at the time but she did twist the back.

"In 1972 it was found the ankle jerk was diminished. This finding apparently disappeared in a short time and there has been no recurrence of objective neurological findings.

"At this time I find no significant congenital deformities in the low back. L5 is deeply set in the pelvis. There is no spondylolisthesis detected at this time and there are definitely no defects in the pars interarticularis. There are mild degenerative changes.

"The symptoms are obviously aggravated by her excess weight.

In addition she states that they are aggravated by changes in the weather and apparently markedly aggravated by her menstrual periods."

* * *

"At this time her potassium is definitely low and could be contributing to her subjective complaints. . . .

"In addition the laboratory work showed a low iron [count] in the blood and a predominance of lymphocytes in the differential. A sedimentation rate of 30 suggests some other pathology causing musculoskeletal complaints other than her trauma."

* * *

"Objectively at this time there is only a slight limitation of motions of her back. Straight leg raising is negative at 90 degrees. The neurological examination reveals no evidence of low-back pathology or nerve root compression.

"DIAGNOSIS

"1. Obesity—marked.

"2. Cardiovascular hypertension—mild.

"3. Lumbosacral strain—chronic.

"4. Hypokalemia.

"5. Osteoarthritis and degenerative changes, lumbosacral spine and knees—mild to moderate.

"DISCUSSION

"At the time of my examination May 19, 1981, examination of her back did not indicate that the chronic lumbosacral strain was in itself causing her to be disabled for her work, performing janitorial duties.

"Trying to perform such work with her marked obesity might result in recurrent back symptoms.

"Her obesity and degenerative changes will continue to contribute to low-back symptoms as she is carrying almost 100 pounds excess weight at all times."

The Office referred Dr. Sheppard's report to Dr. Arthur S. Harris, a general surgeon and Office medical consultant. He stated in a July 21, 1981 report as follows:

> "Dr. Sheppard indicates that Mrs. Bogan had back pain after lifting in 1970 and left leg symptoms. Although he does not specifically address the point of injury-related conditions, it seems that Dr. Sheppard feels that the chronic lumbosacral strain has been caused by the conditions of employment. Dr. Sheppard also notes that the chronic lumbosacral strain was not in itself causing her to be disabled for her work—performing janitorial duties. Dr. Sheppard also indicates that her symptoms are obviously aggravated by her excess weight and trying to perform such work with her marked obesity

might result in recurrent back symptoms. He also notes that her obesity and degenerative changes will continue to contribute to low back symptoms as she is carrying almost 100 pounds excess weight at all times."

The Office then referred the case record to Dr. Don King, a Board-certified surgeon of professorial rank and an Office medical consultant. The Office asked Dr. King to address the same issue and questions as presented to Dr. Sheppard. In a July 27, 1982 report Dr. King summarized appellant's medical history and the medical reports in the case record. He stated in part as follows:

> "In December 1977 Doctor Charmak, orthopedic surgeon in San Francisco, interviewed and examined Mrs. Bogan and he made a diagnosis of forward slip of the lumbar spine at the lumbosacral joint area due to a condition due to spondylolisthesis.
>
> "In May 1981 Dr. William B. Sheppard, orthopedic surgeon in Oakland, interviewed and examined her. . . . Neurological examination was completely negative and x-ray studies were reported as showing a tilt of the sacrum but no mention is made of lumbarization of the first sacral vertebra. He also noted osteoarthritic spurring of L5 on each side, as well as on the anterior, superior, inferior aspects of L4 on L5. The oblique films showed no evidence of spondylolisthesis, however. He made a diagnosis of marked obesity as well as hypertension and chronic lumbosacral strain, osteoarthritis and degenerative changes, lumbosacral spine and knees mild to moderate. In his discussion of his findings he stated that 'examination of her back did not indicate that the chronic lumbosacral strain was in itself causing her to be disabled for her work, performing janitorial duties.' He felt that the obesity was a contributing factor not only to her low back symptoms and degenerative changes but was also contributing to her high blood pressure. He did not answer the question that had been specifically asked concerning a possible relationship of her present complaints and disability to the injury which she received on 11-22-72.
>
> "The final medical report is one written by Dr. Arthur S. Harris, OWCP consultant in orthopedics. Dr. Harris' short report concerns itself entirely with the report of Dr. William B. Sheppard, and he interprets Dr. Sheppard's discussion as indicating that the chronic lumbosacral strain which he diagnosed has been caused by the conditions of employment.
>
> "*Discussion*
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> "It is now almost ten years since this extremely obese lady sustained a minor sprain or strain to her lower back. Soon thereafter the patient was seen by Dr. James Johnston, chief of the orthopedic service of the Kaiser hospital in Oakland, who stated in his report that 'the industrial episode was probably a minor precipitating factor

> in regard to her total problem. It seems quite obvious that her future prognosis is quite poor because of her extreme obesity and because of the congenital nature of her disability.' As far back as 3-8-73 Dr. Johnston went on to say in another report that 'there were no longer any objective findings of nerve root pressure and because of her obesity she will probably never return to gainful operation.' He felt that her condition at that time was stable and stationary. Then again, on 4-16-74, Dr. Haugen found that 'she has made a good recovery.' He described her complaints as being minimal and felt that she was severely handicapped because of her obesity. Dr. Charmak's findings of spondylolisthesis have not been substantiated either by Dr. Johnston or Dr. Sheppard's x-rays.
>
> "*Medical Opinion*
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> "This claimant's original injury was a minor one and temporarily aggravated a preexisting condition first of congenitally weak lumbosacral spine and second degenerative osteoarthritis affecting this area. The diagnosis is well established as mentioned, congenital anomaly of lumbosacral spine with preexisting superimposed osteoarthritic degenerative changes with superimposed minor sprain of low back. The medical records reviewed indicate that the symptoms from this injury terminated in the early part of 1974. Her present condition of disability is purely the result of the natural degenerative changes that frequently occur especially in very obese people who have congenital weakness of the lower back.

By compensation order dated September 17, 1982 the Office rejected appellant's claim for compensation on the ground that "the medical evidence of record does not support an injury-related disability after June 26, 1974."

Appellant requested reconsideration on November 2, 1982 and by letter decision dated March 4, 1983, the Office found her request for reconsideration *prima facie* insufficient to warrant review of the prior decision on the ground that she "failed to provide any medical evidence in support" of her request for reconsideration.

The Board finds that the case is not in posture for decision.

In his December 12, 1977 report, Dr. Charmak, an orthopedic surgeon, opined that appellant's subjective complaints were "consistent" with her employment injury and that without the injury aggravating her "congenital defect of the lumbar area," her symptoms would not have continued. He concluded that the employment injury "precipitated her symptoms, causing pain and disability." Following this report, the Office medical director concluded there was a conflict in the medical evidence and the Office referred appellant and the case record to Dr. Sheppard, a Board-certified orthopedic surgeon, to resolve the conflict.

Dr. Sheppard, the impartial medical specialist, found mild degenerative changes and "no significant congenital deformities" in the lower back. He also stated that a "sedimentation rate of 30 suggests some other pathology causing musculoskeletal complaints other than trauma." He diagnosed a chronic lumbosacral strain and stated that this condition "in itself" was not "causing her to be disabled for her work, perfoming janitorial duties." He did not specifically state whether he believed that appellant's lumbosacral strain was caused by her employment injury, although Dr. Harris, a general surgeon and Office medical consultant, stated after reviewing Dr. Sheppard's report that "it seems that Dr. Sheppard feels that the chronic lumbosacral strain has been caused by the conditions of employment."

Dr. Sheppard also did not clearly address the issue of whether appellant had any disability due to her employment injury after June 26, 1974, the date the Office terminated her compensation. The Office requested Dr. King, a Board-certified orthopedist and Office medical consultant, to address this issue, which he did in his July 27, 1982 report.

The Office should not have sought clarification of Dr. Sheppard's report from Dr. King, the second Office medical consultant, without first requesting clarification from Dr. Sheppard.[5] This is particularly true in light of the fact that Dr. Harris, the first consultant, opined that Dr. Sheppard seemed to support causal relationship.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. Unless the above-mentioned procedure is carried out by the Office, the intent of section 8123(a)[6] of the Act will be circumvented when the impartial specialist's medical report is not sufficient to resolve the conflict of medical evidence.[7]

On remand, the Office should request Dr. Sheppard to submit a supplemental report indicating whether appellant has fully recovered from her November 22, 1972 employment injury, and if so, when such recovery occurred. If appellant has not fully recovered from the employment injury, the Office should instruct Dr. Sheppard to set forth all limitations for work which are due to residuals of the employment injury and preexisting conditions. Following such further development as the Office deems appropriate, it should then issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated September 17, 1982 and March 4, 1983 are hereby set aside and the case is remanded for further proceedings consistent with this decision of the Board.

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[5] There is no indication in the case record that Dr. Sheppard was unavailable for further consultation.

[6] 5 U.S.C. section 8123(a).

[7] *Lon C. Dunn*, 32 ECAB 323.

In the Matter of JIMMIE D. BREWER *and* DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Okla.

Docket No. 83–1102; Submitted on the Record;
Issued October 19, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issues are (1) whether appellant's phlebitis condition was causally related to his federal employment; (2) whether his emotional condition was causally related to his federal employment; (3) whether appellant's cervical condition was causally related to his federal employment; (4) whether his hernia condition was causally related to his federal employment; and (5) whether the Office of Workers' Compensation Programs used the proper rate of pay in computing the amount of appellant's compensation for the period March 18, 1977 to May 19, 1982.

This is the third appeal in this case. In the first appeal,[1] the Board on December 22, 1981 issued an order dismissing the appeal in view of the fact that there was no final decision by the Office of Workers' Compensation Programs in the case. In the second appeal,[2] the Board on January 12, 1983 issued an order remanding the case to the Office for placement of the case record in chronological order, for clarification of what condition(s) the Office had accepted as being employment related and for a *de novo* decision.

In a compensation order dated April 1, 1983, the Office found that appellant's phlebitis, emotional, cervical, and hernia conditions were not causally related to his federal employment. In addition, the Office found that the Office had used the proper rate of pay in calculating appellant's compensation for temporary total disability for the period March 18, 1977 to May 19, 1982.[3]

With respect to the phlebitis condition, appellant filed a claim on December 19, 1967, alleging that on December 13, 1967 he sustained a right knee injury when he knelt down during a work break. At that time he was 34 years old and a jet engine assembler.

Dr. Olma D. Sparks, Jr., an employing establishment physician, diagnosed appellant's condition on April 5, 1968 to be "soft tissue strain right knee."

In a report dated April 8, 1968, Dr. Samuel T. Moore, a Board-certified orthopedic surgeon, diagnosed appellant's condition to be the following: "Synovial thickening of undetermined origin of the lateral suprapatellar pouch of the right knee." On May 9, 1968, Dr. Moore stated: "I really don't feel like the symptoms he has are fully accounted for by the saphenous varicosities but I think it would bear investigation."

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[1] Docket No. 82-253.

[2] Docket No. 83-287.

[3] The Office terminated appellant's compensation effective May 20, 1982 finding that it had erred in accepting that appellant's phlebitis condition was causally related to his federal employment.

On May 21, 1968, Dr. John D. Ingle, a Board-certified surgeon, suggested to the Office medical director that appellant "should have venograms to determine vein pathology." The Office medical director on May 24, 1968 responded to Dr. Ingle's suggestion and authorized consultation and the venograms.

On June 3, 1968, Dr. Ingle reported that the venograms taken on May 28, 1968 were "entirely normal, showing no pathologic change whatever in either the superficial or deep venous system of the right leg."

Dr. Moore reported on June 6, 1968 that appellant sustained "acute phlebitis probably secondary to the venogram which was carried out several days ago at Mercy Hospital." On June 24, 1968, Dr. Moore stated that appellant's "phlebitis has practically cleared up" and his impression of appellant's condition was "plantaris muscle sprain and tear." The doctor released appellant to return to work.

On November 21, 1975, appellant filed a notice of recurrence of disability for the period beginning November 21, 1975 as a result of his phlebitis condition. The Office of Workers' Compensation Programs accepted the recurrence of disability as being employment related, and began paying compensation for temporary total disability on November 21, 1975. Appellant's supervisor stated that appellant's rate of pay on the date of the recurrence, November 20, 1975, was $6.41 per hour.

On September 1, 1976, the employing establishment made the following comments regarding appellant's rate of pay on or about the time of appellant's November 20, 1975 recurrence of disability: "10-19-75 — $6.41 per hour — corrected on 3-16-76 to $6.85 per hour retroactive back to 10-19-75."

In an Office "Attending Physician's Report" dated December 17, 1975, Dr. D. F. Rhinehart, a neurologist, indicated his diagnosis of appellant's condition to be "chronic refractory right lower extremity pain, secondary to chronic thrombophlebitis." The doctor also indicated that on November 26, 1975 he performed a chordotomy surgical procedure on the leg.

In a note dated March 24, 1976, Dr. Rhinehart stated in part:

> "I feel that he [appellant] has a 100% permanent partial disability to the body as a whole in regard [to] his persistent pain pattern status post thrombophlebitis and resultant need for chordotomy. He has persistent D7 sensory level with paraparesis."

Appellant returned to work on February 28, 1977. However, on March 11, 1977, Dr. Rhinehart reiterated his diagnoses and prognosis of appellant relating to his phlebitis condition.

On March 29, 1977, appellant filed a notice of recurrence of disability for the period beginning March 20, 1977 as a result of his phlebitis condition. Appellant's supervisor indicated that on the date of the recurrence, March 18, 1977, appellant's rate of pay was $7.47 per hour.

On May 25, 1977, the Office informed the employing establishment that it had accepted that appellant's conditions of "acute phlebitis, right leg and extruded disc (cervical)" were accepted as being related to his federal employment and that it had accepted appellant's recurrence of disability on March 20, 1977 as being employment related. The Office paid compensation for temporary total disability commencing March 20, 1977. The Office also indicated that it had used the incorrect rate of pay in calculating appellant's compensation for temporary total disability for the recurrent period of disability beginning in November 1975. The Office stated that the correct rate of pay was $6.41 per hour × 40 = $256.40 × ¾ = $192.30 per week. The Office concluded that appellant had been underpaid and sent a check for the difference. The Office also stated that the rate of pay used in calculating appellant's compensation for the recurrent period of disability beginning in March 1977 was $7.47 per hour × 40 = $298.80 × ¾ = $224.10 per week.

On December 12, 1977, the Office recalculated the rate of pay for the recurrent period of disability beginning in November 1975. The Office found that appellant's correct rate of pay was $6.85 per hour × 40 = $274.00 × ¾ = $205.50. The Office recalculated the amount of compensation appellant received for the period November 21, 1975 to February 27, 1975 based on the incorrect $6.41 per hour rate of pay and determined that based on the correct $6.85 per hour rate of pay, appellant should be paid an additional $873.84 in compensation.

On September 16, 1981, the Office referred appellant to Dr. Donald M. Mauldin, a Board-certified orthopedic surgeon, for evaluation with respect to his phlebitis condition. In a report dated September 28, 1981, Dr. Mauldin stated in part:

> "The above patient is a 48-year-old . . . male who has been sent here by the Dept. of Labor for evaluation. There are no records available from his prior treatment."
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> * * *
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> "IMPRESSION: Status post right knee injury with chronic pain in the right leg which subsequently required a chordotomy. Questionable internal derangement of right knee.
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> "RECOMMENDATION: From the knee standpoint the only thing that I would recommend that the patient might subsequently require would be an arthrogram of the right knee to r/o [rule out] any meniscal type lesions. On the other hand, the occasional instability of his knee he relates may be possibly related to some altered sensation from his chordotomy. If he does not feel that he is having

> many symptoms I would not feel strongly that an arthrogram would need to be done. On the other hand, the knee appears to be fine from the standpoint of any arthritis and I would not feel that he would have any major long term disability from the knee specifically. I do not have a real good feel for post-chordotomy patients and would not therefore be able to make a judgment on his functional ability. The majority of his complaints are subjective types of burning pain in his leg and I would have no way of disproving or proving these complaints. From a functional standpoint he has intact motor function and can carry out most routine activities. He does have some increased thigh circumference on the right and calf circumference possibly secondary to some venus insufficiency. On the other hand he does not have gross evidence of severe venus insufficiency with any skin changes. In general, I would feel that from the specific standpoint of his right knee he should be able to function relatively well with no major limitations placed on him especially if an arthrogram was negative. On the other hand with his subjective complaints of intermittent falling and giving way from the altered sensation from his chordotomy this would certainly limit what he could do safely from a standpoint of activity on the knee. This individual falls into one of those categories of being extremely difficult to evaluate exactly what he can and cannot do but, he also appears to be very conscious of his levels of disability and his desire to be totally disabled. Please let me know if I can be of any further assistance."

An Office medical adviser reviewed the medical evidence and on March 5, 1983 negated causal relationship of appellant's phlebitis condition.

The Board notes that the Office found that appellant's phlebitis condition was caused by the venograms which were recommended by Dr. Ingle, as authorized by the Office medical director, to determine the extent of appellant's employment injury to his right knee of December 13, 1967. The Office in accepting that the phlebitis condition was a consequential injury paid compensation for temporary total disability for the period beginning with appellant's recurrence of disability on November 21, 1975 and again on March 18, 1977.[4] The Office terminated appellant's compensation as of May 20, 1982 finding in its April 1, 1983 decision that it had erred in determining that appellant's phlebitis condition was a consequential injury causally related to the employment injury of December 13, 1967.

Once the Office determines that an employee has disability causally related to his federal employment and pays compensation for such disability, it has the burden of proving that his disability has ceased.[5] This burden of proof is not lessened by the fact that the Office later determines that it initially erred in accepting the claim and awarding compensation. The Office must show with rationalized factual and medical evidence that its initial acceptance of the claim was incorrect and that appellant's disability for the period in question was not causally related to his federal employment.[6]

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[4] The basic rule respecting consequential injuries, as expressed by Larson, *Workmen's Compensation Law*, sections 13.00, 13.11, is that "when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct." The subsequent injury is compensable if it is the direct and natural result of compensable primary injury. *See Frank Barone*, 30 ECAB 1119.

Under the present circumstances, the Office failed to meet its burden of proof in terminating appellant's compensation on May 20, 1982. There is no rationalized factual and medical evidence indicating that appellant's disability beginning on March 18, 1977 was not causally related to his federal employment. In fact, Dr. Mauldin stated in his September 28, 1981 report that he did not have appellant's medical records from his prior treatment.

It should be further noted that there is evidence in the case record in the form of reports from Dr. Rhinehart that on November 26, 1975 appellant underwent a chordotomy as a result of his phlebitis condition. There is also evidence that appellant has sustained residuals associated with this surgical procedure.

In view of the foregoing, the Office should refer appellant, along with the case record and a statement of accepted facts, to a Board-certified specialist for a rationalized opinion regarding the issue of whether appellant's disability beginning on March 18, 1977 allegedly as a result of a phlebitis condition was causally related to the December 13, 1967 employment incident or to the authorized venograms and whether the chordotomy was causally related to the accepted phlebitis condition.

The Board finds that appellant's emotional condition was not causally related to his federal employment.

Appellant filed a claim on May 30, 1972 alleging that his "deep depression" and resultant disability beginning on May 1, 1972 were causally related to factors of his federal employment. Appellant returned to work on May 23, 1972.

In an Office "Attending Physician's Report" dated May 19, 1972, Dr. Nolen L. Armstrong, a psychiatrist, diagnosed appellant's condition to be "involutional melancholia." The doctor stated: "Disability due to stress of employment and generalized arteriosclerosis. Both peripheral and cerebral; producing a severe depression."

In a hospital discharge report dated June 7, 1972, Dr. Armstrong stated that appellant was hospitalized for the period May 1 through May 22, 1972 for treatment of involutional melancholia.

The Board notes that there is no medical evidence in the record establishing that appellant's emotional condition and resultant disability were caused by factors of his federal employment. Dr. Armstrong did indicate that the disability was a result of "stress of employment" but the doctor did not provide a rationalized opinion supporting his statement. As such, appellant's claim for compensation for the period May 1 through May 22, 1972 was not supported by probative medical evidence.

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[5] *Roy C. Price*, 31 ECAB 233.

[6] *Paul L. Kent*, Docket No. 81-1785 (issued October 29, 1981); *Benny E. Sherritze*, 33 ECAB 299.

The Board finds that appellant's cervical condition was not causally related to his federal employment.

Appellant filed a claim on September 6, 1973 alleging that on the previous day he had slipped on some water and fell hitting his elbow and hip. Appellant described the nature of the injury as "contusion and swelling of [the] right elbow." He did not stop work.

On March 19, 1974, appellant filed a claim for intermittent periods of disability between March 7 and March 13, 1974 for which he received compensation.

On March 25, 1974, appellant filed a notice of recurrence of disability for the period beginning March 11, 1974. He returned to work on May 6, 1974. The Office accepted this period of disability as employment related and paid compensation for said period.

In a March 26, 1974 report from Dr. Harry B. Tate, a Board-certified neurosurgeon, to Dr. Hughes, Dr. Tate related that appellant slipped and fell on his right elbow and right hip on a wet floor at the employing establishment in September 1973, that the right elbow was x-rayed but no pathology was found, and that appellant stated that he had pain "in his posterior thigh into his calf area to the heel" along with weakness. Dr. Tate stated that his examination of appellant was within normal limits as was the result of appellant's myelogram.

In a report dated April 30, 1975, Dr. Harry J. Freede, a Board-certified orthopedic surgeon, stated that appellant had been referred to his office for examination by an employing establishment physician, Dr. Grover Harrison. Dr. Freede stated that in view of appellant's "considerable complaints referable to his neck and back," myelographic evaluation was recommended to appellant and accepted by him.

Appellant filed a notice of recurrence of disability for the period beginning May 1, 1975. He returned to work on August 11, 1975. The Office accepted this period of disability as being employment related and paid compensation for said period.

On May 7, 1975, Dr. Freede reported that appellant underwent a spinal tap and pantopaque myelogram which "revealed a defect at C-5, C-6 in his cervical spine which corresponds with the clinical pattern of a C-5, C-6 disc."

On May 20, 1975, Dr. Rhinehart reported that on May 19, 1975 appellant underwent "an anterior cervical disc and fusion . . . with excision of [a] frankly extruded disc."

The Office on May 18, 1982 accepted that in his fall of September 5, 1973 appellant sustained a contusion of the right elbow. The Office did not accept that appellant's cervical and lumbar conditions were causally related to the September 5, 1973 fall at work.

The Board notes there is no evidence in the case record establishing that appellant's cervical condition was related to his fall at work on September 5, 1973. Neither Dr. Freede who detected the cervical defect in a myelogram of May 7, 1975 nor Dr. Rhinehart who performed the anterior diskectomy and fusion at the C-5,6 interspace stated that appellant's cervical condition was causally related to his federal employment.

The Board finds that appellant's hernia condition was not causally related to his federal employment.

Appellant filed a claim on October 10, 1975 alleging that he injured his left arm and shoulder on the same date when he reached for a bag of bolts with his right hand while holding on to the stairwell with his left hand. He did not stop work.

Appellant was examined on the day of the work incident at the employing establishment dispensary by Dr. William B. Geb, an osteopath, who indicated the following: "Subjective symptoms left shoulder and upper arm tenderness." Dr. Geb returned appellant to "limited duty" for five days.

In letters dated September 2, 1978 and December 19, 1979, appellant alleged that he sustained a bilateral hernia as a result of the October 10, 1975 incident at work.[7]

In a report dated October 24, 1978, Dr. Orville L. Rickey, Jr., a Board-certified surgeon, stated:

> "In September 1977, I saw Jimmie D. Brewer with bilateral inguinal herniae present. The history at that time, was that these had been present for about two years and they had been found on examination at Tinker Field. His pain on the left which radiated into the scrotum, he dated to at least two years previously. With a history of a straining type injury at that time I think the possibility of his having presented his herniae with his effort must certainly be considered. At the time I saw him he was having no significant pain on the right but he had had a previous chordotomy in November 1975, and did not feel pain on the right.
>
> "On September 23, 1977 his bilateral inguinal herniae were repaired and when last seen December 1977, he was doing well without evidence of recurrence."

In a second report dated April 13, 1981, Dr. Rickey stated:

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[7] The Office indicated in a memorandum dated April 21, 1982 that it had accepted that appellant sustained a left shoulder sprain as a result of the October 10, 1975 employment incident.

> "I saw Jimmie D. Brewer on September 20, 1977 after he had been referred by Dr. Don Rhinehart, 'neuro-surgery'. The complaint at that time was found in January 1976 by Dr. Max Gregory. He complained of some pain radiating into his scrotum. He had no complaints of his right side, but had previously had a chordotomy. Physical examination at that time in September 1977 revealed a definite bulging at the external ring on both sides which reduced promptly with reclining.
>
> "Mr. Brewer was admitted to the hospital on September 22, 1977 and his bilateral inguinal hernias were repaired. There were also associated lipomas of the cord on each side. His post operative recovery had been satisfactory when last seen in November 1977.
>
> "As to the etiology of the hernias, it seems reasonable to me that if hernias had not been present prior to January 1976 and there is a history in October 1975 as claimed by the patient a cause and effect relationship of the injury and the hernias might well be suspected. The examination findings at surgery some two years after an injury will not allow one to make that definitive association. It also appears to me that if Mr. Brewer was employed without hernias in a physically active job and subsequently had developed the hernias I could not deny a relationship between the two."

The Board notes that Dr. Rickey submitted reports, dated October 24, 1978 and April 13, 1981, which tend to support appellant's claim that his bilateral hernia condition was causally related to the employment incident of October 10, 1975. However, Dr. Rickey's April 13, 1981 report which addresses the issue of causal relationship merely speculates with respect to the etiology of appellant's bilateral herniae. As such, Dr. Rickey's reports can be afforded little probative value and are not sufficient to establish causal relationship.[8] Therefore, appellant's allegation that he sustained a hernia condition at work on October 10, 1975 cannot be sustained.

The Board finds that the proper rate of pay was used by the Office in calculating appellant's compensation for the period of March 18, 1977 to May 19, 1982. Section 8101(4)[9] of the Federal Employees' Compensation Act provides three alternatives for determining the rate of pay to use in calculating compensation; the pay rate in effect at the time of injury, the pay rate in effect at the time disability begins, or the pay rate "at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment . . ., whichever is greater."

In the present case, the Office properly selected the pay rate in effect on March 18, 1977 ($7.47 per hour) when appellant had a recurrence of disability for work. There is no evidence that appellant's pay rate should have been higher for the period in question.

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[8] *Eloise L. Berry*, 25 ECAB 61.

[9] 5 U.S.C. section 8101(4).

The decision of the Office of Workers' Compensation Programs, dated April 1, 1983 is affirmed insofar as it finds that appellant's emotional, cervical and hernia conditions were not causally related to his federal employment and that the Office properly selected the correct pay rate in determining appellant's compensation for the period of March 18, 1977 to May 19, 1982. However, the Office decision of April 1, 1983 is set aside with respect to the issue of whether appellant's phlebitis condition and chordotomy surgery are causally related to his federal employment and the case is remanded for further development as outlined above, to be followed by a *de novo* decision on this issue.

In the Matter of ERNESTO L. MONTOYA *and* DEPARTMENT OF AGRICULTURE, PLANT PROTECTION AND QUARANTINE PROGRAMS, El Paso, Tex.

Docket No. 83-1227; Submitted on the Record;
Issued October 20, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether the Office of Workers' Compensation Programs' decision, in which it refused to authorize payment for a home spa purchased by appellant for relief of back pain, complied with the requirements of the applicable law so as to constitute a final decision.

On March 2, 1978 appellant, a 43-year-old plant protection and quarantine officer, sustained an injury to his lower back and right hip when the stool he was attempting to sit on "broke in three pieces." He stopped work that day and was treated by Dr. Adrian L. Grass, a Board-certified orthopedic surgeon, for low back strain. He returned to work on June 1, 1978 and received continuation of pay for intermittent periods from March 3 through May 31, 1978.

Appellant filed a notice of recurrence of disability on January 21, 1980 stating that he stopped work on September 19, 1979 because his back pain increased in severity. He was on sick leave for intermittent periods between September 19, 1979 and December 11, 1979, and again from May 1, to September 5, 1980.

During this period of time appellant came under the care of Dr. J. Philip Richardson, a Board-certified orthopedic surgeon, who reported on May 1, 1980 that he was of the opinion that, based on the history of the March 2, 1978 employment incident, appellant had "residuals of a degenerative disc disease of L5-S1."

Based on Dr. Richardson's report, the Office of Workers' Compensation Programs determined that appellant's condition resulted from the March 2, 1978 employment injury and authorized payment of medical expenses for treatment administered by Dr. Richardson.

On January 30, 1981 appellant filed another notice of recurrence of disability alleging its occurrence on January 26, 1981.[1] At this time appellant was attended by Dr. Eduardo Hazarian, a Board-certified orthopedic surgeon, who, on February 16, 1981 diagnosed severe chronic degenerative lumbar disc disease at L4-L5, "with sizeable discogenic characteristics and possible herniation of a disc fragment." Dr. Hazarian hospitalized appellant on February 23, 1981 and referred him to Dr. Khosrow Zolfoghary, a Board-certified neurosurgeon, who, on February 27, 1981, performed a "lumbar laminectomy and excision of herniated L-5 disc, right." Dr. Zolfoghary continued to treat appellant following the surgery and did not release him to return to work until June 27, 1981.[2]

In a letter dated October 15, 1981 appellant requested that the Office reimburse him for the cost of a home spa he purchased which, he stated, was prescribed by Dr. Zolfoghary.

By a "2-way memo" addressed to appellant and dated November 3, 1981, an Office claims examiner stated the following:

> "This concerns your purchase of a home spa. Reimbursement for this purchase cannot be considered until we have an explanation from Dr. Zolfoghary concerning the necessity of the spa.
>
> "In addition, I would like Dr. Zolfoghary's opinion as to whether there are not cheaper ways of obtaining hydrotherapy."

In response to the Office's request, appellant submitted two notes by Dr. Zolfoghary, dated March 31 and October 8, 1981. The March 31, 1981 note read as follows:

> "Due to pts [patient's] severe muscle spasm and back pain, he [is] required to have daily hydrotherapy."

Dr. Zolfoghary stated in his October 8, 1981 note that appellant was required to continue his physical therapy "to alleviate his pain in low back." A November 16, 1981 progress note contained essentially the same information.

Additionally, under the cover of a December 15, 1981 letter, appellant submitted a December 10, 1981 progress note by Dr. Zolfoghary, who reported:

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[1] It is unclear from the record whether or not appellant worked or was on sick leave for the period September 6, 1980 to January 26, 1981.

[2] By letter dated February 1, 1982 the Office informed appellant that he was entitled to all compensation and medical benefits for the period February 13, 1981 to June 27, 1981 if he either entered a leave without pay status or bought back the leave he used. Appellant chose to buy back the leave he used. He returned to work on June 28, 1981.

> "[Appellant] has had back surgery and back problems. He has been on workmans' compensation and he has continued to have low back pain and discomfort. It is my opinion that the patient may have prolonged and continued pain and discomfort for some time to come. Apparently physical therapy and hydrotherapy are very effective in relieving this man's pain. Therefore, he may be required to have continued physical therapy such as hydrotherapy."

With regard to Dr. Zolfoghary's progress note, appellant advised the Office that Dr. Zolfoghary informed him that he may require physical therapy and hydrotherapy to relieve pain and discomfort; that the doctor himself did not provide physical therapy, and therefore the doctor was "not in a position to state what would be more economical"; and that he contacted a licensed physical therapist who quoted a base price of $15.00 per session for hydrotherapy which would increase "depending on what else has to be done." Appellant further advised the Office that the spa was a "sound investment" because it was "well on its way to paying for itself" since he was not required to remit $15.00 per session. He therefore requested that the Office reimburse him for his purchase of the spa.

By a "2-way memo" dated April 22, 1982, an Office supervisory claims examiner informed appellant of the following:

> "Please be advised your request for a spa at $1,989.75 is disallowed. It is not the policy of this Office to authorize unsupervised therapy, nor is it our policy to authorize other than *medical appliances* when they provide relief, expedite return to work, care, or expedite removal from compensation, etc. If your doctor requires therapy, *please have him* authorize it, and send itemized statement, and reports of your progress to this Office." (Emphasis that of the Office).

Appellant resubmitted Dr. Zolfoghary's December 10, 1981 note and the receipt for the purchase of the spa, and asked the Office to reimburse him for the spa since it was "a prescription and should be paid as were the others."

In a subsequent letter dated June 22, 1982 appellant requested a hearing regarding the Office's refusal to reimburse him for a home spa prescribed by his physician.

By a letter dated February 9, 1983, the Office informed appellant that a hearing before an Office hearing representative was scheduled for Monday, April 11, 1983. However, by letter dated March 14, 1983, the Office informed appellant that his hearing had been cancelled for the following reasons:

> "The Federal Employees' Compensation Act, 5 U.S.C. section 8124, provides for hearings on Federal compensation cases when a request

> is made within 30 days after the issuance of a final decision. Since your request was not made within 30 days of the District Office's decision dated April 22, 1982, you are not, as a matter of right, entitled to a hearing on your case. We have considered the matter in relation to the issue involved and your request is hereby denied for the reason that the issue here is strictly a medical one and a hearing would serve no useful purpose. You have been advised by letter dated November 3, 1981 and by the Office's decision of April 22, 1982 of the type of evidence required to justify reimbursement of your purchase of a home spa. Lay testimony regarding medical questions is of no probative value and any doctor's testimony could be submitted in report form."

The Board finds that the April 22, 1982 Office "2-way memo," affirmed by the Office in its letter of March 14, 1983, refusing to authorize payment for a home spa purchased by appellant for relief of back pain, did not constitute a final decision, pursuant to the requirements of 20 CFR 10.130.

Section 10.130 of part 20 of the Code of Federal Regulations provides in pertinent part:

> "The Federal Employees' Compensation Act, as amended, requires determination of a claim, with findings of fact and a decision for or against the payment of compensation. *** The decision shall contain findings of fact and a statement of reasons."

The Office stated in its April 22, 1982 "2-way memo" that it had "disallowed" appellant's request for a home spa in the amount of $1,989.75 and that it was not the Office's policy to authorize unsupervised therapy, nor to "authorize other than medical appliances" because they, *inter alia*, provide relief, and expedite return to work and removal from compensation rolls. The Office suggested that Dr. Zolfoghary submit reports of appellant's progress and an "itemized statement" regarding any therapy he prescribed for appellant.

Although the "2-way memo" contained a statement of reasons explaining the denial, it did not contain adequate findings of fact, and was not in the form of a final decision. It was not accompanied by "information as to the right to a hearing, to a review, and to an appeal to the Employees' Compensation Appeals Board, [which] shall be mailed to the claimant at his or her last known address." [3] These deficiencies were not corrected in the letter of March 11, 1983.

Since appellant is entitled to a final decision made in accordance with the applicable law, the case will be remanded for *de novo* consideration and preparation of a proper compensation order with appropriate findings of fact and rationale.[4]

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[3] 20 CFR 10.130.

The case is remanded to the Office of Workers' Compensation Programs for further proceedings consistent with this decision of the Board.

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[4] See *Antoinette J. Radson*, 31 ECAB 1265; *Joseph Skiba*, 31 ECAB 1263.

In the Matter of RICHARD A. SROKA *and* DEPARTMENT OF AGRICULTURE, FOREST SERVICE, ALLEGHENY NATIONAL FOREST, Warren, Pa.

Docket No. 83-1304; Submitted on the Record;
Issued October 21, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant had any employment-related disability after September 1, 1979, the date the Office of Workers' Compensation Programs terminated his compensation.

This is the second appeal in this case.[1] The prior decision sets forth the background and history of the case. In the first appeal, the Board found that there was a conflict in the medical evidence regarding the extent of the employment-related aggravation of appellant's condition and resulting disability which required referral to an impartial medical specialist pursuant to section 8123(a) of the Federal Employees' Compensation Act.[2] The Board stated that the conflict of medical opinion was between Drs. John L. Harrington, and Ralph G. Walton, both Board-certified psychiatrists to whom the Office of Workers' Compensation Programs had referred appellant, who had "provided well-rationalized opinions on the issue of causal relationship." The Board further stated that Dr. Harrington had reported "on June 9, 1980 that appellant had not recovered from the April 1979 [employment] incident and aggravation of his condition; while Dr. Walton stated there was only a temporary aggravation, and that on the date of his examination, September 8, 1980, appellant could return to work." The Board set aside the Office's December 2, 1980 decision and remanded the case for the Office to refer appellant with the case record and a statement of accepted facts to an impartial Board-certified psychiatrist for a complete evaluation and rationalized opinion on the nature, extent, and duration of any employment-related aggravation of appellant's preexisting condition.

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[1] Docket No. 81-1601, issued September 30, 1981.

[2] 5 U.S.C. section 8123(a).

By letter dated November 27, 1981, the Office referred appellant to Dr. Theodore Kushner, Board-certified in psychiatry and neurology, and submitted to him the case record and a statement of accepted facts dated November 18, 1981. Among the "facts" set forth which the Office advised Dr. Kushner to use as his frame of reference were that "claimant has not returned to duty since April 17, 1979," the date appellant had stopped working, that appellant was "receiving benefits from the Veterans Administration for a nervous condition with skin manifestations," and "was last seen at Veterans Administration [hospital] on March 9, 1978," and that appellant had "retired on disability."

Dr. Kushner examined appellant on January 4, 1982 and in a report of the same date recounted his medical and personal history and noted that appellant had lost "25 months from work" since appellant stated he had returned to work "approximately 5/18/81." Dr. Kushner further noted that appellant had worked approximately 13 months for the employing establishment before he stopped working in April 1979 and that this job "had been a change from a previous situation which he had requested on a voluntary basis." [3] Dr. Kushner reported as follows:

> "Psychiatric examination reveals no evidence of excessive anxiety. Psychiatric examination reveals no evidence of gross psychopathology. There was no psychotic disease nor any significant depression. Flow of thought and speech were normal and proceeded to a logical goal idea. Affect was adequate and appropriate. Motor behavior was consistent with both thought content and with affect. Judgment and reasoning were not defective.
>
> "From the psychiatric standpoint, it appears that this patient is doing well today. He is no longer overtly depressed. However, based on the available medical information given by history to me by the patient as well as based on a review of the medical records of the various psychiatrists, it would appear that this patient has suffered from a chronic and recurrent depressive problem over a period of many years. This became obvious in March 1977, some two years before he stopped working in April 1979. In fact he has a service-connected disability due to a nervous condition certified in 1974, at which time he may have also had a similar problem of a depressive nature. The patient . . . has a family history of depression in his mother. This would suggest the strong possibility of a manic-depressive illness, without any specific manic episodes at least by history. The patient is doing well from the psychiatric standpoint now and certainly is intact psychiatrically at this time. He continues on anti-depressant medication and has been able to compensate in

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[3] In an April 26, 1979 statement, appellant noted he had worked from March 1977 to March 1978 for the Immigration and Naturalization Service as a GS-12 supervisory personnel management specialist and "took a voluntary reduction in rank to GS-11 to transfer to my current position as Personnel Officer in March 1978. . ."

this regard both in terms of his own personality balance mechanisms as well as in terms of the medication. However, it would appear, based on his history, that the depressive episode which essentially began in April of 1979, could have in part been due to the interruption of the Elavil although it would be unlikely that stopping Elavil would cause a severe depression in two days. The patient states that the job that he took for the Forest Service in March 1978, some 13 months before, was of such nature that although of a similar title, was different from his other job in that he felt inadequate in terms of being able to handle the job. As such this, no doubt, lowered his self-esteem to the point where depression set in once more. Therefore we are dealing with a patient who has had a long-term history of chronic intermittent depression, possibly of the manic-depressive type, when considering his family history . . . but with an exacerbation of a depression possibly in part caused by the job description which he voluntarily took on during the month of March 1978 and for 13 months preceding his disability period which commenced in April of 1979. Therefore, by way of exacerbation, the job situation must be considered, at least in part, a cause for this patient's period of disability resulting from the recurrence of his depression which had its onset in or about April of 1979. Whether or not such depression required a two year and one month period of recovery cannot be determined by today's evaluation since the patient is sitting at this point in time as a relatively normal individual. In the interim, he moved to Arizona and took a job for a non-governmental company. He also moved from there to Texas and apparently then returned to this area in a governmental position. Therefore, some of this 25-month period was not actually all disability due to depression but probably in part was due to the fact that the patient stayed out of work while looking for some other type of occupation. Having been unsuccessful in finding same, as he put it due to his psychiatric disability, he then returned to government service. In essence, I would attribute the onset of his recurrent depression in April 1979, at least in part by way of exacerbation, to his job situation. I am unable to determine by his evaluation today and a review of the medical records as to when such disability terminated at which time [he] could then be considered able to return to his previous occupation. I believe that a good cutoff point would be when he attempted to obtain non-governmental work for the company to whom he applied in Arizona, having apparently moved to Arizona in or about September of 1980. Thus, this latter date might be the best point in time for cutoff in terms of the patient's recurrent attack of depression which had its onset in April 1979, thus therefore allowing him, at the most approximately one and a half years of psychiatric disability due to the depression. However,

> as mentioned above, I can only estimate the cutoff date since the patient has been seen on only this one occasion."

By letter dated February 11, 1982, the Office medical adviser requested a supplemental report from Dr. Kushner and advised him that "if claimant changed jobs of his own choosing for personal consideration it becomes more difficult to cite the job as the cause of a subsequent condition or aggravation of a preexisting state."

Dr. Kushner reported the following on February 18, 1982:

> "I have reviewed my report of 1/4/82 after receiving your letter of 2/11/82. Indeed, when I dictated my report I was of the impression, as so stated in my report and in your letter, that the patient changed jobs of his own choosing. From the medical standpoint, it is my considered opinion, that the job to which he changed, apparently on a voluntary basis, did affect his psychiatric status somewhat adversely. From the legal standpoint, as alluded to in your letter, if the change in jobs was of the patient's own choosing, then there is less of a relationship between his job situation and an exacerbation of a preexisting condition. However, since the latter statement is one purely of legal rather than medical interest, I would have to defer to the Compensation Courts in making the determination as to a relationship. If the courts rule that a voluntary, self-imposed job situation, which leads to illness, is non-compensatory, then obviously there would be no relationship between his job and his psychiatric problem."

The Office medical adviser reviewed the case record on March 30, 1982 and stated that Dr. Kushner "estimated 18 months of disability from the claimed incident but in [a] supplemental letter further diminished the importance of the voluntary change in jobs as having had causal relationship." The medical adviser further stated that Dr. Kushner had opined there was no relationship between appellant's condition and his federal employment and concluded "Dr. Kushner's report is historically well-conceived but provides no rationale for acceptance of any aspect of employment relationship in development of the depression of 1978." [4]

In response to an Office request for information concerning when he began working for a non-governmental company, appellant stated the following on August 21, 1982:

> "From April 1, 1980 to May 15, 1980 I worked a total of 137 hours for Hector's Motorcycle Sales, Inc., 1200 East 2nd Street, Jamestown, New York 14701 as a motorcycle mechanic helper. My gross

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[4] The medical adviser cited an incorrect date; the date should be 1979.

> wages for this period were $424.70. I also worked on contract on 14 occasions during the period from September 1979 to September 20, 1980 for Automatic Data Processing of Buffalo, Inc., 5500 Main Street, Williamsville, New York 14221 as an Unemployment Insurance Hearing Representative. My gross contract earnings from this employment for this period were $484.30 less my expenses of $149.60 for a net income of $334.70. So, between both types of employment I earned a grand total of *$759.54* during the period I was unable to work for the Federal Government. Both of these firms are non-governmental companies."

Subsequently asked by the Office to state the "exact date in September 1979" he had begun working as a hearing representative, appellant replied that although he became an independent contractor of Automatic Data Processing in September 1979, he did not receive his first assignment until approximately March 1, 1980. Appellant submitted a January 26, 1983 letter from Automatic Data Processing which stated he first represented clients at an unemployment compensation claims hearing "during the week ending March 1, 1980." Appellant also submitted a May 19, 1982 letter from the Office of Personnel Management which noted he had retired on disability on May 4, 1979, been reemployed on December 1, 1981 in a position in federal service equivalent in grade or pay and tenure to the position from which he had retired on disability, and that therefore his entitlement to an annuity terminated effective December 1, 1981.

By letter dated January 13, 1983, the Office advised Dr. Kushner that appellant "was hired in September 1979 as an unemployment insurance hearing representative," and asked Dr. Kushner whether "it [would] appear that he had made an adequate recovery from his depression at that time or do you still believe he had not made a full recovery until September 1980." Dr. Kushner reported as follows on January 18, 1983:

> "In answer to your letter of 1/13/83 I have again reviewed my report addressed to your office of 1/4/82. I also reviewed the information you submitted under cover of your recent letter wherein the patient, Mr. Sroka, states that he was gainfully employed from April 1980 through September 1980 for two different non-governmental employers. In this regard, as described more fully in the last paragraph of my report of 1/4/82, I believe that the patient's psychiatric disability which I felt commenced in April 1979 would then have more properly subsided in September 1979 when considering the type of work for which this patient was employed beginning in September 1979, that is, an unemployment insurance hearing representative. This statement is in keeping with the opinions I expressed in my report of 1/4/82, at which time I had no direct knowledge as to when the patient commenced non-governmental employment following the

> onset of his April 1979 disability. Now knowing such date to be September 1979, I feel that his disability ceased on the latter date."

The Office medical adviser again reviewed the case record and opined that "the disability ceased in September 1979 but it was not due to factors of Federal employment but rather was a recurrence of a preexisting psychiatric state for which previously under therapy."

The Office determined that the report of Dr. Kushner, a Board-certified psychiatrist and impartial specialist, contained sufficient rationale to establish causal relationship and that the period of employment-related aggravation "commenced April 1979 and ended September 1979, the date he was hired by a non-governmental employer."

By compensation order dated March 15, 1983, the Office rejected appellant's claim for compensation beyond September 1, 1979 on the grounds that "claimant's work-related disability has ceased by September 1, 1979."

On the present appeal before the Board appellant asserts that "This [September 1, 1979] cessation date is based solely upon the fact that, as of that date, I entered into a contractual relationship with Automatic Data Processing . . . to represent their clients as needed at New York State Unemployment Compensation Claims hearings." Appellant reiterated that he did not attend any hearings until approximately March 1, 1980 and that from "March 1 to September 20, 1980 I attended 12 hearings and received a total of $386.42 for my services rendered." He contended that the period of temporary aggravation continued beyond September 1979 until May 18, 1981, the date be returned to federal employment, and that he was treated by "a number of psychiatrists," took medication on a continuing basis and was hospitalized twice during the period from September 2, 1979 until October 3, 1980.

The Board finds the case is not in posture for decision.

The only question before the Board is whether the employment-related aggravation of appellant's emotional condition had ceased by September 1, 1979, the date the Office terminated his compensation. The Office relied on the opinion of Dr. Kushner, a Board-certified psychiatrist and neurologist and impartial specialist. However, Dr. Kushner's original report dated January 4, 1982 is based on an inaccurate statement of facts which omitted appellant's intermittent employment during the period September 1979 to September 1980 during which, he stated, he had earned less than $1,000.00. When the Office became aware of such employment, it advised Dr. Kushner merely that appellant had been hired in September 1979 as an unemplovment insurance hearing representative. It submitted to Dr. Kushner appellant's letters concerning this employment, but these were apparently misinterpreted as showing that appellant "was gainfully employed from April 1980 through September 1980 for two different non-governmental employers."

The Board notes the statement of the Office medical adviser addressed to Dr. Kushner that "if claimant changed jobs of his own choosing for personal considerations it becomes more difficult to cite the job as the cause of a subsequent condition or aggravation of a preexisting state." There is no basis in the Federal Employees' Compensation Act, the applicable regulations or Board precedent for such a statement. Determination of legal standards in regard to medical questions presented by a case are outside the scope of expertise of the medical adviser or any other physician involved in a case.[5]

The Board also notes that appellant asserts on appeal that during the period September 1979 until October 1980 he was treated by psychiatrists, was on continuing medication and was hospitalized twice. The case will be remanded for the Office to obtain with appellant's assistance his medical records for this period. The Office should then prepare a detailed accurate statement of accepted facts which includes findings of facts concerning the factors of federal employment and concerning appellant's apparently intermittent non-governmental employment during the period beginning September 1979. The Office should then refer the statement of accepted facts to Dr. Kushner with a copy of his previous reports and request a supplemental rationalized opinion addressing when the temporary aggravation of appellant's emotional condition ceased. The Office should then issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated March 15, 1983 is hereby set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

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[5] See *John A. Snowberger*, 34 ECAB 1262.

In the Matter of CLIFFORD W. KRIPPENDORF *and* DEPARTMENT OF THE ARMY, SAVANNA ARMY DEPOT, Savanna, Ill.

Docket No. 83–1535; Submitted on the Record;
Issued October 21, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether appellant has established that he sustained a loss of wage-earning capacity as a result of his employment-related hearing loss.

This case has previously been on appeal before the Board.[1] The Board's decision and order issued on October 21, 1981 sets forth the facts and history of the case up to that time. In that decision the Board noted that the employing establishment's minimum physical standards for appellant's position included the ability to hear "the whispered voice at 15 feet correctible for each ear." The Board found the case not in posture for decision, and stated:

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[1] 33 ECAB 94.

> "In the present case, the Office failed to fully develop the evidence concerning whether appellant could meet the minimum hearing requirements of the employing establishment's truck driver position.
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> "The record shows that an Office medical adviser speculated that a 25 percent loss of hearing would still enable an individual to meet the hearing requirements of appellant's position. Because the medical evidence was not sufficiently developed to allow him to decide whether appellant was disabled, Dr. Benda was asked to perform a whispered test. In his report of December 21, 1979, Dr. Benda noted that appellant could hear only 40 percent of the words whispered at 15 feet; however, this report was never reviewed for its intended purpose. The Office failed to complete its development of the issue, but simply issued a decision based in part on a January 12, 1976 fit for duty report which did not appear nor was it described in detail, in the record. (footnote omitted)"

The Board remanded the case to the Office of Workers' Compensation Programs for completion of its development of the medical evidence "to determine if appellant's hearing loss physically disqualified or rendered appellant incapable of doing his work."

On remand, the Office obtained a copy of appellant's personnel file. Included was a report of a January 12, 1976 fitness for duty examination performed by Dr. James E. Bagentose of the employing establishment. Dr. Bagentose concluded appellant had no limiting conditions for his job of truck driver, noting "Needs hearing aid, not disabling for truck driver." In reports of fitness for duty examinations done on March 19, 1975 and March 29, 1974 Dr. Bagentose noted that appellant had a moderate bilateral high frequency hearing loss, and concluded that appellant had no limiting conditions for his job.

The Office referred the case record to an Office medical consultant for an opinion whether the medical evidence established that appellant was able to return to work with a hearing aid. In a November 17, 1981 report the medical consultant answered "This becomes a question of laws, rules, and regulations. I know that a driver is readily licensed to drive a private car while wearing a hearing aid; I have no knowledge of the regulations for truck drivers or driving on public or federal property."

The Office referred the case record to a second medical consultant for an opinion whether the medical evidence established that appellant was not able to return to work as a truck driver. In a March 8, 1983 report this medical consultant stated "I fail to find any medical evidence on file that contends that [appellant] was or is not fit for duty as a truck driver (with or without a hearing aid). None of Dr. Benda's M/R's [medical reports] asserts that 'appellant's hearing loss physically disqualified or rendered appellant incapable of doing his work.' "

By a compensation order dated May 31, 1983 the Office rejected appellant's claim for loss of wage-earning capacity on the ground that the evidence established that his "hearing loss did not physically disqualify or render him incapable [of] doing his former work."

The Board finds that the case is not in posture for decision and that further development of evidence is required.

The employing establishment reported that the minimum standard for hearing for appellant's position of truck driver was "hearing the whispered voice at 15 feet correctible for each ear." Dr. Thomas J. Benda, a Board-certified otolaryngologist, performed a whispered voice test of appellant's hearing using a hearing aid on December 21, 1979 which revealed that appellant could hear only 40 percent of the words whispered at 15 feet. As noted in the Board's prior decision, this report was not reviewed for its intended purpose. On remand, the Office should have a physician review this report and render an opinion whether appellant could meet the minimum hearing requirements for a truck driver as set forth by the employing establishment.

The fact that the employing establishment allowed appellant to continue working at his regular job and wages, despite its knowledge of his hearing loss, does not show that appellant had no loss of wage-earning capacity due to his hearing loss. The Board has pointed out that ability to earn, rather than wages actually received, is the test of wage-earning capacity. As the Board stated in the *Tietze* case, "Wages or actual earnings after injury should not be confused with 'wage-earning capacity'; and while the wages earned after injury often may reasonably reflect the ability of the individual to earn, they do not always reflect such ability, as for example, if the employer should because of generosity, special need, or other similar reason pay the employee the same wage as he received at time of injury and thus pay more than employee's capacity would warrant. . ." [2]

Appellant contends on appeal, as he did before the Office, that his hearing loss precludes him from obtaining a state license to drive trucks. This contention, if proven, would show a loss of wage-earning capacity, as the general test is whether his work-related impairment prevents him from engaging in the kind of work he was doing when injured.[3] There is, however, no evidence in support of his contention that he cannot obtain a state license to drive trucks. As appellant has the burden of proving a loss of wage-earning capacity, he should be given an opportunity to submit evidence supporting his contention, which would consist of evidence such as the hearing requirements for the state license needed or a rejection due to his hearing loss of an application for such a license. If appellant submits such evidence, it should be reviewed by a physician for an opinion whether appellant's work-related hearing loss physically disqualifies him or renders him incapable of performing the duties of a truck driver.

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[2] *Elden H. Tietze*, 2 ECAB 38 at 41.

[3] *Phyllis LeVane*, 32 ECAB 51.

The decision of the Office of Workers' Compensation Programs dated May 31, 1983 is hereby set aside and the case remanded to the Office for further action in accordance with this decision of the Board, such further action as the Office deems necessary, and a *de novo* decision.

In the Matter of MARY BEE McCABE, Personal Representative of the Estate of GEORGE S. SAMPAIO *and* DEPARTMENT OF THE NAVY, NAVAL SUPPLY CENTER, Pearl Harbor, Hawaii

Docket No. 83-1425; Submitted on the Record;
Issued October 24, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant, either as representative of the employee's estate or as his widow, is entitled to a schedule award for the employee's loss of hearing impaired at his death.

The employee filed a claim for compensation for an employment-related loss of hearing on October 31, 1974. He had retired March 30, 1973. The claim was rejected by the Office of Workers' Compensation Programs by compensation order dated April 14, 1975 with a finding of failure to show sufficient cause for waiver of the applicable one-year time limit for filing a claim. Subsequently, after reconsideration by the Office under section 8128 of the Federal Employees' Compensation Act, the Office vacated the April 14, 1975 order and by letter decision dated October 19, 1979 found that the employee's claim for compensation for hearing loss was timely filed.

The employee died on October 20, 1980 from causes unrelated to the hearing condition. The Office approved his claim for a 100 percent binaural hearing loss on June 12, 1981.

Appellant claimed entitlement to the employee's schedule award unpaid at his death on the ground that she was his widow and had lived with the employee for seven years prior to his death in a "common-law" marriage relationship. On November 10, 1981 the Office informed appellant that no schedule award had been paid since it did not appear that the deceased employee had any eligible survivors. In a letter to appellant's representative dated November 9, 1982, the Office pointed out she did not meet the legal definition of "widow."

On November 29, 1982 appellant requested reimbursement for the funeral and burial expenses she had incurred as personal representative of the estate. On December 17, 1982 the Office reimbursed burial expenses to the estate in the amount of $800.[1]

By compensation order dated April 8, 1983 the Office rejected appellant's claim finding that the employee's estate had no entitlement to the benefits claimed.

Section 8109 of the Federal Employees' Compensation Act [2] provides that portions of schedule awards unpaid at the death of an employee are payable to the children, widow or widower, or parents in a specified order of precedence. The term "widow" is defined in section 8101(6) of the Act to mean "the wife living with or dependent for support on the decedent at the time of his death, or living apart for reasonable cause or because of his desertion."

It is well-established that questions affecting relationship, such as the validity of marriage or divorce, are determined by the statutory and decisional domestic relations law of the jurisdiction where the alleged marriage took place.[3] In the present case, the laws of Hawaii are applicable. It is noted that the Hawaiian law does not recognize common law marriages.[4] Hawaii statutory section 572-1(7) provides:

> "It shall be in no case lawful for any persons to marry in the state without a license for that purpose duly obtained from the agent appointed to grant marriage licenses." [5]

The Board finds that appellant has failed to establish that she is the widow of the deceased employee as she does not come within that class of beneficiaries as defined by section 8109. The state laws of Hawaii do not recognize common law marriages. Since she is not the "widow" of the employee she is not entitled to the unpaid portion of his schedule award.

The Board further finds that only those classes of persons specifically named in section 8109(a)(3)(D) of the Act are eligible for compensation due under a schedule award and unpaid at the time of the employee's death. When Congress made provision for a schedule of compensation for the total or partial loss of a member or function of the body in 1949,[6] it made clear that in the absence of any surviving specified beneficiaries the unpaid schedule award would lapse.

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[1] 5 U.S.C. section 8134(a); 5 U.S.C. section 8109(a)(3)(D)(v).

[2] 5 U.S.C. section 8109.

[3] Larson, *The Law of Workmen's Compensation*, section 62 (Vol. 2 1982); *Marolyn M. Videto*, 23 ECAB 207; *Eugene W. Ganczak*, 30 ECAB 958.

[4] Hawaii Atty. Gen. Op. 73-5.

[5] Hawaii Rev. Stat. section 572-1(7)(1976). Hawaii state statutes also require a valid marriage ceremony by a person authorized to conduct such ceremonies.

> "Should there be no such beneficiaries or should they die before receiving full payment, any balance remaining could be used to defray the employee's burial expenses. Any further balance not so applied would lapse. The disposition of unpaid schedule awards is provided for in a manner similar to that in New York Law and Longshoremen's Act." [7]

The decision of the Office of Workers' Compensation Programs dated April 8, 1983 is affirmed.

In the Matter of CHARLES D. THOMPSON *and* DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT AGENCY, Washington, D.C.

Docket No. 83–1384; Submitted on the Record;
Issued October 24, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant has more than a 32 percent employment related loss of wage-earning capacity effective November 5, 1981 based on his capacity to perform the duties of a personnel worker.

On August 16, 1971 appellant, then a 27-year-old special agent trainee, injured his left elbow in a fall during judo training. He was examined on August 24, 1971 by Dr. Bruce Butler, a Board-certified orthopedic surgeon, who noted that appellant's "left olecranon bursa is slightly enlarged from repeated trauma of judo training but there is no acute problem present. He has a full range of elbow motion." Dr. Butler diagnosed "olecranon bursitis, traumatic, minimal," noted that appellant continued to work full time, and recommended that appellant be reevaluated when he reported to his permanent duty station in San Francisco, California.

On October 6, 1971 appellant was examined by Dr. Robert L. Brown, a Board-certified orthopedic surgeon with the San Francisco Public Health

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[6] October 14, 1949, sec. 104, 63 Stat. 855.

[7] S. Rept. No. 836, 81st Cong., 1st sess, Committee on Labor and Public Welfare at p. 18. Also H. Rept. No. 729, 81st Cong., 1st sess. Committee on Education and Labor at p. 8.

Service (PHS) Hospital. In a report on that date, Dr. Brown noted that x-rays of the left elbow revealed "evidence of old changes which have been there obviously a long time," and indicated that there was "some spurring of the radial head and the articular surface of the humerus proximally." He concluded:

> "It is obvious, although he does not give a history of prior injury to the left elbow, that he has had a problem there. He shows signs of early traumatic arthritic changes even as of this date and from time to time he may have symptoms about the elbow depending upon how much stress is applied to the joint."

Appellant continued to complain of pain and restriction of motion in his left elbow until June 13, 1972, when he was hospitalized in the San Francisco PHS Hospital under the care of Dr. Aldis Baltins, a Board-certified orthopedic surgeon, who perfomed an arthrotomy on appellant's left elbow (with excision of joint mice and excision of some hypertrophic synovium) on June 15, 1972. In a June 22, 1972 report, Dr. Baltins noted that appellant had an excellent recovery from the surgery and described the prognosis as "excellent." In a July 17, 1972 report, an associate of Dr. Baltins at the PHS Hospital, Dr. Kretschmer, stated that appellant was released for his regular work on July 12, 1972.

The Office of Workers' Compensation Programs referred appellant to Dr. Marvin H. Bloom, a Board-certified orthopedic surgeon, for evaluation of any permanent impairment of his left elbow due to his August 16, 1971 employment injury. Based on a December 21, 1972 report from Dr. Bloom and other medical evidence, the Office on January 30, 1973 granted appellant a schedule award for a ten percent permanent impairment of his left arm, entitling him to 31.2 weeks of compensation, with the award running from December 21, 1972 through July 27, 1973.

Prior to the expiration of his schedule award, appellant requested compensation for an employment-related loss of wage-earning capacity due to his work injury. The Office provided Dr. Bloom with a copy of appellant's position description and a description of the physical requirements of the position. In a July 9, 1973 report, Dr. Bloom stated:

> "I reviewed my report of 12-21-72 and minimal loss of motion about the left elbow is noted. The patient was having no pain and his chief problem from his point of view was a lack of total motion at the left elbow although I felt that the loss of motion was a very minimal one on a functional basis. There were mild posttraumatic degenerative changes at the left elbow on x-ray.
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> "In reviewing the record and in reviewing the patient's job description, I would feel that the proper determination in this case would be that this man is able to perform full duties as described in the job description and physical requirements."

An Office medical adviser reviewed the case record. In an October 30, 1973 report, he concurred with Dr. Bloom, stating that "the residual impairment of the left elbow is not disabling for work for which this individual has been trained.

By compensation order dated November 20, 1973, the Office rejected appellant's claim for compensation for loss of wage-earning capacity on the ground that he "has not sustained loss of wage-earning capacity by reason of his work injury."

Appellant requested a hearing before an Office hearing representative and submitted in support of his request a December 19, 1973 report from Dr. David D. Charmak, an orthopedic surgeon, who noted that factors of disability included appellant's subjective complaints, limitation of full extension of the left elbow, tenderness over the olecranon process, and one-half inch of atrophy. Dr. Charmak also noted that x-rays taken on November 5, 1973 revealed "minimal hypertrophic changes of the coronoid process and the trochlea."

The case was then reviewed by the Office's deputy medical director. In a February 27, 1974 report, he concluded that appellant had a 15 percent permanent impairment to his left arm, rather than the 10 percent previously awarded. Concerning appellant's ability to perform the duties of the position he held when injured, the deputy medical director stated:

> "In view of the rigorous physical requirements of special agents and claimant's continuing complaints of pain in elbow, I believe he would be disqualified."

In a March 18, 1974 decision, finalized March 26, 1974, the Office hearing representative set aside the November 20, 1973 Office decison, finding that appellant should be granted an additional schedule award and that he was precluded by residuals of his employment injury from performing the position he held when injured. The hearing representative remanded the case to the district office of the Office for issuance of an amended schedule award and for a *de novo* determination on appellant's entitlement to compensation for loss of wage-earning capacity.

On remand, the Office proceeded to develop the case in an effort to determine appellant's loss of wage-earning capacity. In a June 13, 1974 memorandum, an Office rehabilitation adviser stated:

> "I feel at this time that the job classification of Personnel Worker, D.O.T. [Department of Labor's *Dictionary of Occupational Titles*] 166.088 through 166.268 is most appropriate for this claimant when considering the facts of his age, education, work background and physical restrictions.
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> "Minimum wage for this occupation remains at $200 per week. Claimant lives within commuting distance of San Francisco and employment of this type is reasonably available in this area."

By letter decision dated June 25, 1974, the Office determined that appellant had a 32 percent loss of wage-earning capacity effective November 14, 1973 based on his capacity to perform the duties of a personnel worker. By compensation order dated July 1, 1974, the Office amended its January 30, 1973 schedule award, granting appellant an award for an additional five percent permanent impairment of his left arm, with the period of the total 15 percent award extending from December 21, 1972 through November 13, 1973.

In an undated statement which appears, from its placement in the case record, to have been received by the Office in April 1978, appellant requested that the Office discharge its obligation to him by granting a lump-sum payment. After substantial development of the record on the issue whether the Office should grant appellant a lump-sum payment, an Office claims examiner in a March 12, 1981 memorandum recommended that the request for a lump-sum payment be approved. The case record was then transmitted to the national office of the Office for the final approval of the lump-sum payment, as required by Office procedures.[1]

By compensation order dated November 12, 1981, the Office determined that appellant had a two percent loss of wage-earning capacity effective November 5, 1981, based on his ability to perform the duties of a superintendent, plant protection. In a January 13, 1982 decision, the Office amended the November 12, 1981 decision to reflect a change in the compensation rate (on the ground that appellant had no dependents).

Appellant requested a hearing before an Office hearing representative, which was held on April 15, 1982. By decision dated and finalized on July 30, 1982, the hearing representative affirmed the Office's November 12, 1981 and January 13, 1982 decisions.

Appellant filed an appeal with this Board and submitted in support of his appeal an October 8, 1982 memorandum from Joe Preston of the California Employment Development Department.

By a January 20, 1983 order, the Board noted that it could not consider the October 8, 1982 memorandum because section 501.2(c) of its Rules of Procedure limits review to evidence which was in the case record before the Office at the time of its final decision.[2] The Board accordingly remanded the case to the Office for consideration of this new evidence and a *de novo* decision.[3]

Appellant submitted the October 8, 1982 memorandum from Mr. Preston to the Office. In the memorandum, Mr. Preston stated:

> "We have *no* data on supervisory positions. Any estimate of earnings and/or job availability for supervisory personnel would be an edu-

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[1] *FECA Procedure Manual*, Chapter 2-1300, paragraph 6(a).

[2] 20 CFR 501.2(c).

[3] Docket No. 83-312.

> cated guess on my part, and clearly stated as such when information was requested, as I'm sure I would have done with such a request from [the Office]." (emphasis in original)

Appellant submitted a March 3, 1983 affidavit from Mr. Preston, who stated:

> "I, Joseph Preston, am an employee of the Employment Development Department of the State of California. I have been an employee here for seven years. The injury concerning the availability of a security supervisor position, paying $30,000 per year, is a nonexistent position. The only jobs about which I have any knowledge is that of a security guard position, paying about $3.50 per hour.
>
> "I make this affidavit under penalty of perjury on this date to Mr. Charles Thompson, who explained that if this job is available, he would want it."

In an April 12, 1983 letter, the Office requested further information from the California Employment Development Department on the availability of the position of superintendent, plant protection. In an undated response received by the Office on April 15, 1983, Ruth Kavanagh of that office replied:

> "We do not have data available on most small occupations. Some of the larger employers shown in the enclosed size of firm reports *might* hire a plant protection superintendent. You could also call our San Rafael office, but it is doubtful that they could help you much."

In an April 22, 1983 memorandum, an Office rehabilitation specialist stated:

> "It is my opinion that the position of superintendent, plant protection, could not be considered to be reasonably available in the San Francisco area. Very little manufacturing is done in the area, and few, if any, industrial plants large enough to employ a plant protection superintendent are within the commuting area of Sausalito, California [appellant's place of residence]."

In a May 6, 1983 memorandum, an Office Chief of Claims stated:

> "Based on information submitted from EDD [Employment Development Department] and Rehabilitation review, I find that job of Superintendent, Plant Protection is and was not reasonably available. Claimant will be restored to previous rating."

By letter decision dated May 9, 1983, the Office determined that the job of plant protection superintendent "was and is not reasonably available within commuting distance" of appellant's residence and restored his compensation to the "loss of wage-earning capacity amount based on your wage-earning capacity as a personnel worker." In a May 24, 1983 letter, the Office confirmed the May 9, 1983 decision and informed appellant of his compensation rate.

On appeal to the Board, appellant contends that he is entitled to compensation for temporary total disability, rather than compensation for a 32 percent loss of wage-earning capacity based on his ability to perform the duties of a personnel worker.[4]

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[5]

The Board finds that the weight of the evidence fails to establish that appellant has more than a 32 percent employment-related loss of wage-earning capacity effective November 5, 1981 based on his capacity to perform the duties of a personnel worker.

In the present case, the Office on June 25, 1974 determined that appellant had a 32 percent loss of wage-earning capacity effective November 14, 1973 based upon his capacity to perform the duties of a personnel worker. This determination remained undisturbed until November 12, 1981 when the Office, after developing the case record in response to appellant's request for a lump-sum payment, determined that appellant had only a two percent loss of wage-earning capacity effective November 5, 1981, based on his ability to perform the duties of a superintendent, plant protection. Subsequently, on May 9, 1983, based on evidence submitted by appellant, the Office determined that its November 12, 1981 decision was erroneous, and restored appellant's compensation to his prior 32 percent loss of wage-earning capacity. Accordingly, the issue is whether appellant is entitled to compensation for more than a 32 percent loss of wage-earning capacity.

To justify a modification of an established loss of wage-earning capacity, one of the following must occur: 1) a material change in the nature and extent of the injury-related condition; 2) the employee has been retrained or otherwise vocationally rehabilitated; or 3) the original determination was, in fact erroneous. Since neither of the first two possibilities is applicable, appellant's contention must be that the original determination was erroneous. There is no evidence in the record, however, which demonstrates that the Office's June 25, 1974 decision was erroneous. The Office carefully considered appellant's work restrictions, chose the position of personnel worker as the position which suited his capabilities, and verified the reasonable availability of the position within appellant's commuting area. There is no evidence in the record which demonstrates that appellant was not capable of performing the position, nor is there any evidence demonstrating that the position was not available.

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[4] Appellant requested on appeal that the Office's decision "to subtract monies from my backpay" to recoup an overpayment (due to payment of compensation to appellant at the augmented rate rather than the basic rate) be reviewed by the Board. It is unclear from the record as transmitted to the Board whether an overpayment has been declared and, if so, whether appellant has been given an opportunity to request an oral hearing on the issues of fault and waiver. On return of the case record, the Office should issue a final decision on this issue.

[5] *Elmer Strong*, 17 ECAB 226.

The May 9, 1983 decision of the Office of Workers' Compensation Programs, formalized on May 24, 1983, is hereby affirmed.

In the Matter of PATRICK J. WALLACE *and* U. S. POSTAL SERVICE, POST OFFICE, Clarksburg, West Va.

Docket No. 83-1606; Submitted on the Record
Issued October 25, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellant's disability after October 14, 1982, due to the condition of Ewing's sarcoma, is causally related to his June 7, 1982 employment injury.

Appellant, a 27-year-old mail clerk, filed a claim on June 28, 1982 stating that he injured the lower right side of his back and his right leg while lifting and pushing machinery on June 7, 1982. An x-ray report dated June 8, 1982 from Dr. P. Van Dyke stated that the alignment of the vertebral bodies was normal and no abnormalities of vertebral bodies, interspace and pedicles were identified, the impression being of a normal lumbar spine. An attending physician's report dated July 1, 1982 from a Dr. Elliott stated that appellant injured his back at work on June 7, 1982; the diagnosed condition was mild lumbosacral strain.

On July 14, 1982, appellant filed for recurrence of disability for "pain in right leg—lump on back." He did not stop working.

Dr. J. M. Dauphin, a general surgeon, submitted a medical report dated October 12, 1982, stating he had first seen appellant on August 20, 1982, for the condition of low back pain with sciatica to midleg of two months duration. Dr. Dauphin further stated that appellant was treated with rest and analgesics, showing slight improvement when seen again on September 10, 1982; Dr. Dauphin indicated that appellant's leg pain was gone when he was examined on October 11, 1982 and that appellant had only mild intermittent back pain which did not interfere with his activities.

Appellant filed notice of recurrence of disability commencing October 14, 1982; his condition was described as "numbness in leg and shoulder —also numbness in right jaw." He stopped work the same day.

By letter dated November 18, 1982, the Office of Workers' Compensation Programs requested a detailed, narrative medical report from appellant's attending physician as well as additional information on appellant's physical condition and an explanation as to why appellant believed his current condition was related to the original injury.

A November 8, 1982 report from Dr. George E. McCarty, a general practitioner, stated that appellant was not able to resume light work and that he had been transferred to another hospital for treatment of polyostotic bone disease, probably malignant.

By compensation order dated December 14, 1982, the Office denied appellant's claim for continuation of pay during his absence from work from October 14, 1982 to November 27, 1982 on the ground that the medical evidence of record did not support causal relationship between the June 7, 1982 work injury and his condition beginning October 14, 1982.

Appellant requested reconsideration, stating his belief that there was a relationship between his condition of Ewing's sarcoma and his original injury due to lifting and straining. He submitted a November 30, 1982 report from Dr. Robert N. Raju containing an impression of "Ewing's sarcoma involving the skull bones, both humeri and femor a S/P [shunt procedure] surgical fixation of the right hip and chemotherapy." A December 9, 1982 report from Dr. Reginald P. Pugh, a Board-certified internist specializing in hematology and oncology, provided an impression of "multicentric Ewing's sarcoma of the bone. Readmission for continuing chemotherapy."

A January 17, 1983 letter from Dr. Bernard L. Zidar, a Board-certified internist specializing in hematology and oncology, stated that appellant was currently on a chemotherapy program necessitating periodic admissions to the hospital for treatments. Dr. Zidar commented:

> "The cause of Ewing's sarcoma of bone remains unknown."

The case record was evaluated by an Office medical adviser on April 20, 1983. He stated that the diagnosis was established as Ewing's sarcoma and was not work-related. He evaluated the case as follows:

> "The current cause of the claimant's symptoms and impairment is Ewing's sarcoma; this is a cancer of the supporting structures within the bone marrow, it usually occurs in white males, ages 4-25, . . . The cause is unknown. There [are] no reports in orthopedic textbooks that it is precipitated by trauma. None of the medical reports

> in the file support causal relationship. The [appellant's] back pain from the [lumbosacral strain] ceased to be a cause of impairment on October 11, 1982, according to Dr. J. M. Dauphin. In summary there is no medical evidence in the file to support causal relationship of the sarcoma to the work injury."

By compensation order dated May 4, 1983, the Office denied modification of its December 14, 1982 decision on the ground that the evidence submitted in support of the application for review was found to be lacking substantial probative value and was not sufficient to warrant review of the prior decision.

The Board finds that the medical evidence does not establish that appellant's disability commencing October 14, 1982, due to Ewing's sarcoma, is causally related to his June 7, 1982 employment injury.

Dr. Elliott's attending physician's report dated July 1, 1982 stated that appellant injured his back at work on June 7, 1982, the diagnosis being mild lumbosacral strain. According to Dr. Dauphin's October 12, 1982 report, appellant's leg pain was gone and he had only mild intermittent back pain which did not interfere with his activities.

Dr. McCarty's November 8, 1982 report made no mention of the June 7, 1982 employment injury, stating only that appellant was unable to work and was being treated for bone disease.

None of the reports which accompanied appellant's request for reconsideration were supportive of appellant's claim that his Ewing's sarcoma was causally related to his June 7, 1982 employment injury. The reports submitted by Drs. Pugh and Raju made no mention of the June 7, 1982 employment injury and did not address the cause of appellant's condition. Dr. Zidar stated in his January 17, 1983 letter that the cause of Ewing's sarcoma is unknown. The Office medical adviser negated causal relation noting the absence of any medical evidence in support of causal relation and stating there is no indication in the medical literature that Ewing's sarcoma is precipitated by trauma.

On appeal, appellant alleges that since the cause of the disease is not known, he should be given the "benefit of the doubt" that it could have been caused by trauma. The Board notes that the fact that the etiology of the disease is unknown or obscure does not shift the burden of proof to the Office to disprove an employment relationship. Neither does the absence of a known etiology for his condition relieve appellant of the burden of establishing a causal relationship by the weight of the evidence, which includes affirmative medical opinion based on the material facts with supporting rationale.[1]

The decisions of the Office of Workers' Compensation Programs dated December 14, 1982 and May 4, 1983 are hereby affirmed.

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[1] *Melvin E. Koon*, 32 ECAB 258; *John F. Curran*, 32 ECAB 647.

In the Matter of JOHN D. POPE, PH. D. *and* DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, MCNEIL ISLAND, Steilacoom, Wash.

Docket No. 83-318; Submitted on the Record;
Issued October 26, 1983

Order Granting Petition for Reconsideration of Prior Decision, and Decision and Order

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant's respiratory condition was causally related to factors of his federal employment after November 30, 1974.

On February 10, 1983 the Board issued its decision and order in the above-entitled case. In that decision the Board affirmed a November 19, 1982 Office decision which found that appellant had no employment-related disability after November 30, 1974. On February 25, 1983 appellant filed a petition for reconsideration of the Board's February 10, 1983 decision. In his petition, appellant contended that he had sent a 10-page "brief and argument in support of claims" to the Board on December 20, 1982 via certified mail; that the Board did not receive this pleading before issuing its February 10, 1983 decision; and that the Board's February 10, 1983 decision contained errors of fact sufficient to require reconsideration by the Board.

Since the February 10, 1983 decision was issued prior to receipt by the Board of appellant's arguments on appeal, and since appellant's petition for reconsideration raises possible errors of fact in the February 10, 1983 decision, the petition is hereby granted. The Board will now proceed to issue a new decision on appellant's current appeal.

This is the third time appellant's case has been appealed to the Board. In a decision dated March 23, 1982, the Board found that the Office of Workers' Compensation Programs acted improperly when it rejected appellant's claim—in effect rescinding his compensation award—on the basis that he failed to offer sufficient evidence linking his respiratory condition to factors of his employment, either on the basis of causation or material aggravation. The Board pointed out that the Office had wrongly placed on appellant the burden of proof and had failed to produce medical evidence such as to warrant a change in its previous finding that appellant sustained an employment-related aggravation of obstructive pulmonary disease. The Board directed that, on remand, the Office should refer appellant, along with the case record and statement of accepted facts, to an appropriate impartial specialist for an opinion as to whether appellant's current condition was causally related by aggravation to factors of his federal employment.[1]

On remand, the Office referred appellant, along with the complete medical case record and statement of accepted facts, to Dr. David L. Luterman, a Board-certified pulmonary specialist. Dr. Luterman examined appellant on July 22, 1982 and submitted an August 11, 1982 report along with copies of the results of pulmonary function and laboratory studies. He reviewed appellant's medical history and the findings of previous medical reports and noted that appellant had an underlying upper and lower respiratory condition which preexisted his job at the employing establishment in 1973. Dr. Luterman stated that his review of the records as well as the results of his own testing indicated continued improvement of lung function over the years with only minor abnormalities, and he noted that appellant was working. He reported the following:

> "Dr. Pope probably had reversible airways disease antedating his employment at McNeil Island. It is quite possible, and by history quite likely, that something in the environment at McNeil Island caused increased respiratory symptoms. Although other physicians have presumed an immune mechanism (an inhaled allergin), I feel that another mechanism is more likely. Patients with reversible airways disease have hyperreactive airways and may be sensitive to many inhaled irritants that would not affect people without hyperreactivity. The fact that he had difficulty within days of arriving at McNeil Island leads me to believe, that if an offending agent was present, it was not an allergin. There was not a sufficient 'latent period' to develop an allergic response to an agent to which he was never exposed. I would imagine that some other form of nonspecific irritant, such as dust or fumes, was present and irritated an already susceptible respiratory tract. Unfortunately, lung function, inhalation challenges, or other attempts to characterize the process at that time were not performed. In fact, the first test of lung function was performed in January, 1975.
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> "Currently there is only mild abnormalities of lung function. Prebronchodilator spirometry was very difficult to obtain. After repeated attempts I was not satisfied that I was receiving maximum patient effort. The results reported are the best obtained. Post-bronchodilator studies show only a mild abnormality, that being a reduction in midflow (FEF 25% – 75%). Because of the failure to achieve a maximum effort, I cannot assess the effects of the inhaled bronchodilator. Lung volumes and diffusion capacity studies were in the normal range. I would interpret the lung functions as showing,

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[1] The background facts of this case, including a discussion of the various medical reports, are set out in the Board's prior decisions. 29 ECAB 643; 33 ECAB 810.

at worst, a very mild obstruction to air flow, possibly secondary to reactive airways. There is no evidence of emphysema. This degree of lung abormality does not correlate with the symptoms of which Dr. Pope complains. Shortness of breath at rest should not be present with such mild abnormalities. I make the following two conclusions from the observations I made in my office: (1) Dr. Pope's symptoms do not necessarily correlate with objective measurements of pulmonary function and (2) Prior pulmonary function testing may not be accurate because of Dr. Pope's failure to give a maximum effort.

"Dr. Pope had preexisting upper and lower airways disease prior to his employment at McNeil Island. It is quite conceivable that environmental conditions at McNeil Island caused transient worsening of his lung function. In view of such a relatively short exposure, this transient effect should have cleared within weeks to months. An IgE level obtained during his visit to my office was very low at 5.4. u/ml. Although this does not definitely rule out an ongoing IgE mediated allergic reaction, it gives no support to it. As mentioned above, pulmonary function testing, at the worst, shows only a mild abnormality. On examination in my office he had a blood pressure of 140/96, pulse 84/minute, respirations of 18/minute and a temperature of 98.8 degrees fahrenheit. His weight was 226 pounds. His nasal mucosa was reddened and raw appearing. His chest had inspiratory wheezes scattered throughout the lung fields. There was slight reduction of breath sounds during expiration. His heart had a regular rhythm without murmurs or rubs. There was no palpable adenopathy. His abdominal exam was normal.

"One can say that regardless of the events at McNeil Island, presently his lung function is unaffected by the events that occurred in 1973. He had underlying disease before employment at McNeil Island. There is no reason to expect Dr. Pope's prior lung condition to disappear even though he may have been transiently affected by the environment on McNeil Island in 1973. There is no convincing evidence at present to suspect that it is playing any role in his disease process, as it exists today.

"His prognosis is difficult to assess. Presently, he has objective evidence of extremely mild disease, which should not be associated with significant symptoms. Dr. Pope, however, has many symptoms for which I cannot find objective evidence. His disease may improve, may stay stable, or may worsen. Patients with reactive airways have a variable course. Treatment is directed at the activity of disease that is present at the time. His trend over the past several years, however, has been of improving lung function. From a pulmonary standpoint, as assessed in my office on July 22, 1982, he should be able to maintain a full day of employment. Certain peculiarities of his

> job may limit his activity. For instance, he claims that after several hours he becomes hoarse and cannot maintain himself as a psychotherapist. In review of his file, I see no objective evidence of vocal cord dysfunction. In my office he maintained normal speech. On the day after his appointment with me, he called me after 5:00 p.m. I returned his call. On the telephone he also maintained normal speech."

The case record was referred to an Office medical adviser for review. He submitted a report dated September 19, 1982 in which he concurred with Dr. Luterman's findings and conclusions. The medical adviser opined that any temporary aggravation of appellant's preexisting condition would have cleared within "weeks to months . . . Certainly by 11/30/74 no remaining aggravation existed." [2]

By compensation order dated November 19, 1982, the Office rejected appellant's claim for additional compensation subsequent to November 30, 1974 upon a finding that he had no employment-related disability subsequent to that date.

The Board finds that the weight of the medical evidence is represented by the rationalized opinion of Dr. Luterman and establishes that appellant's employment-related disability had ceased no later than July 22, 1982, the date of his examination of appellant. However, the case is not in posture for decision with respect to the period prior to July 22, 1982.

In its March 23, 1982 decision, the Board, finding that the Office had failed to produce medical evidence which would warrant a change in its previous finding that appellant sustained an employment-related aggravation of obstructive pulmonary disease, remanded the case for referral of appellant, a statement of accepted facts and medical reports from the case record "to appropriate Board-certified specialists, for an examination of all the medical aspects of this case." [3] The Board emphasized that "these evaluations should include opinions as to whether appellant's current condition was causally related by aggravation to factors of his employment insofar as they can be identified, and, if so, the extent of any such aggravation." [4]

On remand, the Office referred appellant to Dr. Luterman, a Board-certified pulmonary specialist. In his August 11, 1982 report, Dr. Luterman concluded that as of the date of his examination (July 22, 1982) appellant had "objective evidence of extremely mild disease, which should not be associated with significant symptoms" and that, from a pulmonary perspective, appellant "should be able to maintain a full day of employment." Dr. Luterman also concluded that "there is no convincing evidence at present to suspect that [the environment to which appellant was exposed at work in 1973] is playing any role in his [pulmonary] disease process, as it exists today." Thus, Dr. Luterman concluded that appellant did not have employment-related disability as of the date of his examination, July 22, 1982, and provided medical rationale supporting this conclusion.

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[2] Appellant ceased working at the employing establishment on November 30, 1973, one year earlier.

[3] 33 ECAB 810.

[4] *Id.*

Concerning the question of the duration of any temporary aggravation of appellant's obstructive pulmonary condition by factors of his employment, Dr. Luterman stated that "it is quite conceivable that environmental conditions at McNeil Island caused transient worsening of his lung function," and concluded that "in view of such a relatively short exposure, this transient effect should have cleared within weeks to months." Dr. Luterman provided no supporting medical rationale for this conclusion, nor did he attempt to explain why his conclusion differed so significantly from the many physicians and specialists who concluded that appellant was temporarily totally disabled through December 31, 1976.[5] Furthermore, the Office medical adviser in his September 19, 1972 report also neglected to provide any medical rationale supporting his selection of November 30, 1974 as the date appellant's employment-related aggravation of his obstructive pulmonary condition ceased. Since no medical rationale for selecting the date of November 30, 1974 as the date of termination of disability has been provided, the Office has not met its burden of proof on this issue and the case must be remanded for further development.

On remand, the Office should refer appellant, along with the case record (or at least the medical reports of record) and a statement of accepted facts, back to Dr. Luterman for a rationalized medical opinion concerning when the employment-related aggravation of appellant's obstructive pulmonary condition ceased. The Office should authorize Dr. Luterman to consult other specialists, if he deems it appropriate, and should request Dr. Luterman's rationalized medical opinion whether appellant may have been only partially disabled for any period prior to the date the aggravation ceased. In addition, Dr. Luterman should be requested to discuss specifically the June 18, 1979 and July 11, 1979 reports of Dr. Mitchell Kuppinger, and the September 11, 1979 report of Dr. William S. Horn, which provide substantial support for appellant's contention that the employment-related aggravation of his pulmonary condition extended beyond November 30, 1974.[6] After such further development as many be deemed necessary, the Office should issue a *de novo* decision on all aspects of appellant's case.[7]

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[5] As noted in the Board's March 23, 1982 decision in Docket No. 82-71 (slip opinion at 8), the Office in an October 12, 1979 decision advised appellant that "it has been determined that we have accepted as related to your federal employment a temporary aggravation of obstructive pulmonary disease." The Office subsequently paid appellant compensation for temporary total disability for the period December 3, 1973 through December 31, 1976.

[6] These reports are quoted extensively in the Board's March 23, 1982 decision in Docket No. 82-71.

[7] In light of the Board's action in this decision, there is no question of overpayment in appellant's case at this time.

The February 10, 1983 decision of this Board is set aside; the November 19, 1982 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded to the Office for further action consistent with this decision.

In the Matter of JOHN M. TORNELLO *and* U.S. POSTAL SERVICE, POST OFFICE, Far Rockaway, N.Y.

Docket No. 83–1276; Submitted on the Record;
Issued October 26, 1983

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant was disabled from work for the period October 8, 1981 through January 17, 1982 as a result of his March 17, 1981 employment injury.

On March 17, 1981, appellant, then a 46-year-old letter carrier, was injured when an elevator door struck him in the head as he was pushing a skid out the elevator. According to a statement submitted by his supervisor to the Office of Workers' Compensation Programs, appellant stated soon after the injury that he felt "all right," but wanted to report the injury in case problems developed.

Appellant was examined on March 20, 1981 by Dr. Joseph Lamanna, a general practitioner, who diagnosed head contusion and trauma and vertigo on attending physician's reports dated March 20. Dr. Lamanna diagnosed head trauma with cerebral concussion in an April 24, 1981 report. Dr. Burton S. Diamond, a Board-certified neurologist, diagnosed post-traumatic headaches in an April 28, 1981 attending physician's report and post-traumatic syndrome in a May 1, 1981 attending physician's report.

Appellant received continuation of pay for his absence from work from March 18 through 22 and from April 13 through May 22, 1981. He filed periodic claims for continuing compensation covering the period from June 15 through September 13, 1981, and he received compensation for temporary total disability for that period.

Dr. Diamond performed an electroencephalogram and stated in an August 3, 1981 report that the results were normal. He further stated as follows:

> ". . . The patient still complains of episodic vertigo and he said that he even had one episode of double vision. This occurs mostly when he bends down and he gets up quickly or engages in physical activity.

> "A repeat neurologic exam at this time reveals no nystagmus, normal posture and normal tandem walking, no ataxia.
>
> "IMPRESSION: Patient still exhibits some traumatic labyrinthitis. I can't objectify it. I feel a CAT [computerized axial tomography] scan is in order . . . "

A CAT scan was performed by Dr. Lucille P. Taverna, Board-certified in diagnostic radiology, who stated as follows in an August 10, 1981 report:

> "Computed tomography of the posterior fossa was performed with and without contrast material.
>
> "The fourth ventricle was normal in size and position, with no abnormal areas of absorption or enhancement noted in the posterior fossa. The suprasellar cistern was partially visualized and was normal. The third and lateral ventricles were normal in size and position. No abnormal areas of enhancement were noted after the intravenous administration of contrast material.
>
> "Mild enlargement of the sylvian fissures and cortical sulci was noted, compatible with mild cortical atrophy.
>
> "High-resolution, magnification views of the petrous pyramids reveal the internal auditory canals to be within normal limits bilaterally measuring 6.5 mm [millimeters] on the left and 6 mm. on the right. No evidence of bone destruction was demonstrated.
>
> "IMPRESSION: Mild cortical atrophy, compatible with the age of the patient. Normal internal auditory canals."

Appellant was examined by Dr. James M. Pomarico, a Board-certified otolaryngologist, who stated in an August 27, 1981 report that appellant's dizzy spells were "not true vertigo" and never lasted more than a "few moments." He noted that appellant had had chronic mastoiditis in 1955 while serving in the Navy, and a mastoidectomy was performed in January of that year without post-operative "difficulty." He stated that an audiogram revealed a binaural hearing loss at a frequency of 8,000 cycles per second.[1] The doctor stated that appellant could not "reproduce dizziness" in tests, and recommended that he return to his regular duty.

In an August 31, 1981 report, Dr. Diamond stated that appellant was no longer experiencing vertigo, that his neurological examination was negative, and that he could return to work on September 14. Appellant returned to work on that date and worked until October 8, 1981, when he claimed a recurrence of disability due to the March 17, 1981 injury.

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[1] Appellant is receiving disability benefits from the Veterans Administration for a service-connected hearing loss, apparently related to the mastoiditis. In an application to the VA for disability benefits dated November 19, 1971, appellant stated that he had "dizzy spells in which I have fainted occasionally," and headaches in the morning with dizzy spells."

He remained off work until January 18, 1982, when he returned to light duty.

By letter dated November 6, 1981, the Office notified appellant that there was no medical evidence supporting causal relationship between his alleged disability and his March 17, 1981 injury, and that his claim would be denied unless further evidence were forthcoming.

In a November 20, 1981 report, Dr. Lamanna stated as follows:

> ". . . On 9/14/81 Mr. Tornello returned to work stating that he felt better but on 11/6/81 he came back to me again because he lost his sense of equilibrium while working and could not function to do his normal duties. I suggested to him that he resume a period of rest and to see Dr. Diamond for up-to-date neurological consultation.
>
> "At this time the situation is as follows: The patient does not show any objective signs of illness but subjectively he constantly complains that vertigo is affecting him anytime he tries to move around and do his work. My decision to suggest this patient's disability is based only upon his complaints.
>
> "For further information and clarification please obtain from Dr. Burton Diamond his late observation and diagnosis. Until the patient stops complaining of dizziness and agrees to go back to work I have to give him the benefit of the doubt and ask him to abstain from physical activity."

Dr. Mary McLarnon, an Office medical consultant who is Board-certified in neurology and diagnostic radiology, reviewed the case record and concluded in a December 11, 1981 report that appellant's condition described by Dr. Lamanna in his November 20, 1981 report was not causally related to the March 17, 1981 injury. She stated that appellant's injury was "not sufficiently severe" to cause dizziness nine months later, noting the statement of appellant's supervisor that appellant said he felt "all right" after the injury. She concluded that total disability had terminated as of August 27, 1981, the date of Dr. Pomarico's report.

Dr. Diamond subsequently submitted the following report, dated November 30, 1981:

> "[Appellant was] first seen on April 16, 1981. Apparently on March 17, 1981, he hit the top of his head on a freight elevator while at work. He did not complain of unconsciousness, but he felt nauseous and he had a severe headache. He also complained of vertigo.
>
> "Neurological examination at the time was negative. However, it was felt that he had a post-traumatic vertigo or post-traumatic labyrinthitis. The symptoms improved, however, they never went away completely. He found that on quick motions of the head he had vertiginous sensations and could not work.
>
> "CAT scan done on 8/10/81 with views of the posterior fossa showed

> normal. Patient seen on 11/30/81. Apparently, in the interim he had gone back to work, but it was intolerable because of vertiginous attacks recurring.
>
> "Neurologic examination on the latter date showed nystagmus. Rest of exam negative.
>
> "IMPRESSION: Though there are no objective signs, I believe this patient has a labyrinthine disturbance secondary to head trauma. In most cases it is impossible to find an abnormality on standard x-ray examination. In my opinion this represents a significant disability in the work he does. Prognosis is guarded because I can't tell how long the symptoms are going to last. I do believe it is secondary to the trauma suffered on his job, however . . . "

The Office determined that a conflict of medical opinion existed, and on March 10, 1982 it referred appellant, along with the case record and a statement of accepted facts, to Dr. David M. Eisenberg, a neurologist and impartial medical specialist, to resolve the conflict. Dr. Eisenberg stated in a March 25, 1982 report as follows:

> "I saw John Tornello in neurologic consultation on March 25th, 1982. On March 17th, 1981 he was struck over the superior aspect of his head by a closing freight elevator door. Loss of consciousness is denied. He states that he felt dizzy. Subsequently he complained of headache and dizziness. He returned to work on January 18th of this year and has been working since then. He is performing light duty. He says that when he is physically active he will note some dizziness. His past history reveals a hearing reduction on the left side ever since a mastoidectomy performed on that side in 1955. His medical records were reviewed and it was noted that neurological examination, an EEG and a CAT scan were all normal after the injury. At this time he states that he gets an occasional headache as well as dizziness when he is very active.
>
> "On examination there were no abnormalities of station or gait. Pupils reacted normally to light and in accommodation. Fundoscopic examination revealed sharply outlined optic discs. There was no nystagmus. Visual fields were full by confrontation. There was no facial weakness or asymmetry. Corneal reflexes were equal and active. The tongue protruded in the mid line. Cranial nerves were intact. Deep tendon reflexes were equal and active. There were no pathological reflexes. There were no abnormalities of coordination or sensation.
>
> "He sustained cranial trauma on March 17, 1981 and suffered from a post-traumatic syndrome. He is not currently disabled. Indeed he has been working since January 18th. Very vigorous, rapid work might cause him to feel dizzy. The disability after the March 17th,

> 1981 injury was not contributed to by any preexisting condition. It is not possible for me to state now just when in the past the patient would have been able to return to work. I can only comment that his period of total disability was unusually long for the type of injury sustained."

By letter dated May 24, 1982, the Office requested Dr. Eisenberg to provide a supplemental report with an opinion on whether appellant's disability from October 8, 1981 through January 17, 1982 was causally related to his March 17, 1981 injury. In a reply dated May 27, 1982, Dr. Eisenberg stated that he found it "difficult to justify disability from October 8th, 1981 to January 18th, 1982 as a result of the injury of March 17th, 1981."

An Office medical adviser reviewed Dr. Eisenberg's reports and in a June 15, 1982 report, he concurred with Dr. Eisenberg's opinion that there were "no residual findings nor justification for disability after 10/8/81" and that appellant was fit for duty as of the date of examination on March 25, 1982.

By compensation order dated June 28, 1982, the Office rejected appellant's claim of recurrence of disability on the ground that the "preponderance of evidence supports that [appellant] was not disabled, as a result of the 3/17/81 injury, from 10/8/81."

Appellant requested a hearing on September 1, 1982, and on October 6, 1982, the Office denied this request as untimely under section 8124 of the Federal Employees' Compensation Act (the Act). [2] He requested reconsideration on November 5, 1982 and submitted a September 13, 1982 note from Dr. Diamond stating that when he examined appellant in November 1981 and January 1982, he found headaches and vertigo "secondary to head trauma." He also submitted an October 29,1982 note from Dr. S. A. Garroway, a Board-certified family practitioner, who stated that he examined appellant on October 9 and 27, 1981 and found him totally disabled for work until January 18, 1982, with a diagnosis of post cerebral concussion syndrome. Appellant also submitted a copy of Dr. Diamond's November 30, 1981 report.

By compensation order dated November 16, 1982, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted "is found to be of a cumulative, repetitious nature, and lacking substantial probative value, and is not sufficient to warrant review of the prior decision."

The Board finds that the evidence fails to establish that appellant was disabled for work from October 8, 1981 through January 17, 1982 as a result of his March 17, 1981 employment injury.

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[2] 5 U.S.C. section 8101 *et seq.*

Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that his condition was caused or adversely affected by factors of his employment. An award of compensation may not be made on the basis of surmise, conjecture, speculation, or on an employee's unsupported belief of causal relation. As part of this burden, appellant must furnish reasoned medical evidence, based on a proper factual and medical history, which establishes a causal relationship between his condition and his employment injury.[3]

Dr. Diamond, a Board-certified neurologist, stated in his August 3, 1981 report that, although appellant exhibited "some traumatic labyrinthitis," there were no objective findings, and he recommended a CAT scan. Dr. Taverna, Board-certified in diagnostic radiology, performed a CAT scan and found only "mild cortical atrophy, compatible with the age of [appellant]." Dr. Pomarico, a Board-certified otolaryngologist, examined appellant and stated in his August 27, 1981 report that appellant's dizzy spells were "not true vertigo," that they never lasted more than a "few moments," and that appellant could not "reproduce dizziness" in tests. He noted that appellant had a mastoidectomy performed in 1955 after having chronic mastoiditis while serving in the Navy.

Dr. Lamanna, a general practitioner who had treated appellant since three days after his March 17, 1981 injury, stated in a November 20, 1981 report that although appellant did not have objective signs of illness, he continuted to complain of dizziness and should not work until the dizziness ceased. Dr. McLarnon, an Office medical consultant who is Board-certified in neurology and diagnostic radiology, stated in December 9, 1981 report after reviewing the case record that appellant's injury was not "sufficiently severe" to continue to cause dizziness as of the time of Dr. Lamanna's November 20, 1981 report. She opined that appellant's employment-related disability had ceased by August 27, 1981, the date of Dr. Pomarico's report.[4]

Dr. Diamond opined in a November 30, 1981 report that appellant had a "labyrinthine disturbance secondary to head trauma," although he found "no objective signs." He stated that in "most cases it is impossible to find an abnormality on x-ray examination."

The Office determined that a conflict of medical opinion existed between the opinion of Dr. McLarnon and the November 20, 1981 opinion of Dr. Lamanna. It referred appellant, along with the case record and a statement of accepted facts, to Dr. Eisenberg, a neurologist and an impartial medical specialist, to resolve the conflict. He concluded that it would be "difficult to justify" appellant's disability from October 8,

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[3] *Robert M. Sanford*, 27 ECAB 115; *Frances B. Evans*, 32 ECAB 60.

[4] See note 1, *supra*, concerning appellant's preexisting dizzy spells.

1981 through January 17, 1982 as causally related to his March 17, 1981 employment injury. Dr. Eisenberg noted the absence of findings in several tests performed.

Although the reports of Dr. Lamanna and Dr. Diamond lend some support to appellant's claim, they lack sufficient rationale and medical findings to carry his burden of proof. The many tests taken repeatedly failed to produce objective findings concerning any injury-related condition. The weight of the evidence is with the report of Dr. Eisenberg indicating that appellant was not disabled due to his employment injury during the period alleged.

The decisions of the Office of Workers' Compensation Programs dated June 28, 1982 and November 16, 1982 are hereby affirmed.

In the Matter of WILLIAM S. JOHNSON *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Pocatello, Ida.

Docket No. 83-1573; Submitted on the Record; October 26, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's post-infectious polyradiculopathy condition is causally related to his federal employment.

Appellant, a 58-year-old engineering equipment operator, filed a claim on May 6, 1980 alleging that his "pain and swelling in legs and arms [and] some dizziness, general 'unwell' feeling" was causally related to his exposure to lead and cadmium while "scraping old lead base paint and welding cadmium materials" at the employing establishment. In an attached statement, appellant stated the following:

> "During the time from May 1, 1977, to May 27, 1977, I was assigned to work in Twin Falls, Idaho, painting various facilities. I was working eight-hour days, five days a week. During the course of my work, I got what appeared as a minor scratch on the third finger of my right hand. Because the scratch was so insignificant and quite common for someone in my work, I ignored it but it became infected. I notified Phil Lively, Chief, AFSFO S-8515, and Gene Tesdahl, Chief ESU, Pocatello Sector, of this infection. On May 20, 1977, I made an appointment with Dr. Robert E. Barter who gave me sulfa pills for four days. The infection improved to some extent, but I began to have spells of numbness and pain in my arms and legs so

> I quit taking the pills. This was the first time this numbness and pain occurred."
>
> * * *
>
> "December 17, 1979: The symptoms of pain, swelling, and generally feeling unwell persisted from onset in 1977 and on this date, I went to Dr. A. H. Jones in an attempt again to find the root of the problems. Dr. Jones took a hair sample which indicated a high level of lead and cadmium in my body which I felt could account for illness. Soon after this, Chelati Treatments were begun to try to get rid of the lead and cadmium.
>
> "April 21, 1980: After treatments, same symptoms remain."

In a report dated April 25, 1980, Dr. A. H. Jones, an osteopath, stated:

> "Mr. Johnson was first seen October 1, 1979, complaining of abdominal pain and rectal bleeding. He had a prior history of peptic ulcer disease, but no prior episodes of bleeding. He was treated with IV Cemetidine and with volume and blood replacement, and his condition was much improved and stable after three days. An incidental complaint was made of a chronic muscle aching which the patient had had for three years.
>
> "I next saw him one month after discharge for the primary complaint of the generalized aching. Prior evaluations for this complaint had included muscle biopsy, electromyography, angiography, and neurological evaluation, all of which were reported as normal. At the time of this examination several trigger points were located in the paravetebral muscles but his range of motion was normal. He was treated with manipulative therapy and massage but these had little if any long term effect. A sed rate was three, ANA-neg, and CBC normal.
>
> "In view of the persistent nature of his problem, a hair sample was taken for trace metal analysis. Results showed 31 PPM for lead (upper acceptable limit = 15) and 3.43 PPM of cadmium (upper acceptable limit = 1.6). When confronted with these findings, the patient related that several years ago, prior to the onset of the symptoms, he had done a lot of galvanized welding and cutting of galvanized pipe. Since that time, he gets very bad headaches and generally sick when he is around others working with galvanized materials.
>
> "A provisional diagnosis of chronic lead and cadmium poisoning was made and the patient was counseled that a trial of chelation therapy was advisable. In view of the chronic nature of his problem a series of injections is necessary. These are currently in process."

An employing establishment manager stated in a note dated April 21, 1980 that appellant related that "working remains a very painful and arduous process." The employing establishment manager also stated the following:

> "Stan is now being treated by Dr. Jones at the St. Anthony Hospital for a suspected heavy metal poisoning. If confirmed, this might be job related since Stan has been involved in sanding old paint off buildings and fences prior to repainting. Much of this old paint was lead base. While working for FAA and BLM [Bureau of Land Management] he has done welding."

In a second employing establishment note dated April 13, 1981, a program support officer stated in part:

> "During his employment with the FAA from 1975 to 1977, when the symptoms began, he was assigned duties where painting and preparing surfaces for painting involved approximately 50% of his time from early May to late October. He occasionally welded whenever the need arose throughout his employment, approximately once a week.
>
> "I do not have first hand knowledge of exposure time when he worked for BLM, but he was hired by the FAA based on its experience and background in these same areas where he could have been exposed.
>
> "Specifically, early in the summer of 1977 when he first had symptoms of his illness, he was working in the Burley and Twin Falls, Idaho area, scrapping and sanding paint. He continued doing this work for some time even though he was ill since he did not realize the lead base paint may have been causing his problem.
>
> "If Mr. Johnson's illness is diagnosed as being caused by this exposure, it is my judgment it would have been work related."

On May 26, 1981, the employing establishment forwarded a copy of appellant's medical file to the Office of Workers' Compensation Programs. In an undated electromyograph report, Dr. Jack H. Petajan, a Board-certified neurologist, stated:

> "Mr. William Johnson was seen on July 28, 1977 for evaluation of myalgia and generalized weakness following an infection of the hand and a flu-like syndrome which occurred in June 1977.
>
> "Electromyographic evaluation revealed conduction velocities of the right median and perneal nerves to be 60 to 62 meters/second respectively. Evoked muscle action potentials were normal, and there was no terminal polyphasia. Latencies were normal. Needle electrode examination of muscles of the right upper and lower extremities was entirely normal.
>
> "Neurological examination revealed normally active deep tendon

> reflexes and a normal sensory examination. I would agree that the patient has some kind of post-infectious syndrome, but at the present time there is little evidence for post-infectious polyneuritis or inflammatory myopathy. I suggested to the patient that before returning to vigorous heavy labor he return for reevaluation."

In a report dated May 10, 1978, Dr. Clark E. Jaynes, a neurologist, stated in part:

> "This is a very perplexing 56-year-old man who states that last summer he developed some infection in his left finger. He states he was treated with Sulfa for approximately four days. He developed the fairly rapid onset of what he described as myalgia and weakness in all extremities. There was no rash and no frank paresthesias. The Sulfa was stopped; however, he still continued to complain of weakness and myalgia. He was later placed on penicillin and the infection in the hand cleared; however, the weakness and myalgia have not. He states that he has had no frank problems regarding weight loss. There has been no atrophy. He denies any specific muscle group being involved. He has had no frank paresthesias. He apparently was seen by Dr. Petajan at the University of Utah sometime in June or July where electromyography was done. He states that he does not know the results of such. I do not have a copy of such. Since this spring he has had increasing amounts of myaligia and weakness, however, he states that he is able to get up and down from a chair fairly easily. He states that activity seems to make this worse; however, it does not frankly make him more weak but gives him more myalgia. He certainly gives no history that sounds typical of myesthenia or other problems in this regard. He has had no problems regarding swallowing, any weakness in mastication or diplopia, or frank generalized weakness associated with activity. He denies any neck or back pain. He has had no history of trauma.
>
> "Neurological examination is totally normal at this time."

* * *

> "IMPRESSION: This is a grossly normal [electromyographic] study. I find no evidence of polyneuropathy. He does have some slight increased polyphasia which might go along with a possible post-infectious myopathy but certainly I cannot call the record frankly myopathic."

On September 4, 1981, Dr. Jones made the following report:

> "Mr. Johnson has been under my care for the past two years for peptic ulcer disease and severe myalgia in his legs. The pain is not severe at the time or even shortly after exertion as in claudication

> (arteriograms done previously were normal) but is marked the next day. His problem has been increasing over the last few years.
>
> "Sixteen months ago a toxicology screen using hair demonstrated above-normal amounts of lead and cadmium. Abnormal elevations were confirmed by serum and urinalyses. Since elevated levels of these metals were the only objective abnormalities found after extensive testing, and since these elements, considering the number of intracellular enzymes they can interefere with, would cause Mr. Johnson's symptoms, he was treated with Ca EDTA to reduce lead levels. Since no successful form of treatment of cadmium toxicity is known, the patient was instructed on reducing his exposure to that element.
>
> "Now, one year after treatment, lead levels are found to be within normal limits but cadmium levels are still abnormally high, though lower than a year ago. Subjectively, however, the patient is not improved. It is possible that the damage was done and the process irreversible, or that cadmium alone is causing the problems. Whether this metal can be further reduced by cutting down more on the amount of exposure I do not know. According to toxicologists with whom I have consulted regarding Mr. Johnson's problems, it is also possible that there are still levels of cadmium and/or lead within the muscles high enough to support the symptoms. A muscle biopsy would verify this but Mr. Johnson is reticent to undergo this procedure as a biopsy he had some years ago was extremely painful. Thermography might be helpful in determining whether or not a circulatory deficit is contributing to the problems and he could be sent to Salt Lake City for this procedure.
>
> "I have not observed Mr. Johnson at work and so am unable to ascertain to what degree his employment is contributing to the problems. Certainly he is under some distress every time he is required to exert a persistent or repeated effort with his legs."

An Office medical adviser reviewed the evidence of record and on October 8, 1981 recommended that appellant be referred to Dr. Jaynes for further neurological evaluation.

In a report dated March 11, 1982, Dr. Jaynes stated in part:

> "IMPRESSION: It was felt both by myself and Dr. Petajan that this man did suffer from a post-infectious myalgia. I am somewhat surprised that he has continued to complain of such. In any event, I find no clinical abnormalities that would go along with heavy metal intoxication that one generally sees classically. It would [be] pure speculation that his ingestion of heavy metals if indeed the ones that were given to me from the osteopath are correct, would give him any clinical picture that I am seeing at the present time.

> "I think it would be prudent, however, to repeat blood levels in a lab that is well-known to us. I have checked with three of our pathologists who are all board-certified. They have never heard of the above-mentioned laboratory in Chicago, nor had they ever had heavy metals being reported in parts per million. It is, therefore, suggested that blood levels, urine levels, pubic hairs levels be taken on this man to see if he does indeed have a true problem regarding heavy metal toxicity on a laboratory basis."

A second Office medical adviser reviewed the evidence of record and on March 15, 1982 stated that Dr. Jaynes should be requested to perform further laboratory tests for evidence of lead and cadmium.

A blood test dated May 12, 1982 indicated that said test was normal for lead content.

A third Office medical adviser reviewed the evidence of record and on July 15, 1982 stated that the diagnosis of appellant's condition was "post-infectious myalgia 1977—no current diagnosis"; that appellant's condition was "probably" work related "but [the] cause of [the] infection and cut was not addressed"; and that any "current problem" was not work related. The medical adviser further stated that "if cut and infection were work related, no impairment existed when Dr. Petajan examined him 7/28/77"; that no further treatment was necessary; that there were no work restrictions; and that "all blood and serum metal levels normal."

By letter decision dated September 16, 1982 rejecting his claim, the Office found that since appellant's complaints have not been established "there is no basis for coverage under the [Federal Employees'] Compensation Act."

On February 24, 1983, appellant requested the Office to reconsider his claim. In support therof, appellant submitted an October 15, 1982 report from Dr. Robert C. Burton, a Board-certified neurologist, who stated in part:

> "In summary, Mr. William Johnson is a 60-year-old gentleman who presents with an interesting story which begins with a paronychia or infection of his finger at a time when he also developed the 'flu.' After two weeks of sulfa therapy he subsequently developed paresthesias of the hands and legs bilaterally and symmetrically and then diffuse myalgia aggravated by activity and improved by rest. All tests including muscle biopsy, electromyographic examinations, and neurologic examinations have been normal. The tests that were sent to a Chicago laboratory by Doctor Jones suggested increased lead and on the basis of this, the patient received chelatin therapy without improvement in his condition. In the absence of this test, it would be my judgment that this gentleman is describing classic post-infectious mild polyradiculopathy akin to the category of Guil-

> lian-Barre syndrome. This was, however, insufficient to produce any changes on any of his examinations. This is not the clinical picture of a toxic state, i.e., heavy metal poisoning, and on the basis of the history, examinations, and tests, one can clearly state that this is not a manifestation of heavy metal and specifically, lead poisoning.
>
> "In order to make the diagnosis of lead toxicity, one must first establish an exposure history. Although it is possible that the work he had done on fences at the FAA facility, i.e., scraping and sanding the posts prior to repainting them, might be sufficient to give him lead toxicity. He was indeed in open air at that time and it is doubtful whether he could receive a significant dose of lead. Secondly, one must clearly identify the fact that not only was the patient exposed but that he absorbed the lead either by ingestion or pulmonary intake. This seems unlikely in terms of the description of this man's activities. Finally, the symptoms that follow lead toxicity in the acute phase are usually abdominal, in which case cramps and diarrhea are common. Rarely there may be an encephalopathy and this requires a massive dose of lead and is seen predominantly in children. Finally, the establishment of the diagnosis depends upon appropriate and controlled blood and urine levels of lead and if indeed chelation is performed this may in itself be a diagnostic test in that if urine output is monitored there should be an increased excretion of lead.
>
> "Associated with the above perimeters of diagnosis are certain hematologic findings including stippling of the red cells, and anemia. These were not found on the tests that had been performed by the physicians who saw him at the time of his problem.
>
> "In summary, the criterion for the diagnosis of lead toxicity do not exist in this gentleman's case and indeed the chronologic history of his illness is that of a mild post-infectious polyradiculopathy.
>
> "My only concern regarding this gentleman was the fact that he continues to have leg pain with ambulation. Although this particular symptom does not have the classic signs and symptoms of claudication, i.e, vascular insufficiency in the lower extremities, I felt that this should be further evaluated and had noted that an arteriogram of the vessels of the lower extremities had been performed and contacted Doctor Jaynes for this report. On September 27, 1978, a femoral arteriogram was performed and revealed no particular abnormalities with the exception of an atrophic right kidney which may be secondary to 'ischemia.' There was no evidence of peripheral vascular atherosclerosis that might explain his leg symptoms."

A fourth Office medical adviser reviewed Dr. Burton's report and on April 22, 1983 stated:

> "I have read Dr. Burton's excellent review of the situation and in my opinion this should not change the opinion to refuse reopening of the claim.
>
> "Any increase in symptoms is more likely to be from senescence than from residuals of any conceivable toxic effects of a chemical."

By compensation order dated May 12, 1983, the Office found that [t]he evidence submitted in support of the application for review is found insufficient and does not warrant review of the prior decision."

The Board finds that the case is not in posture for decision.

The Board notes that appellant's claim was based on his belief that his symptoms were caused by his exposure to lead and cadmium while in the performance of his federal duties. A diagnosis of "chronic lead and cadmium poisoning" was made by Dr. Jones, an osteopath, in his February 25, 1980 report. However, three neurologists who later examined appellant, Drs. Petajan, Jaynes and Burton, did not agree with this diagnosis but suggested that appellant suffered a post-infectious condition. The neurologists further elicited a history from appellant who related that the condition occurred subsequent to cutting a finger of his right hand (in May 1977) while in the performance of his federal duties and later developing an infection in said finger. This history of appellant's condition was confirmed in his statement of May 6, 1980 with respect to his claim. The neurologists and an Office medical adviser on July 15, 1982 suggested that appellant's neurological condition of post-infectious myalgia was related to the injury appellant sustained to his finger.

In view of the foregoing, the Office should prepare a statement of accepted facts, and submit it and the case record to a Board-certified medical specialist for a rationalized opinion regarding the issue of whether appellant's post-infectious condition is causally related to his employment injury.

The decisions of the Office of Workers' Compensation Programs dated September 16, 1982 and May 12, 1983 are hereby set aside and the case emanded to the Office for further proceedings as outlined above, to be ollowed by a *de novo* decision.

In the Matter of RAYMOND E. GWYNN *and* DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

Docket No. 83-1495; Submitted on the Record;
Issued October 27, 1983

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant has more than a 10 percent permanent loss of use of the left leg for which he received a schedule award.

On October 5, 1978 appellant, then a 58-year-old foreman, sustained an injury to his left knee when he struck it against a desk while rising from a chair at work. He stopped work and was referred for examination by the employing establishment dispensary to Dr. W. Clark Pole, a Board-certified orthopedic surgeon, who diagnosed a contusion and acute synovitis of the knee. The physician found appellant totally disabled from work for the periods October 6 to 17 and October 25 to November 11, 1978.

In periodic medical reports Dr. Pole indicated that appellant continued to complain of pain to his knee and reported treating him with injections of Kenalog and Xylocaine, anti-inflammatory medications. In a report dated January 5, 1979 Dr. Pole stated that an arthrogram of appellant's left knee showed only mild degenerative arthritis; however, in a subsequent report dated May 10, 1979, he stated that appellant probably had a torn cartilage and that a second arthrotomy would be performed if improvement did not occur. On June 30, 1980 Dr. Pole performed an arthrotomy which revealed "erosion of the medial articular cartilage of the tibia and femur and a tear of the medial meniscus." The physician repaired the knee by menisectomy. In a report dated December 9, 1980 Dr. Pole stated:

> "[Appellant] has made a good deal of improvement since his previous visit. He has not had significant episodes of synovitis and today has no appreciable fluid or synovial swelling in the knee, motion is good, and his improvement seems excellent."

Dr. Pole concluded his report by estimating that appellant had a 25 percent permanent impairment of the left lower extremity.

On January 24, 1981 an Office of Workers' Compensation Programs medical adviser reviewed the case record and stated:

> "[Appellant] has full range of motion. Arthritic changes are present but clearly preexist his injury (medical report December 11, 1978). The torn cartilage did not occur due to work injury (negative arthrogram reported December 11, 1978) and the torn meniscus must be suspected to be due to the preexisting arthritis and its natural progression. No schedule award is appropriate and no permanent partial impairment exists by AMA guidelines."

By letter dated March 4, 1981 the Office notified appellant that his claim had been accepted for contusion of the left knee and that the medical evidence of record was insufficient to establish that his current disability was causally related to the employment injury of October 5, 1978. Appellant was requested to submit further medical evidence.

In a letter dated March 30, 1981 appellant responded that he had had no injury to his left knee prior to the October 5, 1978 injury and that his records were available from Dr. Pole. He also indicated that he had retired on February 22, 1980. Appellant also submitted the March 16, 1981 report of Dr. Pole, who stated:

> "Mr. Gwynn has been followed by the writer since October 6, 1978. He originally had a contusion of the left knee and had persistent disability necessitating repeated aspirations and injections for hydrarthrosis and the condition finally culminated in arthrotomy on June 30, 1980.
>
> "I know of no subsequent injury between the initial injury on October 5, 1978 and June 30, 1980. Accordingly, I would feel that the condition and the symptoms are directly related to the injury of October 5, 1978."

On May 28, 1981 a second Office medical adviser reviewed the case record and stated:

> "The accepted diagnosis (work-related) was a contusion of the left knee and the claimant was not disabled at that time. His surgery and retirement were due to preexisting conditions."

Due to the conflict of medical opinion between Dr. Pole and the Office medical advisers, the Office referred appellant, together with the record, for examination by Dr. Sidney S. Loxley, a Board-certified orthopedic surgeon. In a report dated July 24, 1981 the physician stated:

> "Early in his course [of treatment] x-rays were obtained of the knee including an arthrogram. The arthrogram did not report evidence of a torn meniscus but did report changes of early degenerative arthritis. However, the subsequent surgery revealed a torn medial meniscus and rather marked arthritic changes in the medial compartment of the knee. Subsequent to the surgery, Mr. Gwynn developed a persistently painful grating and snapping sensation both in the peripatellar region and in the medial joint line region. He developed some loss of motion of the knee and became unable to do any prolonged walking."

* * *

> "Physical examination of the knee revealed a well-healed arthrotomy incision. There was exquisite medial joint line tenderness to palpation as well as exquisite tenderness on palpation and compression of the patella against the end of the femur. Range of motion of the knee with patellofemoral compression produced a marked grating which could easily be appreciated by the examiner's fingers.

There was a small effusion present. The medial collateral ligament was stable but exquisitely tender to valgus stress.

"A complete x-ray series of the left knee was obtained. This revealed complete collapse of the medial compartment of the knee with marked arthritic change and with bone rubbing on bone, femur to tibia. There was spur formation all about the joint line and spurring of the patella superiorly, inferiorly and medially. There was also some arthritic change of milder degree affecting the lateral compartment where a reasonably good joint space was maintained.

"Diagnosis: Degenerative arthritis left knee, three compartment, worse medially. The medical conditions which are relative to the injury of October 5, 1978 include: (1) contusion left knee; (2) torn medial meniscus left knee; (3) degenerative arthritis left knee."

* * *

"A considerable discussion is in order. At first glance the initial injury does not seem of the type to produce a torn meniscus. Meniscal tears ordinarily result from a twisting type injury. In this regard it may well be that Mr. Gwynn had a torn meniscus at the time he banged his knee at work in October 1978. Unfortunately I do not have any documented evidence of prior knee symptoms. Had Mr. Gwynn been seen previously for knee complaints then it would be relatively easy to compartmentalize his 'knee contusion' from the remainder of his problem. Alas, however, we are stuck with the details of the current situation and must therefore do the best with it that we can.

"I have, on occasion, seen other patients with torn menisci whose history of injury was comparable to that of Mr. Gwynn. In their case, as in Mr. Gwynn's case, I could never say that the contusion did not produce a tear of the meniscus. In order to be certain one would need to immediately open the knee and inspect the meniscus to see if the tear was fresh or longstanding. There can be no doubt that Mr. Gwynn's x-ray arthritic changes were present at the time of his injury, although we are once again struck by the lack of symptoms prior to the injury. Certainly an arthritic knee is more subject to injury even in the early states of the arthritic process. Also arthritic knees tend to develop wear and tear changes in their menisci which facilitate sustaining a new or additional tear. In this case Mr. Gwynn developed a recurrent effusion which was treated on multiple occasions by arthrocentesis and the injection of steroid medication. Steroid medication is a helpful local anti-inflammatory agent and is used universally by orthopedists to quiet down inflammation in joints. In this case, however, Mr. Gwynn received many, many such injections. It is well known that the use of steroid medication, while helpful in its anti-inflammatory effect does accelerate degenerative changes within a joint, particularly when used frequently. It is therefore possible to ascribe some of the subsequent arthritic change to the overuse of steroid injection.

"In summary we have here a gentleman who sustained what would seem to be a relatively mild injury to his left knee in October 1978. There is no doubt that he had arthritis at the time of injury but it was an arthritis that was apparently asymptomatic. His arthritis subsequently became symptomatic as a result of the injury and was perhaps accelerated by an overoptimistic installation of steroid medication. The steroid medication was instilled into his knee joint as the result of his injury. The current estimated 25 percent permanent physical impairment of his left lower extremity is the result of his arthritis. It seems rational that some portion of that arthritic change, but not all, should be ascribed to his injury which was the event which precipitated the onset and worsening of his symptoms."

On November 3, 1981 the second Office medical adviser reviewed Dr. Loxley's report, stating:

> "The claimant's estimated impairment has been stated as 25 percent both by Dr. Pole (treating physician) and our impartial orthopedic specialist, Dr. Loxley. However, a big portion of this 25 percent has been attributed as to his preexisting condition. Dr. Loxley states that of this estimate of 25 percent impairment to his osteoarthritis, a portion of this should be ascribed to his injury. Thus, in my opinion, 10 percent impairment is a reasonable schedule award, for aggravation of his preexisting condition and his surgery."

In a schedule award dated December 17, 1981 the Office found that appellant had a 10 percent permanent loss of use of the left leg. The award covered the period from December 9, 1980 to June 28, 1981.

By letter dated March 17, 1982 appellant requested a hearing before an Office representative; however, his request was denied by the Office on the basis that the application for hearing was not timely filed.

On October 21, 1982 appellant, through his representative, requested reconsideration of the Office's decision. In support thereof a report, dated October 15, 1982, was submitted by Dr. Pole who stated:

> "As far as Mr. Gwynn's lower extremity is concerned, the patient does have some minor decrease of strength and atrophy of muscles consistent with his knee condition, and he has no changes in sensation in the extremity. This would certainly not be expected with his knee situation. Sensory and motor function should be in no way affected, except for diminished strength. There was obviously no change in length of the affected member, this being impossible with this type of situation. Length could be affected only by fracture or some other bone shortening situation.

> "This patient's problem is one of an arthritic condition within the knee itself, which gives pain and disability, and the disability rating was based primarily upon these considerations. No other significant findings are expected."

On March 23, 1983 a third Office medical adviser reviewed Dr. Pole's report and stated:

> "Severe pain, surgery for torn meniscus of left knee, pain degenerative joint disease, no notation on range of motion, slight decrease in sensory and motor [function] equals 10 percent.
>
> "[Dr. Pole] has not used A.M.A. guidelines and neither can the medical adviser justify 25 percent impairment using the A.M.A. guidelines. 10 percent is the usual award for severe pain and meniscus removal. It covers symptoms and the inevitable degenerative joint disease that will develop."

By compensation order dated May 26, 1983 the Office denied appellant's application for review finding that the evidence submitted in support thereof was not sufficient to warrant modification of the prior decision.

The Board finds that the Office improperly calculated the amount of appellant's schedule award in that it failed to incorporate the preexisting impairment of the left knee.

The weight of the medical evidence of record is represented by the reports of Dr. Pole, appellant's attending physician who is Board-certified in orthopedic surgery, and the reports of Dr. Loxley, a Board-certified orthopedic surgeon and impartial specialist in this case. Dr. Pole treated appellant shortly after his injury on October 5, 1978 and diagnosed a contusion and synovitis of the knee. On May 10, 1979 he modified his diagnosis to a torn cartilage after appellant did not respond to conservative treatment. This diagnosis was confirmed by the arthrotomy and meniscectomy performed on June 30, 1980. Dr Pole stated that appellant's torn meniscus was causally related to the October 5, 1978 employment injury and concluded that he had reached maximum improvement with a 25 percent impairment to the left leg. The Office initially did not accept appellant's impairment as being employment related, finding that the torn meniscus was due to preexisting arthritis and not to the factors of the employment injury. Due to the conflict of opinion between Dr. Pole and the Office medical adviser, appellant was referred to Dr. Loxley.

Dr. Loxley, based on his examination of appellant and the case record, indicated that appellant had a 25 pecent permanent impairment based in part on the preexisting arthritis and the employment injury.

On review of the record, the second Office medical adviser opined that appellant had a 10 percent impairment of the left leg noting that

Dr. Loxley's estimate of 25 percent impairment was attributed, in part, to the preexisting osteoarthritis. The impairment estimate was affirmed by the third Office medical adviser who reviewed the record at the time of appellant's request for reconsideration.

The Board notes that the Federal Employees' Compensation Procedural Manual of the Office provides:

> "Scheduled Awards and Calculations of Impairment: The phrase 'permanent disability' in 5 U.S.C. 8107(a) is interpreted to mean 'permanent physical impairment.' The same standards for evaluating such impairment are applied in all cases. The MA [medical adviser] shall in all cases document his/her calculations to show how he/she arrived at the percentage of impairment, *incorporating all preexisting impairments of the scheduled member . . .*"[1]

It is well-established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[2] As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him."[3]

In the instant case, the Office medical advisers erred by not following the procedures established by the Office in calculating scheduled awards. The 25 percent impairment estimate of the Board-certified physicians constitutes the weight of the medical evidence.

The decision of the Office of Workers' Compensation Programs dated May 26, 1983 is reversed and the case remanded to the Office for issuance of a schedule award for 25 percent loss of use of appellant's left leg less the amount previously awarded.

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[1] FECA Procedure Manual, Chapter 3-600, page 1. (Emphasis added).

[2] See *Donald A. Myers*, 22 ECAB 49 (schedule award for 10 percent loss of use of right leg included effect of preexisting chondromalacia of right patella); *Dovard H. Butler*, 22 ECAB 139 (schedule award for 15 percent loss of use of right leg included effect of preexisting calcific tendinitis of right patella); *Mary B. Bray*, 22 ECAB 329 (schedule award for 14 percent loss of use of left leg included effect of preexisting pronated flat foot); *Hobart L. Staats*, 18 ECAB 533 (schedule award for 45 percent loss of use of right leg included effect of preexisting arthritis).

[3] Larson, *The Law of Workmen's Compensation*, section 12.20 and section 58.21 (1982). "Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition [in this case osteoarthritis], the entire disability is compensable, and . . . no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death." Larson, section 59.22.

In the Matter of REX A. LENK *and* DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Mechanicsburg, Pa.

Docket No. 83–1397; Submitted on the Record;
Issued October 24, 1983

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant had any disability for work commencing April 11, 1982 causually related to his federal employment.

On April 11, 1982 appellant, then a 25-year-old packer, filed a claim alleging that on that same day he sustained an "acute low back strain" while "loading a pallet full of oil and my back went out on me. The box weighed 55 lbs."

On the reverse side of the claim form, appellant's supervisor stated that her knowledge of the facts about the injury agreed with appellant's statement. However, the claim form indicated that the employing establishment was controverting the claim because of an injury that appellant sustained on October 9, 1979 from which he stated he had continuing problems with his back.

In a separate statement, appellant's supervisor reported that appellant verbally informed her at 9:00 a.m. on April 11, 1982 that he had injured his back. He stated that he had bent over and when he straightened his back "went out." She indicated that another employee, Mr. Charles Garman, warehouse leader, had taken appellant to Seidle Memorial Hospital, where he was examined by Dr. William Shoff, an internist.

The case record contains a copy of the April 11, 1982 disability slip signed by Dr. Shoff which indicated that appellant should not return to work that date due to an injury to his back, and that he would receive follow-up care from Dr. C. Scott Harrision, a Board-certified orthopedic surgeon. Dr. Harrison submitted a disability slip indicating that appellant was totally disabled beginning April 11, 1982.

On April 12, 1982 the employing establishment reported that its dispensary had records of appellant injuring his back at work on October 9, 1979 at which time he was off work from October 16 through November 19, 1979. Appellant reported that his back went out on him again on March 23, 1982 but that the injury was not employment related. The dispensary noted that it had no record of appellant injuring his back from working in lead pile.

Dr. H. Cohen at the Seidle Memorial Hospital reported that appellant had received emergency treatment only on April 11, 1982. He was sent home for rest and instructed to see Dr. Harrison for follow-up care. His condition was diagnosed as "lumbosacral strain, possible impingement on spinal nerve." The doctor checked "yes" that the condition was caused by the history given of picking up a box at work and back "went out."

Dr. Harrison's associate, Dr. Morton L. Rubin, Board-certified in family practice, submitted a report dated May 19, 1982, which indicated that appellant was first examined on April 14, 1982. The doctor's findings were "pain and radiation to the left glutear region and leg." Appellant was hospitalized for physical therapy from April 15, 1982 through April 23, 1982. The final diagnosis at the time of discharge was "acute low back strain." The report indicated that appellant was totally disabled from April 14, 1982 until May 13, 1982.

Appellant received continuation of pay from April 12, 1982 through May 12, 1982. He returned to work on May 13, 1982 on light duty for one month. Dr. Harrison released him for full duty on June 24, 1982.

On June 3, 1982 the Office of Workers' Compensation Programs requested appellant to furnish certain information concerning the alleged employment injury, including a detailed description of how it occurred, the immediate effects of the injury and what he did immediately thereafter, and any similar disability or symptoms before the injury. Appellant failed to respond to the Office's questions.

By compensation order dated March 17, 1983 the Office denied appellant's claim on the basis that he did not meet his burden of proof by establishing all necessary elements of his claim.

A person who claims benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his claim, including the fact that he sustained an injury while in the performance of duty, and that he had disability as a result.[1]

The Board finds that, under the circumstances of this case, appellant has discharged his burden of proof of establishing that he sustained an employment related injury on April 11, 1982, as alleged, and that he was totally disabled as a result of that injury from April 11, 1982 until May 13, 1982.

As the Board has stated, an alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[2] He has the burden of establishing the occurrence of the alleged injury at the time, place, and in the manner alleged.[3]

Immediately following the alleged April 11, 1982 injury, appellant informed his supervisor that he had injured his back. He explained that he had bent over and when he straightened his back "went out." Another employee took appellent to the hospital where he was given emergency treatment and instructed to remain off duty and seek follow-up care from Dr. Harrison. Appellant was subsequently hospitalized by Dr. Harrison for physical therapy. His condition was diagnosed as "acute low back strain" which the medical evidence shows caused total disability until May 13, 1982. The history of the injury as reported on the medical reports from the hospital and Dr. Harrison's office was consistent with the statements reported to appellant's supervisor and on the notice of injury. All medical reports indicated that appellant's condition was causally related to the history given of the employment incident.

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[1] See *Joseph M. Whelan*, 20 ECAB 55.

[2] *Walter H. Rick*, 15 ECAB 351.

[3] *Edward C. Lawrence*, 19 ECAB 442.

Although appellant did not respond to the Office's June 3, 1983 request, the information sought by the Office was already a part of the record. Appellant stated on the notice of injury that the injury occurred while he was loading a pallet full of oil which weighed 55 pounds. The same history was stated on the medical reports and also reported by his supervisor.

The decision of the Office of Workers' Compensation Programs, dated March 17, 1983, is reversed; the case is remanded to the Office for further proceedings consistent with this decision.

In the Matter of ROSIE C. RUDNICKI *and* DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Oklahoma City, Okla.

Docket No. 83-1231; Submitted on the Record;
Issued October 31, 1983

Before MARGARET PALLANSCH, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the refusal of the Office of Workers' Compensation Programs to authorize surgery and a change of physicians constitutes an abuse of discretion.

On September 13, 1979 appellant, then a 51-year-old warehouse examiner, injured her back while lifting boxes containing metal discs. She stopped working on September 19, 1979 and received continuation of pay from that date through November 2, 1979. She received compensation for temporary total disability from November 3, 1979 through January 1, 1980 and returned to work January 2, 1980 on light duty.[1]

Appellant was examined on September 19, 1979 by Dr. H. J. Freede, a Board-certified orthopedic surgeon, who opined she had "a low back problem with right sciatica," and "suggestive nerve root irritation on the right," and recommended hospitalization for traction and physical therapy. She was hospitalized from September 19 through September 28, 1979. Dr. Freede reported on September 25, 1979 that a spinal tap and pantopaque myelogram were "entirely negative and normal." Appellant was again hospitalized by Dr. Freede from October 9 through

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[1] Appellant's light-duty restrictions were lifted on May 29, 1980.

October 24, 1979 for evaluation of continued low back and right leg pain. Dr. Freede reported on October 10, 1979 that he had consulted Dr. D. F. Rhinehart, a Board-certified neurosurgeon, who believed appellant "most probably has extruded disc at L-5, S-1 on the right." Dr. Freede reported on October 22, 1979 that appellant "underwent laminectomy and removal of the ruptured disc at L-4, S-1 on the right." She was released to return to light work on January 2, 1980.

Dr. Freede reported on March 5, 1980 that appellant had made "an excellent recovery from her injury," and that lumbar spine x-rays revealed "the laminectomy to be well healed."

Appellant claimed a recurrence of disability beginning June 27, 1980 and stopped working on July 8, 1980. Dr. Freede examined her on June 30, 1980, noted she still complained of back and right leg pain and reported that reexamination of her back and right leg "failed to reveal any evidence of any new findings." He recommended a second myelogram which was performed on July 8, 1980 and which he reported "appears to be normal." Dr. Freede further reported on July 12, 1980 that he had consulted Dr. Rhinehart who "did not feel that this patient had any surgical problem," and that he concurred with this opinion.

Dr. Rhinehart reported on July 21, 1980 that appellant's previous and current myelogram "are essentially unremarkable," and that his impression was "mechanical back pain with suggestion of radiculopathy, unconfirmed." He recommended conservative treatment and stated the following:

> "Consideration to antiarthritic medication should be given in light of facet sclerosis noted on oblique views of her Amipaque myelogram. I do not feel that she has current surgical indications."

By letter dated August 26, 1980 appellant requested that the Office authorize a change of physicians because of her dissatisfaction with the care provided by Dr. Freede. She stated Dr. Freede had incorrectly told her in September 1979 she "had nothing wrong," had failed to tell her of possible side effects of the myelogram,[2] and had failed to diagnose her ruptured disc until October 1979 after consultation with Dr. Rhinehart, the neurosurgeon. She asserted she continued to have severe back pain and also had hip pain from "pinched nerves" which had prompted her hospitalization in July 1980 for another myelogram. She asserted Dr. Freede "found nothing because he was looking for nothing," and that she was "still in about as much pain as in the beginning." She requested the Office to authorize treatment by Dr. B. J. Rutledge, a Board-certified neurosurgeon of professorial rank and an associate of Dr. Rhinehart.

Appellant submitted a September 9, 1980 report from Dr. Rutledge concerning an August 19, 1980 examination. Dr. Rutledge noted appellant complained of continued pain in the low back but that she stated the pain in her right leg had been relieved with disc surgery by Dr. Freede. Dr. Rutledge reported he found "no definite abnormality" on his examination and had an electromyogram done which was "perfectly normal." He further reported appellant's deep tendon reflexes and straight leg raising test "were perfectly normal," and that her myelogams did not show any significant defect. He stated he advised appellant that he "did not find any evidence of nerve root compression and did not feel that her pain at this time was on the basis of nerve compression." He recommended she be seen by an arthritis specialist.

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[2] The record shows appellant suffered post-myelographic headaches in October 1979.

Appellant submitted a September 17, 1980 letter addressed to her from Dr. Freede in which the doctor stated that "your problem with your low back . . . is a continuation of your injury of September 13, 1979." In response to an Office request to clarify his statement, Dr. Freede opined that appellant's "residual subjective complaints referrable to her low back and her right leg are a direct extension and continuation of her original problem," and that such complaints were "not confirmed" by objective findings including a repeat myelogram and examination. Dr. Freede opined that appellant was temporarily totally disabled from July 7 through July 21, 1980 due to the repeat myelogram which "was necessary . . . to rule out any residual or recurrent disc problems." He opined that appellant's subjective complaints "do not preclude her from working her usual vocation."

The Office authorized compensation for temporary total disability for the period July 7 through July 21, 1980.

By letter dated February 10, 1981 appellant, through her husband, again requested the Office's permission to change doctors and asserted that Dr. Freede "is or has not been treating her right," and that she had had to go to other doctors on her own. The Office replied on February 23, 1981 that it could not authorize a change. It further stated "[i]t appears that your current subjective complaints may be attributable to arthritis; and you were advised to seek treatment in that respect."

On May 22, 1981, appellant's representative requested that the Office authorize appellant to change physicians from Dr. Freede to Dr. Nathan E. Bradley, a Board-certified orthopedic surgeon, and to authorize surgery recommended by Dr. Bradley. The representative submitted a May 4, 1981 report by Dr. Bradley in which the doctor recounted appellant's medical history and noted she was back at work[3] and had "missed minimal work in the past year because of her back." Dr. Bradley reported the following:

> "On physical exam she had tenderness in the right low back at the

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[3] The exact date of appellant's return to duty following the July 1980 myelogram is not reflected in the case record.

> lumbosacral junction with minimal spasm. She had tenderness in the right buttocks. She had essentially a full range of motion in her back but full flexion and extension hurt. Straight leg raising was really negative. She had some tension in her hamstrings with straight leg raising but no radicular pain. Acute hip and knee flexion on the right was painful in the buttock and low back. Figure-of-four test was negative and neurological exam seemed normal.
>
> "X-rays of her lumbar spine revealed an apparent, rather wide, laminotomy with disruption of the facet joint on the right at L-5, S-1. The L-5, S-1 disc was markedly narrowed.
>
> "I feel, that Ms. Rudnicki would benefit from an L-5, S-1 fusion. I do not feel, that conservative measures are really going to give her any benefit. We discussed the surgery at some length and she will let me know in the future what she wishes to do."

By letter dated June 5, 1981, the Office noted that appellant "was advised on 2/23/81 that a change of physicians was not authorized," and that the "weight of probative medical evidence does not support the need for continued medical care or further surgery."

An Office medical adviser reviewed the case record on December 2, 1981 and opined that the condition found by Dr. Bradley of narrowing of the L5-S1 interspace was not causally related to the employment injury because previous x-rays of the lumbar spine "did not demonstrate" such a narrowing. The medical adviser stated that "[n]o objective findings support herniated lumbar disc," and recommended an impartial medical examination and an electromyogram (EMG).

The Office thereupon referred appellant and a copy of the medical evidence of record and statement of accepted facts to Dr. J. Raymond Stacy, a Board-certified orthopedic surgeon of professorial rank, for a rationalized opinion concerning whether appellant had any current condition due to her federal employment and his recommendation for treatment. The Office advised Dr. Stacy that it authorized an EMG if one were necessary.

Dr. Stacy examined appellant on March 2, 1982 and submitted a March 3, 1982 report in which he recounted the medical history and stated the following:

> "At the time of my examination she weighed 135 pounds at 5′ 1″ in height. She states that she has constant pain and feels best up and about walking. She states that she is having no right leg pain but her right leg is weak. She is unable to bend forward and touch within 24 inches of the floor upon forward bending complaining of 'pulling.' She also has 'pulling' in the extremes of motion of her neck, shoulders and hips. She will not attempt back exercises and resents quite vigorously any attempt to help her with the exercises. She has no sensory, motor or reflex abnormalities upon gross exami-

> nation of her cranial and spinal nerve system. She has no abdominal or vascular findings. She has no muscle spasm and her posture is good. The surgical wound is well healed in her low back . . . She moves about in ordinary ambulation without apparent difficulty.
>
> "An AP [anterior-posterior] film of the pelvis and four detailed views of the lumbosacral spine reveals the surgical defect at the lumbosacral joint with narrowing of the lumbosacral joint and generalized osteolysis of the visualized bony structures presumably due to inactivity.
>
> "I have reviewed the medical reports submitted to me. In answer to the first question, this woman was not complaining of right lower extremity pain at the time of my examination and there were no findings in the right lower extremity with negative straight leg raising tests. I was unable to demonstrate objective low back pain referable to a ruptured disc. In answer to the second question, I would have no basis for relating her difficulties to the original injury except as I read the medical records which are rather confusing in that regard. ***
>
> ". . . the history which I received from Ms. Rudnicki and the medical records presented to me are quite confusing and conflicting. I certainly would not recommend further surgery but I would recommend that she continue working if at all possible to maintain as much mobility and strength as she can. It would be of considerable help if she could be persuaded to do exercises to regain the strength and mobility which she has obviously lost since her injury. I did attempt to outline such a program to her but she was very resentful of any attempt which I made to help her . . ."

A second Office medical adviser reviewed the case record and stated on April 22, 1982 that "there is no credible medical evidence to indicate that disability and accepted injury are related," and that there is "no evidence of organic residual as a result of injury of 9/13/79." He recommended that surgery not be authorized.

Appellant filed for a recurrence of disability effective January 18, 1982 but did not stop working.

By compensation order dated June 16, 1982 the Office denied appellant's request that the Office authorize a change of physicians to Dr. Bradley and denied authorization for Dr. Bradley to perform surgery on the grounds that the "medical evidence of record does not establish that further surgical intervention is necessary or that a change of physicians should be authorized." The Office stated in June 16, 1982 memorandum incorporated into the decision that "[t]here is no evidence to indicate that the claimant is not receiving proper medical care from Dr. Freede or that a change of physicians is justified for any reason."

Appellant submitted an August 11, 1982 report from Dr. Bradley in which the doctor stated he had seen appellant twice since May 1981, the last time on July 22, 1982, and that she is "continuing to get worse," with "pain all the way down her right leg to the lateral side of her calf now . . ." He reported that appellant's "neurological exam seems normal," and stated he told her "that short of surgery, she needs to take off from work, get some physical therapy either a home or in the hospital and see if she can get better." He further reported he gave appellant a prescription for medication and physical therapy.

At the request of appellant's representative, a hearing was held on December 15, 1982. Appellant testified that she was dissatisfied with the examination by Dr. Stacy and asserted that she had been "downgraded" to another position at work due to her "constant pain." She testified that her back pain caused her "nerves to flare up" which in turn caused elevated blood pressure and an esophageal problem.

Appellant's representative submitted as an exhibit a November 23, 1982 report from Dr. Nick Knutson, an internist and gastroenterologist, in which the doctor stated he had been treating appellant since July 10, 1981 for "hypertensive distal esophageal muscles, or what is commonly known as 'nutcracker' esophagus." Also submitted was a November 29, 1982 report by Dr. Linda F. Deere which stated appellant has "mild diastolic hypertension currently well controlled" with medication and that appellant's "current position as supply clerk is one of stress and she will have more difficulty controlling her hypertension on that basis alone." Appellant's representative also submitted a December 3, 1982 report from Dr. Bradley in which the doctor stated he had been seeing appellant for "degeneration of lumbar or thoracic intervertebral disc," and had recommended "an L-5, S-1 fusion." A final exhibit was an undated statement by appellant's supervisor which stated that appellant had been downgraded in April 1982 "after appearing on a medical downgrade list," and that she "has been a very good employee, learning the requirements of her job and accomplishing all tasks in a very conscientious manner."

By decision dated April 8, 1983 and finalized April 11, 1983, the Office hearing representative determined that the "evidence of record fails to show that the Office abused its discretion in refusing to allow change of physicians and/or surgery."

The Board finds that the Office properly exercised its discretion under section 8103(a) of the Federal Employees' Compensation Act, as amended in 1974 in refusing to authorize surgery and a change of physicians.[4]

The 1974 amendment to the Act adopted the recommendation of the National Commission on State Workmen's Compensation Laws[5] that

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[4] 5 U.S.C. 8103(a), as amended, 88 stat. 114.

[5] H. Rept. No. 93-1025, p. 4, S. Rept. No. 93-1081, p. 5.

"the worker be permitted the initial selection of his physician, either from all the licensed physicians in the state or from a panel of physicians selected or approved by the workmen's compensation agency." [6] However, Congress did not restrict the Office's power to approve appropriate medical care after the initial choice of a physician. The Office still has the general objective of ensuring that an employee recover from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor. Section 10.400(b) of Title 20 of the Code of Federal Regulations is an appropriate exercise of that discretion which does not conflict with 5 U.S.C. 8103(a). The section provides: "An employee has only an initial choice of physicians. A change of physicians will be permitted only upon approval of the Office after the employee submits an explanation for his or her desire to change." An abuse of such discretion is not established merely by showing that the evidence could be construed in such a way so as to produce a contrary factual conclusion.[7]

The Board further finds that the refusal of the Office to authorize surgery and a change of physicians does not constitute an abuse of discretion.

Appellant's reasons for requesting a change of physicians from Dr. Freede, a Board-certified orthopedic surgeon, were her belief that Dr. Freede had incorrectly told her in September 1979 that nothing was wrong, his alleged failure to tell her of possible side-effects of a myelogram and failure to diagnose a ruptured disc until after consultation with a neurosurgeon. Appellant requested surgery based on the May 1981 opinion of Dr. Bradley, a Board-certified orthopedic surgeon, that she "would benefit from an L-5, S-1 fusion." This case does not involve the initial selection of a physician.

An Office medical adviser opined that surgery should not be authorized because the condition for which Dr. Bradley recommended surgery was not employment related. Dr. Stacy, a Board-certified orthopedic surgeon of professorial rank and an impartial specialist, reported he "certainly would not recommend further surgery." The Office found no evidence that appellant was not receiving proper care from Dr. Freede and adequately explained its reasons for refusing to authorize surgery and a change of physicians. There was no abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated, June 16, 1982 and dated April 8, 1983, which was finalized April 11, 1983, are hereby affirmed.[8]

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[6] *Report of the National Commission on State Workmen's Compensation Laws* (1972), pp. 78-79, 80-81.

[7] *Helen A. Pryor*, 32 ECAB 1313.

[8] If appellant believes she has sustained a loss of wage-earning capacity due to residuals of her employment injury, she may file a claim for compensation. The Board notes that the Office so advised appellant by letter dated April 27, 1983. However, such letter is null and void since at the time of the Office's letter appellant's appeal had been filed with the Board and pursuant to 20 CFR section 501.2(c), the Board and the Office may not simultaneously have jurisdiction over a claim.

In the Matter of ROBERT K. BESLEY *and* DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Washington, D.C.

Docket No. 83–1582; Submitted on the Record;
Issued November 3, 1983

Before GEORGE E. RIVERS, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's claim for a hearing loss is barred by the time limitation provisions of the Federal Employees' Compensation Act.

On November 24, 1981 appellant, then a 53-year-old retired special agent, filed a notice of an occupational disease asserting that his hearing loss was caused by 26 years of firearms training. He stated that he first realized his hearing loss was caused or aggravated by his employment "approximately August 1978."

Dr. Alan H. Brill, an otolaryngologist, examined appellant on November 30, 1978 and reported that appellant "first noticed having a [hearing] problem in the Summer of 1978." Dr. Brill's audiometric testing and examination of appellant revealed "a mild high frequency nerve type hearing loss compatible with exposure to firearms."

In a letter to the Office of Workers' Compensation Programs dated May 29, 1982 appellant stated the following:

> "After some 26 years of active service as an FBI Agent I retired 1/3/78. Seven months later on or about August 1, 1978 I realized a small hearing loss which I attributed to the thousands of shots (probably millions) fired during the 26 years of required monthly firearms training."

By compensation order dated June 3, 1983 the Office rejected appellant's claim on the ground that it had not been filed within three years of the date he became aware he had an employment-related hearing loss as required by 5 U.S.C. section 8122.

The Federal Employees' Compensation Act, section 8122,[1] states that "An original claim for compensation for disability or death must be filed within 3 years after the injury or death." Subsection (b) of this section adds that in latent disability cases, this time limitation does not begin to run until the claimant is aware, or reasonably should have been aware, of a relationship between his employment and his injury.

In this case, appellant stated that he became aware of a relationship between his employment and his hearing loss "on or about August 1, 1978." Therefore, the time limitation began to run on that date. Since his claim was not filed until November 24, 1981, the Board finds that the claim was not filed within the applicable three-year time limitation period.

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[1] 5 U.S.C. section 8122, as amended in 1974. See also *Richard E. Jacobson*, 33 ECAB 1517.

Appellant's claim would be regarded as timely under 5 U.S.C. section 8122(a)(1) if his "immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death." The Board finds that there is no evidence of record to establish that appellant's "immediate superior" had such knowledge.

The decision of the Office of Workers' Compensation Programs dated June 3, 1983 is hereby affirmed.

In the Matter of OLLIE RANKINS *and* DEPARTMENT OF THE ARMY, LEXINGTON-BLUE GRASS ARMY DEPOT, Lexington, Ky.

Docket No. 83–1651; Submitted on the Record;
Issued November 4, 1983

Before MARGARET PALLANSCH, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to waive a $2,600.82 overpayment to appellant.

On June 8, 1970, appellant, a 50-year-old forklift operator, filed a claim alleging that he injured his back on January 21, 1970 when he lifted "material" he was "repalletizing." He missed work on January 24, 1970, April 15 and 21, 1970, and May 16 through June 7, 1970, using sick leave to cover his absence. He was examined on May 18, 1970 by Dr. Marion G. Brown, a Board-certified orthopedic surgeon, who stated in a May 21, 1970 report that, four years previously, his x-rays of appellant showed mild degenerative changes in the lumbar spine area,[1] and that his recent examination and x-rays also revealed "minimal degenerative changes" in the lumbar spine area. He also stated that he found a low lumbar sprain and that appellant should be restricted to lifting under 15 pounds and light pushing. In a subsequent report also dated May 21, 1970, Dr. Brown stated that he examined appellant on May 20 and found him in "considerably more pain." He stated that appellant should stay off work for at least another week.

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[1] These x-rays were taken when appellant sustained a low sprain in a nonemployment injury.

Appellant received compensation for temporary total disability from May 16 through June 7, 1970. He used sick leave on portions of June 8, 10, 11, 12, 16, and 18, 1970, and on all of June 15, 1970. He used annual leave on June 26, 1970, and was terminated thereafter because his temporary appointment had expired.

In an October 20, 1970 report, Dr. Brown stated that appellant was "still disabled" due to his back sprain and was capable only of working at a sitting job. He stated in a January 12, 1971 report that appellant had not improved.

Appellant received compensation for the period June 27, 1970 through March 10, 1971, and thereafter the Bureau of Employees' Compensation (now the Office of Workers' Compensation Programs, or "Office") placed him on its automatic roll for payment of compensation for temporary total disability. At the request of the Office, appellant has had periodic medical examinations by Dr. Brown and Dr. Ted D. Ballard, a Board-certified family practitioner, to determine his current condition, and based on their reports, the Office has continued to pay compensation.[2]

Appellant has received periodic increases in compensation based on adjustments in the Consumer Price Index, as required by section 8146(a) of the Federal Employees' Compensation Act.[3] The first such adjustment was an adjustment of 4.0 percent effective March 1, 1971. By letter dated September 15, 1981, the Office notified appellant that there was an overpayment of compensation of $2,600.82 because he was not entitled to the March 1, 1971 adjustment.[4] The letter stated in part as follows:

> "A preliminary finding has been made that you are without fault in the matter of the overpayment. If you disagree with the amount or fact of the overpayment you have the right to submit new evidence in support of your contention. You should be aware that when a claimant is found to be without fault in the occurrence of an overpayment, the law states that recovery may not be made if it can be shown that such recovery would defeat the purpose of the law *or* would be against equity and good conscience.
>
> "The purpose of the Federal Employees' Compensation Act is to provide at least a subsistence income for beneficiaries. Therefore, information about your income and expenses is important.
>
> "*It is important that, if you wish to receive a waiver instead of repaying the overpayment, you should submit any evidence or information you feel would support your argument*. You may provide the evidence directly by mail to this Office.

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[2] On February 16, 1973, the Office commenced a loss of wage-earning capacity determination after finding appellant was not physically disabled for all work, but it concluded on August 2, 1973 that he was not qualified for any jobs for which he had the physical capability.

[3] 5 U.S.C. section 8101 et seq.

[4] 5 U.S.C. section 8146(a) provides for an adjustment in compensation which was "payable on account of disability . . . which occurred more than one year" before the effective date of adjustment. Appellant's disability "occurred" less than one year before the March 1, 1971 adjustment.

> "Information about your financial position will assist us to decide whether or not to waive the overpayment. In the event a waiver is not granted, this information would be used to decide how to recover the overpayment." [Emphasis in original.]

A December 9, 1981 claims examiner's memorandum stated in part as follows:

> "I recommend that waiver not be granted for the following reasons:
> "1. The claimant has not given any reasons for a waiver, as was requested by our September 15, 1981 letter.
> "2. The overpayment could be collected by means of modest deductions from Mr. Rankins' continuing compensation. I recommend that $20.00 be deducted each four weeks, so that the overpayment would be liquidated in ten years time (130 pay periods)."

Effective December 31, 1981, the Office began deducting $20.00 from appellant's compensation every four weeks to collect the overpayment.

At appellant's attorney's request a hearing was held on August 23, 1982 before an Office hearing representative on the issue of waiver of the overpayment. Appellant was represented by his attorney, and he testified in support of his request for waiver of overpayment. He testified that the following are his only sources of income: $818 a month in compensation (after the $20 deduction); $58 a month from the Veterans Administration for a military service-connected disability; and $303 a month in Social Security benefits. He testified that his wife receives $176 a month in Social Security benefits and that she qualifies for Medicare. He further testified that he owns his home free and clear, pays "a little piece" on a car, and that he has no money left at the end of each month after paying for insurance, food, utilities, and living expenses.

Appellant's attorney asserted at the hearing that waiver of the overpayment was necessary to avoid "severe hardship" on appellant because he was unemployed and the cost of living "continues to increase."

By decision dated May 30, 1983 and made final on June 2, 1983, the hearing representative affirmed the decision of the Office to deny waiver of the overpayment and recoup the overpayment in the amount of $20 every four weeks. He found that the "evidence and testimony presented by [appellant] at the hearing did not establish that recovery of the overpayment would 'defeat the purpose of the Act' or that such recovery would be 'against equity and good conscience.'" He also found that a deduction of $20 from appellant's compensation every four weeks was reasonable and did not create an "unnecessary burden" on appellant.

The Board finds that the case is not in posture for decision and must be remanded to the Office for further development.

The appropriate provision for waiver of overpayments, 5 U.S.C section 8129(b), provides:

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

Subsequent to the Supreme Court's decision in *Califano v. Yamasaki*, 422 U.S. 682 (1979), the Office revised the procedures to be followed in adjudicating overpayment of compensation cases. In FECA Bulletin No. 80-35, issued October 20, 1980, the Office interpreted the phrase "defeat the purpose of this subchapter" to mean:

> ". . . defeat the purpose of benefits under the FECA, i.e., to provide at least a subsistence income for beneficiaries. This depends upon whether the individual has an income or financial resources sufficient for more than ordinary needs, or is largely or solely dependent upon current payment of benefits for the necessities of life.

In the same bulletin, the phrase "against equity and good conscience" was defined as meaning that it would be "inequitable to ask for repayment from the individual regardless of financial circumstances," depending upon whether the individual by reason of payment has "relinquished a valuable right" or changed his position for the worse.

The Office should have informed appellant before his hearing of its interpretation of section 8129(b).[5] The Office's September 15, 1981 letter to appellant did not adequately inform him of its interpretation, and the hearing representative made no attempt to provide such interpretation. Appellant was therefore deprived of an effective opportunity to present evidence and arguments in support of his request for waiver of the overpayment.

Upon remand, the Office should provide appellant with its interpretations of the terms "defeat the purpose of [the Act]" and "against equity and good conscience." The Office should then develop the case record as it deems necessary and, if requested, provide appellant with a new hearing. A *de novo* decision should then be issued, including detailed findings of fact[6] and a rationalized opinion[7] on (1) whether recovery of the overpayment would "defeat the purpose of [the Act]" and (2) whether recovery would be "against equity and good conscience."

The decision of the Office of Workers' Compensation Programs hearing representative dated May 30, 1983 and made final on June 2, 1983 is hereby set aside and the case remanded for further proceedings consistent with this decision of the Board.

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[5] See *Abraham Garrett*, 33 ECAB 1282.

[6] See *David Sarrell*, Docket No. 81-1629; *James M. Albers, Jr.*, 33 ECAB 1554.

[7] See *John E. Jenkins*, 33 ECAB 1604; *Tom M. Hurst*, 33 ECAB 1432.

In the Matter of EDWARD L. HAVENER *and* TENNESSEE VALLEY AUTHORITY, PARADISE STEAM PLANT, Drakesboro, Ky.

Docket No. 83-1370; Submitted on the Record;
Issued November 9, 1983

Before MARGARET PALLANSCH, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of watchman I reasonably represents appellant's wage-earning capacity.

This is the second appeal in this case. The prior decision sets forth the history and background of the case.[1] In that decision the Board found that the case was not in posture for decision and remanded the case to the Office of Workers' Compensation Programs for a redetermination of appellant's loss of wage-earning capacity. The Board stated that "[t]he Office here has not met its burden in determining appellant's employment-related loss of wage-earning capacity," and set aside the Office's January 29, 1981 decision which had found that effective October 12, 1978 the position of watchman reasonably represented appellant's wage-earning capacity. The Board directed the Office to submit the case record including the position description of watchman and a statement of accepted facts to a particular Board-certified orthopedic surgeon who had previously examined appellant or to another appropriate medical specialist and to request the doctor to "set forth all limitations for work," and address whether appellant could perform the duties of a watchman. The Board stated that if the Office concludes appellant could not perform such duties, it should "make a proper loss of wage-earning capacity determination."

On remand, the Office restored appellant's temporary total disability compensation effective October 8, 1981. By letter dated November 2, 1981, the Office requested that Dr. Thomas P. Krueger, a Board-certified neurosurgeon, examine appellant, complete a form report concerning his work tolerance limitations, and address whether he would have been able to perform the duties of a "Watchman I/guard; patrolman; special policeman" [2] in October of 1978 and whether he could currently perform those duties. The Office submitted to Dr. Krueger a copy of the medical evidence of record, a statement of accepted facts dated

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[1] 32 ECAB 1748.

[2] Department of Labor's *Dictionary of Occupational Titles*, No. 372.868, 3d Ed. 1965.

November 2, 1981 and the position description for the above-cited jobs. In a November 24, 1981 report, Dr. Krueger stated the following:

> "I examined Mr. Havener, a 56-year-old, on November 24, 1981. The history I obtained from the patient was that he injured himself on August 11, 1969 while working for Tennessee Valley Authority. He was lifting a scaffold and had the onset of pain in the back and right side at that time. He underwent surgery by Dr. Pearson on August 20, 1969, apparently for a herniated disc. The patient told me that he did not show improvement following that. He had a second operation in 1970 and a disc was removed from both sides. Again, he states that his pain is the same now as it was then. He was rehospitalized in 1971 and a lumbar myelogram was carried out at that time. Apparently surgery was recommended to the patient, but the patient refused to undergo another operation."
>
> * * *
>
> "The patient has not worked since his original injury.
>
> "Examination at this time reveals the patient to be awake and alert. He does not appear to be in acute or chronic distress. The back is straight. He has a healed laminectomy scar. There is some tightness in the paraspinal muscles adjacent to the scar. The patient is able to bend forward to within two feet of the floor. He states that he then has back pain but no radicular pain. He is able to extend. He is able to tilt to either side with some limitation.
>
> "He walks with a normal gait and is able to walk on his toes without difficulty. He walks on his heels without difficulty. Knee jerks and ankle jerks are intact, active, and symmetrical. He has excellent strength of dorsiflexion of both feet and extensor hallucis longus. There is no loss on sensory examination to pin prick, light touch, toe position sense, or vibratory sensation. Straight leg raising is to a full 90 degrees bilaterally with only minimal back discomfort present.
>
> "The neck is supple and shows a full range of motion. The deep tendon reflexes in the upper extremities are intact, equal, and symmetrical.
>
> "From an objective standpoint, he does not show any focal neurological deficit or any particular nerve root involvement. In reviewing the papers that you sent me, there is a defect revealed at the L4–5 level on the myelogram done in 1971. I have not seen those myelograms.
>
> "It could be conceivable that this patient does have intermittent neurogenic claudication involving the right leg, perhaps at the L5 or S1 nerve root. When he rests, this would get better.
>
> "In reviewing the job description for Guardman I, I see no reason

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> why he cannot reach, handle, finger, feel, talk, hear, or see. I do not see why he could not work both inside and outside. I have some reservation that if indeed he does have neurogenic claudication and is on his feet for prolonged periods of time or has to walk, he could have some nerve root irritation at that time if there is a spinal stenosis present secondary to either scar or recurrent disc.
>
> "I feel all of his limitations could be related to his initial injury and previous surgery for them.
>
> "If I reviewed the myelogram and found a significant defect as reported, perhaps surgical correction could be carried out. In talking to the patient about surgery, he is not interested in any further surgical procedure. Therefore, I can only go on his history that the leg gives out because he shows no evidence at this examination.
>
> "Regarding the permanent impairment rating with two operations on the low back without objective neurological deficit, I feel this would be 25% of the body as a whole.
>
> "In summary, what I find from examination today I find no reason why the patient cannot be employed as a Guardman I. If indeed he does have a spinal stenosis, this is something that could be surgically corrected."

By letter decision dated February 4, 1982, the Office advised appellant as follows:

> "Based on the existing medical evidence in file, including the most recent report from the impartial medical specialist, we have again found that you are capable of performing the duties required of a Watchman I.
>
> "This finding represents a new decision and [is] effective January 28, 1982. Your former loss of wage-earning capacity rating was restored. ***"

By letter dated April 2, 1982, appellant's attorney requested that the Office reconsider its February 4, 1982 decision. By compensation order dated May 18, 1982, the Office denied modification of its decision on the grounds that the attorney had not submitted any new medical evidence or advanced legal contentions not previously considered by the Office.

Appellant submitted medical records concerning a May 27 to June 7, 1981 hospitalization for conservative treatment of "acute exacerbation of chronic lumbar strain," and "arthritis of lumbar spine." Dr. William E. Pearson, a neurosurgeon who is appellant's attending physician, reported on a work restriction evaluation form dated May 7, 1982 that appellant could do intermittent sitting and walking for one hour each a day and intermittent standing for two hours a day. Dr. Pearson further reported appellant could not do any lifting, bending, squatting, climbing, kneeling, twisting, pushing and pulling or reaching or working above the shoulder, and could work only two hours a day.

By letter dated June 14 and July 9, 1982, appellant's attorney requested a hearing before an Office representative. He submitted a February 5, 1983 deposition of Dr. Pearson in which Dr. Pearson recounted his history of treating appellant since August 14, 1968 and testified as follows in response to the attorney's questions:

> "Q. Now then, Dr. Pearson, there has been an opinion expressed that Ed Havener could perform the duties of a watchman which require such activities as walking, standing or sitting for eight hours a day, five or six days a week. I will ask you, Dr. Pearson, does Ed Havener have the physical capability for such work tolerance?
>
> "A. I do not think so.
>
> "Q. Then in summarization, Dr. Pearson, could Ed Havener perform the duties of a watchman?
>
> "A. Not eight hours a day, no.
>
> "Q. Or could he be gainfully employed in any other type of occupation that requires lifting, bending, stooping eight hours a day, five or six days a week?
>
> "A. No."

Submitted with the deposition was a February 1, 1983 report by Dr. Pearson which states appellant was examined that day for complaints of "low back pain, pain going to both lower extremities, more so on the right side than the left." Dr. Pearson concluded as follows:

> "I see no improvement in this patient's condition over the past two to three years. I feel he has reached his maximum medical benefit at the present time. I feel with time his condition will worsen particularly with arthritis of the lumbar spine. I feel he also has degenerative disc disease of the lumbar area as well as some residual damage to the L–5 nerve root on the right side.
>
> "In the patient's present condition, I do not feel he can be gainfully employed as the result of his continued chronic lumbar strain, degenerative disc disease and arthritis of the lumbar spine, as well as residual weakness of the right leg secondary to ruptured disc causing damage to the L–5 nerve root on the right side."

Also submitted were reports concerning a September 1982 bone scan and x-rays of the pelvis, chest and lumbar spine, the latter reported to be essentially negative."

A hearing was held before an Office representative on March 21, 1983 at which appellant was represented by his attorney. At the request of appellant's attorney, the Office subpoened Dr. Krueger who testified concerning his November 24, 1981 examination of appellant. Appellant testified that he believed he was unable to perform the duties of a watchman in part because he "could not walk over four blocks" without having his right leg "paralyze on me."

By decision dated April 19, 1983 and finalized April 20, 1983, the Office hearing representative found that "the weight of the medical evidence lies with the report of Dr. Krueger, a Board-certified neurosurgeon," and that "the claimant can perform the duties of a Watchman I."

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation.[3] The Office has not met that burden here.

There is an unresolved conflict between the opinions of Dr. Krueger and Dr. Pearson concerning whether appellant is able to perform the duties of a "Watchman I." Dr. Krueger, a Board-certified neurosurgeon to whom the Office referred appellant, opined after his examination of appellant and review of the case record, including a position description for "Watchman I; guard; patrolman; special policeman," from the 1965 *Dictionary of Occupational Titles*, that he could "find no reason why the patient cannot be employed as a Guardman I." Although Dr. Krueger set forth some activities he believed appellant could perform, he did not set forth the number of hours appellant would be able to do such activities; he also did not specifically address whether appellant could work an eight-hour day. Dr. Pearson, a neurosurgeon and appellant's attending physician, reported appellant could not work an eight-hour day, but only two hours a day, could do intermittent sitting and walking for one hour each a day, intermittent standing for two hours a day, no lifiting and could not perform the duties of a watchman.

In addition to this unresolved conflict of medical opinion concerning whether appellant is capable of performing the duties of a Watchman I, the Board notes that the position description relied on by the Office both in its original loss of wage-earning capacity determination effective October 13, 1978 and its second such determination effective January 28, 1982 was taken from the 1965 edition of the *Dictionary of Occupational Titles* and may be out-of-date. The Board also notes that the Office before issuing its "new decision" on February 4, 1982 which reduced appellant's compensation effective January 28, 1982 based on its finding that the position of Watchman I reasonably represented appellant's wage-earning capacity failed to contact the state employment service to determine whether the position was reasonably available to appellant in his commuting area. The only inquiry made to the state employment service was in September 1978, several years before the February 1982 Office decision.[4]

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[3] *Ellen G. Trimmer*, 32 ECAB 1878.

[4] The Board further notes that although the Office restored appellant's temporary total disability compensation effective October 8, 1981 after the Board set aside the Office's January 29, 1981 decision and remanded the case for further development, it failed to restore his temporary total disability beginning October 12, 1978, the date the compensation was originally reduced.

On remand, the Office should consider whether the position representing appellant's wage-earning capacity based on a 1965 job description is out-of-date. If so, the Office should choose another position as representing appellant's wage-earning capacity and determine current reasonable availability and wage rates for the position. The Office should prepare a new statement of accepted facts and refer appellant and the case record to an appropriate Board-certified impartial specialist. The Office should request the specialist to set forth appellant's work restrictions due to residuals of his employment injury and any preexisting conditions and that he or she address in a rationalized opinion whether appellant can perform the duties of the chosen position and if so, for how many hours a day. The Office should then issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated April 19, 1983 and finalized April 20, 1983 is hereby set aside and the case remanded to the Office for further development in accordance with this decision of the Board.

In the Matter of BERNARD O. MILLS *and* DEPARTMENT OF THE NAVY, NEW YORK NAVAL SHIPYARD, New York, N. Y.

Docket No. 83–1368; Submitted on the Record;
Issued November 10, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs acted properly in denying appellant's request to be referred for further audiological testing to the Office's suspension of his rights to compensation for obstructing a medical examination.

Appellant, a 62-year-old shipfitter helper, filed a claim on April 17, 1972 for hearing loss which he alleged he sustained during his federal employment.

Appellant submitted a report dated January 21, 1976 from Dr. Michael H. Princer, a Board-certified otolaryngologist, who diagnosed bilateral neurosensory hearing loss due to occupational noise exposure.

The Office referred appellant to Dr. Roger M. Rose, a Board-certified otolaryngologist, who referred appellant to a speech and hearing center for audiological testing and evaluation. A July 25, 1977 audiogram stated that the audiological findings were consistent with a diagnosis of a functional component superimposed on bilateral moderate sensorineural loss. A second audiogram dated August 12, 1977 was rated to be of "poor reliability" although some improvement was noted. In a report dated August 16, 1977 Maurice M. Miller, Ph.D, an audiologist stated that:

> "Despite the improvement in results on the repeat audiologic evaluation, there continues to be evidence of a functional component as rated by the PTA-SRT (pure tone average—speech reception threshold) discrepancy and the repetition of half of the spondee words correctly at levels well below the pure tone average.
>
> "Auditory evoked response testing was performed, but the results could not be interpreted and no hearing threshold levels could be inferred from the findings . . .
>
> "Speech discrimination scores were noted to decrease in each presentation regardless of the sensation level at which the material was presented. His errors on the phonetically balanced lists were almost entirely on the initial consonants and the patient substituted different consonants and repeated words which rhymed with the test stimulus.
>
> "It would appear that this patient continues to have a significant functional component. The bilateral moderate sensorineural hearing loss shown in the test of 8/12/77 probably does not reflect the actual hearing threshold levels. This patient may have a mild bilateral sensorineural hearing loss . . ."

Dr. Rose's August 29, 1977 report stated:

> "On more than one occasion, [appellant] was tested at the Lenox Hill Hospital Center for Communication Disorders and copies of all tests are enclosed. Initial testing was done July 25, 1977 . . . the subject's reliability was considered poor. Accordingly he was retested August 12, 1977 at the same facility . . . the subject's reliability was again considered poor.
>
> * * *
>
> "As indicated in audiologist's report, several tests suggested a significant functional component and in my opinion [appellant's] hearing is better than what is indicated on the audiogram of August 12, 1977.
>
> "Because of his unreliability as a test subject and the significant inconsistencies in his responses to the test situations, it is patently impossible to judge his correct hearing level. It would therefore also be impossible for me to make any meaningful statement about a relationship between his hearing and his occupational noise exposure. Further testing at this Center does not appear to offer further hope of clarification. You will note that auditory evoked response testing was already performed but the results could not be meaningfully interpreted."

The case record was evaluated on October 4, 1977 by an Office medical adviser who stated that it was impossible to judge appellant's correct hearing level. He noted that appellant's reliability was considered poor in testing performed July 25, 1977 and August 12, 1977 and quoted Dr. Rose's statement that due to appellant's unreliability as a test subject and inconsistent responses, it was impossible to judge his hearing level. The Office medical adviser also noted that Dr. Princer's January 6, 1975 report lacked speech reception thresholds, discrimination, impedence and Stenger testing.

By letter dated March 1, 1978, the Office informed appellant that the Federal Employees' Compensation Act provides that when an employee refuses to submit to or in any way obstructs an examination, the employee's right to claim compensation under the Act shall be suspended until the refusal or obstruction stops. The Office recommended appellant cooperate with Dr. Rose, as it was imperative that a reliable evaluation be a matter of record before a proper determination could be made.

Dr. Rose then referred appellant to the Beth Israel Medical Center for audiological testing. An April 13, 1978 report prepared by David Press, an audiologist, and reviewed by Dr. Leonard Davis, Associate Director of the Department of Rehabilitative Medicine, noted:

> "Pure tone testing reveals bilateral "Ski-Slope" type response at moderate levels. Left ear at 1KHz and 2KHz exhibited an area of possible cross-over to the better ear (AD); Contralateral masking of 65dB was used and subsequently hearing (AS) improved to 25 to 10db. Weber (500Hz 65dB) lateralized to the left ear. Bone conduction threshold for the left ear was equal to the air line of the right ear. Speech reception, threshold was in good agreement with pure tone average (patient was repeating half of bisyllabic Spondaic words). Speech discrimination was fair for both ears in quiet and deteriorated to poor levels with ipsilateral masking at signal to noise ration of +10dB. Evoked Response data was obtained with electroids attached to left mastoid and vertex; stimulus consisted of 70 beeps of pure tone (1K, 2K, 4KHz) with 2 second interval between beeps.
>
> "Response pattern was well-visualized and followed to levels which are considered to be threshold or near threshold for frequencies wave decreases and latency of occurrence increased. Threshold for 1KHz is better than 2dB for AD; better than 60dB 4kHz AD; beter than 40dB but less than 20dB for 2KHz AD. Left ear (AS) 1KHz better than 20dB; 2KHz better than 20dB; 4KHz better than 60dB.
>
> "There is poor correlation between Evoked Response and Pure tone testing. The evoked threshold reveals better hearing than patient reports; especially for left ear. Right ear correlates within 15dB.

> "*Assessment:* Bilateral high frequency hearing loss with conductive overlay and possible pseudohypacusis left ear."

On June 6, 1978, Dr. Rose submitted a report stating there was "definitely poor correlation between pure tone testing and evoked response audiometry indicating a functional loss. For example, pure tone testing revealed a hearing loss at the 65 db level for 2000 hz (hertz) in the left ear; however, evoked response audiometry indicates that the true hearing level is better than 20 db (decibels) at this frequency, a discrepancy of at least 45 db. The discrepancy at 1000 hz is at least 30 db and at 4000 hz, at least 20 db." He concluded that appellant had hearing "significantly better" than he indicated on routine testing.

By compensation order dated July 20, 1979, the Office suspended appellant's right to compensation until his obstruction of a hearing examination had ceased and complete and reliable medical evidence had been submitted.

In letters dated September 13, 1979, January 24, 1980, October 6, 1980 and January 22, 1981, appellant's representative requested that appellant be sent back to Dr. Rose for further audiological testing, stating that appellant "promises to be very cooperative."

By compensation order dated April 27, 1983, the Office denied appellant's request on the grounds that the evidence submitted was irrelevant and immaterial and that no medical evidence with reliable audiometric results had been submitted.

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary.[1] Subsection (d) of section 8123 states that: "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops."

The Board finds that the Office acted properly in denying appellant's request to be sent for further audiological testing.

The Office referred appellant to a Board-certified otolaryngologist to determine the extent of his hearing loss; he was sent for audiological evaluation to three occasions, with the last referral being accompanied by notification of the provisions of section 8123 of the Act.[2] Appellant can end the suspension of his right to compensation at any time by submitting evidence that the obstrution has ceased, for example, by submission of an audiological evaluation by an otolaryngologist which includes a reliable audiogram. The record contains no evidence that the obstruction had ceased.

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[1] "(a) an employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved, by the Secretary of Labor, after the injury and frequently and at the time and place as may be reasonably required."

[2] See *William H. Hudson*, 32 ECAB 1611, *Fred Denig*, 32 ECAB 925.

The decision of the Office of Workers' Compensation Programs dated April 27, 1983 is hereby affirmed.

In the Matter of MAURICE E. ANDERSON *and* DEPARTMENT OF THE AIR FORCE, SACRAMENTO AIR LOGISTICS COMMAND, MCCLELLAN AIR FORCE BASE, Calif.

Docket No. 83-1639; Submitted on the Record;
Issued November 10, 1983

Before MARGARET PALLANSCH, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issues are: (1) whether appellant had any disability due to an employment-related pulmonary condition; and (2) whether he has any permanent loss of use of either lung entitling him to a schedule award.

Appellant, a 57-year-old plastics worker, filed a claim on May 31, 1977 alleging that he had a pulmonary condition caused by exposure to certain hazardous materials and toxic fumes, including toluene diiscyanate (TDI), from April 18, 1966 until he was separated from his employment on March 3, 1978.

In an attending physician's report dated June 2, 1977 Dr. Harvey D. Cain, a pulmonary specialist, diagnosed "partially reversible obstructive and restrictive defect, consistent with active bronchitis, irritant induced." The doctor indicated that no permanent effects were anticipated if exposure was avoided.

In a September 30, 1977 report Dr. Bruce Canaga, a Board-certified internist specializing in pulmonary disease, stated that appellant stopped smoking 12 years ago and that he smoked a pack of cigarettes a day for 20 years. Noting that appellant's symptoms were moderate Dr. Canaga concluded that he had "chronic obstructive pulmonary disease manifested by decreased pulmonary function, recurrent colds and bronchitis which is probably the result of his long-standing exposure to his industrial environment at the McClellan Air Force Base and more specifically to the chemical irritant Toluene Diiscyanate."

Dr. Robert J. Bemrick, a radiologist, noted essentially normal results of chest x-rays taken on January 12, 1978.

In a July 17, 1978 report Drs. Cain and Canaga stated that appellant's "permanent pulmonary disability is considered substantially medically related to his designated fume exposures for 11 years as a plastics worker at McClellan AFB and is related to his necessary medical retirement."

Upon the recommendation of an Office of Workers' Compensation Programs' medical adviser the Office referred the case record and a statement of accepted facts to Dr. Horton C. Hinshaw, a Board-certified internist specializing in pulmonary disease, for an opinion on whether appellant had a disabling employment-related pulmonary condition.

In a May 11, 1979 report Dr. Hinshaw stated that there was insufficient information in the case record for him to render an opinion. He stated that a chest x-ray, an electocardiogram and current pulmonary function studies should be performed upon appellant.

By letter dated June 19, 1979 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Michael Cohen, a Board-certified internist specializing in pulmonary disease, for a further evaluation of his pulmonary condition. In a July 24, 1979 report, based on pulmonary function studies and a normal chest x-ray performed on July 18, 1979, Dr. Gregory D. Anderson, a Board-certified internist specializing in pulmonary disease, and an associate of Dr. Cohen, concluded as follows:

> "On the basis of pulmonary function studies as well as physical examination, the patient has obstructive airways disease. It is well known that chronic exposure to toluene diiscyanate may result in airflow obstruction of an irreversible nature. Given this patient's well-documented exposure history to TDI as well as the fact that he has not smoked for a number of years and his respiratory symptoms have only developed over the past two or three years, it seems reasonable to conclude that his airways disease is solely or in large part related to this substance.
>
> "Although the pulmonary function studies suggested a restrictive defect as well, such a finding is questionable due to the poor patient effort given on pulmonary function studies. As well there was no evidence radiographically or on physical examination to suggest a restrictive problem."
>
> * * *
>
> "It is my opinion that the patient's obstructive airways disease is related to toluene diiscyante exposure which occurred during his employment as a plastics worker at McClellan Air Force Base. This process is moderately severe and appears irreversible on the basis of lack of responsiveness to bronchodilator therapy.
>
> "I therefore feel that he is partially disabled on a permanent basis. As the degree of airway obstruction is moderate, occupations requiring light or sedentary activity would be acceptable but he should perform no activity where there is exposure to toluene diiscyanate or other known pulmonary irritants."

By letter dated September 25, 1979 the Office once again referred the case record and the statement of accepted facts to Dr. Hinshaw for an evaluation of appellant's pulmonary condition. In his October 29, 1979 report Dr. Hinshaw stated as follows:

> "I believe his past history of cigarette smoking is a significant factor in his obstructive airway disease. However the exposure to pulmonary irritants over a period of many years in the course of his employment also has likely accelerated and aggravated his obstructive lung disease and I would consider the occupational factors to be a material portion of his current pulmonary problem."

Dr. Hinshaw concluded that although appellant "certainly would not be able to do work requiring exposure to significant amounts of dust, smoke, vapors or fumes," he could not determine from the available information what appellant's physical limitations would be in a clean environment. He recommended that appellant undergo repeat pulmonary function testing, including a measurement of airway resistance and an exercise study.

By letter dated February 21, 1980 the Office requested that Dr. Anderson perform additional pulmonary tests upon appellant and address the issue of causal relationship.

In a March 13, 1980 report Dr. Harry MacDonald, a Board-certified internist specializing in pulmonary disease, and an associate of Dr. Anderson, interpreted the results of pulmonary function tests. The results of the tests themselves were not submitted. Dr. MacDonald stated that FVC [forced vital capacity] was at 61 percent of the predicted level and FEV 1 over FVC [one-second forced expiratory volume expressed as a percentage of FVC] was at 78 percent of predicted. In a March 19, 1980 report Dr. Anderson concluded as follows:

> "Repeat routine pulmonary function studies were consistent with mild restrictive disease, but again his cooperation was poor making the results suspect. No significant obstructive defect was demonstrated.
>
> "An incremental exercise study was performed and the patient was able to achieve a maximal 0_2 consumption of almost 1800 cc. per minute which is at the lower limits of normal for someone of his age. Significant pulmonary or cardiac dysfunction was not evident, although anaerobic threshold was low suggesting a component of physical deconditioning.
>
> "Due to poor patient cooperation on both occasions during resting pulmonary function testing, results of both of these studies are suspect. However, as information obtained on an incremental exercise study is less effort dependent, I feel it reasonable to conclude that this individual has no significant functional impairment or limitation on a pulmonary or cardiac basis.

> "This study indicates that he is able to exercise to, or perform activities at, a moderately strenuous level."

The Office, by letter dated April 11, 1980 again referred the case to Dr. Hinshaw for an opinion on whether appellant had any employment-related pulmonary disability impairment.

In a report received by the Office on July 22, 1980 Dr. Hinshaw pointed out that the pulmonary function and exercise studies alluded to by Dr. Anderson were not contained in the record. However, based on Dr. Anderson's conclusions, Dr. Hinshaw stated as follows:

> "These further studies would indicate that he is not disabled from performing the physical duties of a plastics worker, although he will have environmental restrictions in that he would not be able to do work requiring exposure to significant concentrations of dust, smoke, vapors or fumes. He would be classified as AMA class 1 and 0 percent impairment."

In a July 28, 1980 report Dr. Canaga diagnosed "reversible obstructive airway disease and chronic pulmonary obstructive disease" and stated that there were no abnormalities in the result of the pulmonary function testing.

By letter decision dated August 13, 1980 the Office found that appellant had no disability or impairment due to an employment-related pulmonary condition.

Pursuant to a request by appellant, a hearing was held before an Office hearing representative on February 23, 1981.

By decision dated August 4, 1981, made final on August 7, 1981, the hearing representative affirmed the Office's August 13, 1980 decision.

Appellant appealed from the August 4, 1981 Office decision. By order dated December 23, 1981 the Board set aside the Office's decision and remanded the case for further development and a *de novo* review.[1] The Board noted that the record did not contain the pulmonary function tests relied upon by Dr. Anderson in his March 19, 1980 report. The Board stated that the Office should obtain these pulmonary function studies, making certain that they comply with the *Federal (FECA) Procedure Manual, Chapter 2-806* and should consider whether appellant sustained an employment-related loss of wage-earning capacity in light of the case of *Dennis L. O'Neill*, 29 ECAB 151.

At the request of the Office, Dr. Anderson submitted pulmonary function tests and an incremental exercise study, both dated March 13, 1980. Dr. Anderson interpreted the results of the exercise study as follows:

> "This study deomonstrates relatively normal tolerance to exercise

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[1] Docket No. 81-1810.

> as the patient was able to reach a maximal oxygen consumption of nearly 1800 ml/min which is at the lower limits of normal for someone of his age. Significant pulmonary dysfunction is not evident as the level of ventilation at rest and during all increasing workloads was appropriate and there was no evidence of gas exchange impairment. Similarly, normal cardiac function is indicated by an appropriate heart rate and 0_2 pulse for each level of exercise. The low normal anaerobic threshold suggest that exercise tolerance might be improved by a program of physical conditioning and training."

In a February 10, 1982 report Dr. Anderson concluded as follows:

> "The exercise study did not demonstrate any appreciable pulmonary or cardiac defects although mild physical deconditioning was apparent. It was because of this latter finding, rather than any pulmonary impairment or for any preventative reasons, that it was suggested this individual could perform activities at a moderately strenuous level."

* * *

> "As initially suggested, this individual should continue to take precautionary measures to avoid any regular contact with known pulmonary irritants including Toluene Diisyanate."

The Office referred the case for review to Dr. Judd Shellito, a Board-certified internist specializing in pulmonary disease, and a consultant to the Office. In a June 30, 1982 report Dr. Shellito concluded as follows:

> "The medical evidence available at this time would indicate the diagnosis of chronic obstructive pulmonary disease in the claimant. This diagnosis is supported by the claimant's history, and pulmonary function tests obtained through Dr. Canaga and initially Dr. Anderson. All pulmonary function tests results have been difficult to interpret because of poor cooperation on the part of the claimant. The cause of the claimant's obstructive pulmonary disease includes both cigarette smoking and/or adult onset asthma. In my opinion, there is no evidence to support a causal link between the claimant's employment condition and any long-standing pulmonary complaints. It is accepted that the claimant was exposed to a variety of irritant chemicals and fumes. Such substances may aggravate underlying obstructive pulmonary disease. Such aggravation is temporary in nature and would have ceased when the claimant ceased his employment. The claimant should continue to avoid exposures to atmospheres containing irritating dust and fumes. If this is not possible in the claimant's present position, then he is disabled from that position. The percentage of respiratory impairment utilizing the most sensitive test of exercise performance, an invasive exercise

> pulmonary evaluation as being performed in March of 1980, is 0%. The claimant was able to achieve a low normal maximal oxygen consumption without obvious ventilatory or gas exchange limitations."

By compensation order dated April 21, 1983 the Office found that appellant did not have any employment-related pulmonary disability or impairment.

The Board finds that the case is not in posture for decision.

In its order dated December 23, 1981 the Board instructed the Office to consider the issue of whether appellant sustained an employment-related loss of wage-earning capacity in light of the case of *Dennis L. O'Neill*. In that case the Board stated as follows:

> "If the medical evidence establishes that the residuals of an employment-related impairment are such that, from a medical standpoint, they prevent the employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity." [2]

On the other hand, in *James L. Hearn* the Board stated the following:

> Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where, as in the present case, the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition without any contribution by the employment." [3]

There is a conflict in the medical evidence to the issue of employment-related disability between the reports of Drs. Anderson and Hinshaw and that of Dr. Shellito.

Dr. Anderson, a Board-certified internist specializing in pulmonary disease, stated in reports dated July 24, 1979 and February 10, 1982 that, given the facts that appellant stopped smoking many years ago and that he was exposed at work to TDI, it was his conclusion that appellant's permanent partial disability was related to that employment exposure and that he should therefore "avoid any regular contact with known pulmonary irritants including Toluene Diiscyanate." Dr. Hinshaw, a Board-certified internist specializing in pulmonary diseases, stated in his reports dated October 29, 1979 and July 22, 1980 that appellant's exposure to irritants at work accelerated and aggravated his pulmonary condition and "he would not be able to do work requiring exposure to significant concentrations of dust, smoke, vapors or fumes." Therefore, the reports of Drs. Anderson and Hinshaw seem to support the conclusion that residuals from appellant's employment-related pulmonary condition prevent him from continuing in his federal employment as a plastics worker—the basis for the payment of compensation according to *O'Neill*.

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[2] See *Dennis L. O'Neill*, 29 ECAB 259.

[3] See *James L. Hearn*, 29 ECAB 278.

On the other hand, Dr. Shellito, also a Board-certified internist specializing in pulmonary diseases, seemed to arrive at a contrary conclusion consistent with the principle enunciated in *Hearn*. He stated in his June 30, 1982 report that, while appellant was exposed to irritant chemicals and fumes during the course of his employment and that such substances were capable of aggravating an underlying obstructive pulmonary disease, "such aggravation is temporary in nature and would have ceased when the claimant ceased his employment."

In order to resolve the conflict in the medical evidence the Office should refer appellant together with the case record and a statement of accepted facts to a Board-certified pulmonary specialist for a fully reasoned opinion on whether appellant had a disabling pulmonary condition subsequent to March 3, 1978 that was either caused or permanently aggravated by his exposure to toxic substances at work. The specialist should also be asked to give his opinion as to whether appellant has any pulmonary impairment, that is, a permanent loss of use of either lung.[4] The Office should then evaluate the specialist's report for the purpose of determining whether appellant is entitled to compensation for a loss of wage-earning capacity in light of the principles set forth in the above-mentioned cases of *Hearn* and *O'Neill*. If causal relationship, by means of direct causation or permanent aggravation, is indicated the Office should determine appellant's entitlement to a schedule award by applying the tables in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* to the specialist's report.

The April 21, 1983 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action in accordance with this decision to be followed by a *de novo* decision.

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[4] The Office should see that pulmonary function testing be consistent with its procedures set forth in *Federal (FECA) Procedure Manual*, Chapter 2-806, FECA Tr. No. 81-44, issued August 1981.

In the Matter of WILLIAM G. SAVIOLIDIS *and* U.S. POSTAL SERVICE, POST OFFICE, Miami, Fla.

Docket No. 83-1233; Submitted on the Record;
Issued November 10, 1983

Before MARGARET PALLANSCH, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs acted properly in suspending appellant's compensation benefits on the ground that he refused to undergo a physical examination as directed by the Office.

Appellant, a 41-year-old letter carrier, injured his neck on October 18, 1973 when he reached around from the front seat of his vehicle to get to mail that was placed on the back seat. He received temporary total disability compensation from the Office of Worker's Compensation Programs for cervical strain and sprain commencing October 23, 1973.

By letter dated March 17, 1978 the Office referred appellant together with relevant medical reports to Dr. Richard Glatzer, a Board-certified orthopedic surgeon, for an opinion addressing whether appellant had any remaining disability causally related to his October 18, 1973 employment injury.

In a May 3, 1978 report Dr. Glatzer concluded that appellant had a "5 to 10 percent permanent disability to his low back" but no "permanent disability involving his subjective complaints with regard to the cervical area." Dr. Glatzer recommended that appellant undergo a neurological evaluation.

Upon being referred by the Office, appellant was examined by Dr. Morton J. Corin, a Board-certified neurologist, who stated in his November 6, 1978 report that appellant had virtually full range of motion of his neck. He diagnosed "1. Possible musculoligamentous dysfunction of the cervical and lumbosacral spine. 2. The numbness in the left leg of which he complains probably represents idiopathic meralgia paresthetica and is almost certainly unrelated to diagnoses listed in number one above."

Upon reviewing the record an Office medical advisor on January 24, 1979, concluded that despite having only minimal symptoms appellant was still partially disabled.

By decision dated April 3, 1979 the Office determined that appellant was only partially disabled after March 29, 1979 and began to pay him compensation for a loss of wage-earning capacity based on the position of manager trainee.

By compensation order dated October 31, 1979 the Office found that "the injury sustained on October 18, 1973 is no longer causing disability for work or loss of capacity to earn wages." It pointed out that both the neurologist and orthopedist made the same findings of "only subjective complaints." The Office terminated appellant's compensation effective December 6, 1979.

At appellant's request a hearing before an Office hearing representative was held on May 9, 1980. By decision dated July 22, 1981 the hearing representative found that the medical evidence of record failed to establish that appellant was no longer disabled as a result of his October 18, 1973 employment injury to his cervical area. The hearing representative reversed the Office's December 31, 1979 decision and remanded the case for reinstatement of appellant's compensation benefits. He also found that appellant had no disability due to a lumbosacral spine condition that was causally related to his employment injury. The Office reinstated appellant's compensation effective December 6, 1979 based on its previous loss of wage-earning capacity determination.

By letters dated August 27, November 24 and December 24, 1981 the Office requested from appellant a current medical report from his attending physician. Appellant submitted a March 28, 1980 report from Dr. Charles B. Mutter, a psychiatrist, and a September 1, 1981 report from his attending physician Dr. Melvyn H. Rech, an osteopath specializing in orthopedic surgery. Dr. Rech concluded as follows:

> "[Appellant] demonstrates evidence of what appears to be a chronic cervical strain and sprain along with lumbosacral strain and sprain. Post-reduction of a dislocated right elbow was also noted.
>
> "Again I feel the patient has reached maximum medical improvement and further therapy should be of a symptomatic and palliative nature.
>
> "He continues to demonstrate this minimal to moderate permanent disability to the body as a whole.
>
> "The patient does state that he is unable to perform his occupational duties because of this pain."

By letter dated April 6, 1982 the Office referred appellant together with the case record and a statement of accepted facts to Dr. Edward J. Bloch, a Board-certified orthopedic surgeon, for comment on the following questions:

> "1. By what approximate date should the accepted cervical condition have resolved without residual?
>
> "2. Identify any objective physical findings to establish that claimant suffers disability [due] to a cervical condition.
>
> "3. What is the entitlement diagnosis of claimant's present cervical condition?
>
> "4. Is claimant's present cervical condition causally related to the injury of October 18, 1973? Please include medical reasoning upon which your opinion is based."

By letter dated October 19, 1982 the Office requested from appellant the reasons for his delay in making an appointment with Dr. Bloch and advised him that refusal to submit to the authorized medical examination would result in the suspension of his right to compensation until such refusal stopped. The Office ascertained from Dr. Bloch that appellant had not made an appointment to be examined. It received no communication from appellant as to the reasons for not making such appointment.

By compensation order dated January 21, 1983 the Office suspended appellant's right to compensation effective January 27, 1983 on the ground that he "failed to undergo a physical examination as authorized. . ."

By letter dated February 1, 1983 appellant's attorney stated that appellant failed to make an appointment with Dr. Bloch because Dr. Bloch was not a neurologist and because his office was almost 30 miles away from appellant's home.

By letter dated February 15, 1983 appellant, through his attorney, requested reconsideration of the Office's January 21, 1983 decision. He argued that if it was necessary for the Office to get a current medical report it could do so from his treating physician.

By compensation order dated April 8, 1983 the Office found that "the evidence submitted in support of the application for review is found to be lacking substantial probative value and is not sufficient to warrant review of the prior decision."

The Board finds that the Office acted properly in suspending appellant's compensation on the ground that he refused to undergo an authorized medical examination by Dr. Bloch.

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of federal employment or who is already in receipt of compensation for such disability to undergo physical examination as it deems necessary.[1] Subsection (d) of section 8123 states that "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[2]

Appellant's attorney contended that the Office should have referred appellant to a neurologist instead of to Dr. Bloch, an orthopedist, and that if the Office needed a current medical report it could have requested one from his treating physician. The Board notes that Dr. Rech, an osteopath and appellant's treating physician, specialized in orthopedic surgery, the very specialty to which appellant's attorney objected. Appellant's attorney also contended that appellant would have made an appointment with a physician who was closer to his home than was Dr. Bloch. The referral to Dr. Bloch, who was approximately 30 miles from appellant's home, was not unreasonable. The Board finds that the Office did not abuse its discretion in referring appellant to Dr. Bloch, a Board-certified orthopedic surgeon, to determine whether he had any remaining disability as a result of the cervical strain and sprain he sustained at work on October 18, 1973.[3]

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[1] "(a) An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required."

[2] See *Dorine Jinkins*, 32 ECAB 1502.

The January 21 and April 8, 1983 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

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[3] The most recent medical reports to have addressed appellant's cervical condition other than those from Dr. Rech and two Office medical advisers were the May 3, 1978 report from Dr. Glatzer, a Board-certified orthopedic surgeon, and the November 6, 1978 report from Dr. Corin, a Board-certified neurologist, both submitted at the request of the Office.

In the Matter of MILDRED A. LINDALL *and* U. S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Anchorage, AK.

Docket No. 83–1436; Submitted on the Record;
Issued November 14, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly declined to pay appellant's bills for unauthorized treatment she received for the period commencing November 17, 1980.

On September 22, 1980 appellant, then a 33-year-old computer technician, sustained a right inguinal strain and a lumbar strain as a result of separately lifting and carrying three computer paper boxes weighing 50 pounds each.

Appellant was first examined at U.S. Air Force Elmendorf Hospital on September 23, 1980 by Dr. Robert M. Hayward, a general practitioner, who diagnosed a right inguinal strain. He found her fit for light duty at that time with the restriction of no "heavy lifting for 7-10 days." The doctor discharged her from treatment and indicated that she could resume her regular work on October 6, 1980.

Medical records from the hospital's Primary Care Clinic indicated that appellant was seen there on September 25, 1980 complaining of pain of the lumbar spine. A physical examination revealed normal range of motion, no sensory motor deficit, negative leg raising, and the L4–L5 paravertebral muscles were tense. The diagnosis was "lumbar strain." Appellant was again seen in the clinic on September 29, and October

14, 1980 and it was noted that her lumbar strain was resolving. The doctor prescribed rest and analgesics.

On November 17, 1980 appellant was treated by Dr. Douglas Mosher, a chiropractor, who stated that x-rays were negative for fracture or pathology, but positive for spinal misalignments. He diagnosed "acute, severe traumatic lumbar strain with muscle spasm, radiculitis, and myositis." Treatment consisted of chiropractic spinal adjustments, cryotherapy, corrective exercises, and kinesiology.

Notes from the Primary Care Clinic of January 5, 1981 indicate that appellant returned there complaining of lower right side abdominal pain. It was noted that she was seeing a chiropractor for low back pain.

The Office of Workers' Compensation Programs initially accepted that appellant had sustained a right inguinal strain on September 22, 1980, as diagnosed by Dr. Hayward.

On March 26, 1981, an Office medical advisor reviewed the case record and commented that appellant's injury was a right inguinal strain and had no relation to her low back, therefore the chiropractic treatment was not necessary, nor was it referred by the doctor who had medical management of her case.

In a June 5, 1981 letter, appellant explained that she continued to have back pain while visiting the Primary Care Clinic. A friend told her about a similar case where the person got relief after visiting a chiropractor, and she decided to visit one. She continued:

> "On 11/17/80, I went to the Ireland Chiropractic Clinic and saw Dr. Mosher. He took a complete set of x-rays, explained to me what was wrong with my back, and adjusted my back. Dr. Mosher has adjusted my back several times since. I am now seeing him only once every three weeks, and I am feeling much better.
>
> "On 1/5/81, I again went to the Primary Care Clinic and this time saw Dr. Anderson. I told him that I was seeing a chiropractor for the lower back pain. Although he didn't actually say it, he left me with the impression that it was good that I was seeing a chiropractor. Dr. Anderson x-rayed me during this visit. It was the first time that I had been x-rayed since my injury by any of the doctors at the Primary Care Clinic. I am sure that the only reason Dr. Anderson x-rayed me is because I told him that I felt no one there was treating me properly and that they hadn't even taken the precaution of x-rays.
>
> "Since Dr. Rea [of the Primary Care Clinic] had adjusted my back and Dr. Anderson seemed to think that it was all right to be seeing a chiropractor, I felt that they agreed with my decision to see a chiropractor.
>
> "The doctors at the Primary Care Clinic were treating me, but I still had a considerable amount of pain. I felt that I had to do

> something to get some help. I was not aware that I had to get permission from Office of Workers' Compensation Programs to change doctors. I would like to request you cover the bills that I have received from Dr. Mosher at the Ireland Clinic."

By letter decision dated June 9, 1981 the Office denied appellant's claim for chiropractic care.

At appellant's request, a hearing was held on June 29, 1982. She described how the injury occurred and the treatment she had received.

In a September 13, 1982 decision, the hearing representative found that appellant had failed to show that the expenses incurred for chiropractic services were for correction of a subluxation "as demonstrated by x-ray to exist" as required by section 8101 (3) of the Federal Employees' Compensation Act.[1] He, therefore, affirmed the Office's prior decision.

Appellant requested reconsideration, and in support thereof submitted the following December 14, 1982 letter from Dr. Mosher to the Office:

> "In regards to the U.S. Department of Labor report on Mildred Lindall, I have reviewed her records in our clinic noting that the initial report of work injury states that the diagnosis as you reiterated in the report. It also states under x-ray findings 'spinal misaligment' which is synonymous with 'vertebral subluxation.' In Ms. Lindall's particular case, L4 and L5 rotatory subluxations exist which are demonstrable on her x-rays. I regret any difficulty which may have come about because of my lack of using the word 'subluxation.' "

By letter decision dated March 7, 1983 the Office found that appellant sustained a lumbar strain as a result of the September 22, 1980 incident. It further found that the chiropractic treatments were in compliance with section 8101 (3) of the Act as a subluxation did exist as shown by x-ray; however, since prior authorization was not obtained for change in medical management, the Office refused to pay the expenses of such treatment.

On March 31, 1983 appellant submitted the following information with a request for reconsideration:

> "In November 1980 I approached . . . our safety officer, regarding not being pleased with treatment at Elmendorf Air Force Base. I asked him in the presence of . . . [the] District Ranger, if I could go to a chiropractor because I was having to see different doctors whenever I called to make an appointment at Primary Care Clinic and felt I wasn't getting anywhere as far as getting proper care for

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[1] 5 U.S.C. 8101 (3).

> my injury . . . [He] right on the spot told me that there was not any reason why I couldn't change medical management and that Workers' Compensation would cover Chiropractic Services. Nothing was ever mentioned about having to get prior authorization. I made an appointment with Ireland Clinic of Chiropractic for November 17, 1980. I have been treated by only one doctor at this clinic, Douglas Mosher."

In a March 22, 1983 letter, the personnel management specialist, stated:

> "During the first week of November, 1980 Ms. Lindall informed me that she was still experiencing quite a bit of pain and that a friend had suggested that she see a chiropractor. She asked me if it was authorized for her to do so. I told her that she could change doctors. I called OWCP in Seattle and explained the situation to the person who answered. I was told that she could change doctors if she wanted, but that a determination as to whether or not it would be authorized would not be made until after the bills were submitted by the second doctor to OWCP. The reason that I remember what happened is that the exact same thing happened again in 1982 with another one of our employees. In the second case, everything was honored."

By compensation order dated April 22, 1983 the Office, after a review of case on its merits, found that the evidence was not sufficient to warrant modification of the March 7, 1983 decision.

The Board finds that the Office did not abuse its discretion in denying appellant reimbursement of payments for unauthorized treatment she received for the period commencing November 17, 1980.

Section 8103[2] provides that an employee ". . . may initially select a physician to provide medical services, appliances, and supplies, in accordance with such regulations and instructions as the Secretary considers necessary . . ." Pursuant to that provision, 20 C.F.R. 10.400 (b) states:

> "An employee has only an initial choice of physicians. A change of physicians will be permitted only upon approval of the Office after the employee submits an explanation for his or her desire to change."

The Office is required by 5 U.S.C. 8103 to provide all medical care necessary on account of an employment injury. It is further provided that this care shall be furnished by or on the order of physicians designated or approved by the Office. Therefore, in the absence of an emergency, an employee may not recover for the cost of medical care obtained without prior approval.[3] In the present case, appellant was authorized to see Dr. Hayward at the Elmendorf Hospital. He treated her on September 23, 1980 and discharged her from treatment at that time. She returned to the Primary Care Clinic of the Elmendorf Hospital and received treatment on September 25, 1980, September 29, 1980 and October 14, 1980. On November 17, 1980 she first went to see Dr. Mosher. The examinations by Dr. Mosher were not authorized by the Office, nor were they recommended by the treating physicians at the Primary Care Clinic, and there is no showing that an emergency condition existed. Therefore, the Board finds that the Office properly rejected reimbursement of the expense for services by Dr. Mosher.

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[2] 5 U.S.C. 8103.

The decisions of the Office of Workers' Compensation Programs, dated April 22, 1983 and March 7, 1983, are hereby affirmed.

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[3] *Alfred Schreiber*, 23 ECAB 235.

In the Matter of GUSTINA NICHOLAS, claiming as the mother of PATRICIA NICHOLAS, deceased employee *and* DEPARTMENT OF HEALTH, EDUCATION and WELFARE, DISEASE CONTROL CENTER, Atlanta, Ga.

Docket No. 83–1704; Submitted on the Record;
Issued November 14, 1983

Before MARGARET PALLANSCH, WILLIE T. C. THOMAS, DAVID S. GERSON

The issues are whether the Office of Workers' Compensation Programs (1) properly determined that appellant was partially dependent on the deceased employee under 5 U.S.C. section 8133; and (2) properly computed its credit against a third-party recovery obtained by appellant.

On May 18, 1978 appellant, Gustina Nicholas, filed a claim for dependency benefits as the result of the death of her 36-year-old daughter, Patricia Nicholas, who died from carbon monoxide and smoke inhalation during a motel fire on April 29, 1978. The employee was staying at the motel while on a temporary duty assignment away from the employing establishment. She had been employed by the government for eight months.

By letter dated June 8, 1978 the Office of Workers' Compensation Programs requested appellant to submit affidavits with regard to the support she received from the employee during the 12 months preceding her death. In a letter dated January 12, 1979 the Office notified appellant that any recovery obtained from a third party liable for the employee's death would be established as a credit against possible future compensation payable.

By letter dated March 14, 1979 appellant, through her attorney, indicated that a wrongful death action had been filed. In a letter dated May 8, 1979 appellant's attorney stated:

> "Be advised that Mrs. Nicholas' gross salary is $324.00 every two weeks, and that she has no other source of income.
>
> "Additionally, I am enclosing a copy of Mrs. Nicholas' living expenses per month. Furthermore, Mrs. Nicholas' daughter, Pat, did not reside with her mother from November 27, 1977 until the date of her death, April 29, 1978.
>
> "Further be advised that Patricia Nicholas paid half of the utilities, grocery bills, rent, sewer bills, etc., when she was living out-of-state. She paid for these expenses by opening a Fast Cashier's account at Cleveland Trust in her name as well as in her mother's name. Patricia would make regular deposits into their joint account and thus Mrs. Nicholas could draw upon that account to pay the bills as they came due."

On an attached living expense form it was indicated that appellant incurred, among others, the following disbursements: $100.00 a month rent; $40.00 a month electricity; $62.50 a month gas; $16.18 a month phone; $6.00 a month lawn care; $6.00 a month water; and $25.00 a month in miscellaneous personal items. Appellant submitted records which indicated that she had an approximate income in 1977 of $9,500.00 and $9,300.00 in 1978. The employee had an income in 1977 of approximately $9,963.00 and provided for her mother's support by making automatic deposits of her salary checks into the Cleveland Trust Bank, from which withdrawals would be made to pay expenses.

Appellant also submitted the August 29, 1980 affidavit of her landlord who stated that until her death, the employee shared equally in the rental payments and that these payments were made in cash.

By letter dated June 10, 1981 appellant's attorney notified the Office that he obtained a settlement of $15,000 in the third party suit. In a Statement of Recovery submitted September 10, 1981 the attorney deducted from the $15,000 gross recovery attorney fees and costs of litigation in amount of $5,000 and one fifth of the net recovery, $2,000, to be retained by appellant as her share of the recovery. Of the remaining net amount, $8,000, the Office claimed reimbursement of its disbursements, $1,256.21, less $418.73 to be retained by appellant as the Office's proportionate share of attorney fee's. The sum of $873.48 was refunded to the Office by appellant's representative on September 25, 1981. The remaining net amount of $6,743.79 was claimed by the Office as a credit against any future compensation determined to be payable to appellant.

By letter dated May 4, 1982 the Office notified appellant it had determined that she was a dependant of her daughter and that the Office was in the process of determining her compensation award. She was also notified that before any compensation could be paid, the balance of the third party credit would be deducted from the benefits due. Applying the standards of the *Ballard*[1] decision, the Office determined appellant was partially dependent on her daughter and entitled to four percent of her daughter's monthly pay.

In an award dated June 17, 1982 the Office found appellant entitled to four percent of her daughter's monthly income.

On June 22, 1982 appellant's representative objected to the terms of the compensation award and requested a hearing before an Office representative.

In a decision dated November 12, 1982 the hearing representative found that the evidence did not establish that appellant was dependent upon her daughter and vacated the Office's June 17, 1982 decision. He stated: "The file does show that the employee and her mother lived together and shared all household expenses equally. Further, both parties had nearly equal incomes ($9,963.00 and $9,372.00 per year). But this does not establish dependency under 5 U.S.C. 8133." The hearing representative remanded the case for further development on the issue of dependency.

On remand, the Office determined that its decision dated June 17, 1982 was consistent with the test of dependency stated by the Board. However, it found that the only probative evidence of partial dependency submitted by appellant was the landlord's affidavit and that no other expenses or contributions paid by the employee had been proven.

By letter dated January 21, 1983 the Office requested appellant's attorney to submit further documentation as to the expenses contributed by appellant's daughter. No further documentation was provided by appellant.

On March 28, 1983 the Office, applying the standards of the *Ballard* decision, determined appellant was entitled to two percent of her daughter's monthly pay. By an award of compensation dated May 9, 1983 the Office awarded appellant two percent of the employee's monthly salary. The award noted that the third party credit would be satisfied before compensation benefits were paid by the Office.

5 U.S.C. section 8133 provides in pertinent part:

> "(a) If death results from an injury sustained in the performance of duty, the United States shall pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule:"

* * *

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[1] *Minnie Ethel Ballard (Capt. Clarence C. Ballard)*, 8 ECAB 716.

> "(4) To the parents, if there is no widow, widower, or child, as follows:
>
> "(A) 25 percent if one parent was wholly dependent on the employee at the time of death and the other was not dependent to any extent;
>
> "(B) 20 percent to each if both were wholly dependent; or
>
> "(C) a proportionate amount in the discretion of the Secretary of Labor if one or both were partly dependent."

In construing the term "dependent" the Board has defined it as meaning one who looks to, and relies upon, support and maintenance in respect to necessities consistent with the dependent's position in life, which are supplied by another. The test of dependency, in general, is not whether the claimant is capable of supporting herself without the assistance of the one upon whom she is dependent, but whether she in fact relies upon the support given by another. The fact that a dependent may be capable of self support does not change dependency status, as the question to be determined is whether the person claiming the benefit was, in fact, dependent upon the deceased.[2] The question of whether a parent is dependent upon a child is a question of fact and it is not necessary to show that dependency shall be to a substantial extent.[3]

The Board finds that appellant has established by the reliable, probative and substantial evidence of record that she did look to and rely upon the contributions of the deceased employee in helping her to maintain her customary standard of living, and was partly dependent within the meaning of the Act upon her deceased daughter for support at the time of her death.

With regard to the compensation appellant is entitled, the Board, in the *Ballard*[4] decision, established the following formula:

> "To establish the minimum parental compensation entitlement, the adjudicator should first determine the percentage that the decedent's contribution, during the accepted predeath time interval, bears to the total moneys the parent received from all sources during the same period of time. Multiply the resulting percentage by the 25 percent and the result obtained is the payable percentage of dependency."

In the instant case, the only documented evidence with regard to the support contributed by the decedent was the affidavit of appellant's landlord who stated that the employee regularly contributed $50.00 per month for rent. Therefore, applying the formula, and accepting for the purposes of this case the 12 months preceding the death on April 29, 1978 as the measuring period:

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[2] *William L. Rogers (Stella Perrine Rogers)*, 1 ECAB 191, 3 ECAB 35; *Agnes M. Chekel (Thomas R. Chekel)*, 13 ECAB 269.

[3] *Viola Davidson (John O. Lynch)*, 4 ECAB 260.

[4] *Minnie Ethel Ballard*, supra, 8 ECAB 716, at 717.

"50.00 (the contribution of decedent) divided by $781.00 (the total monthly income of appellant) equals six percent."

"Six percent multiplied by 25 percent equals 1.5 percent."

This is the minimal compensation award to which appellant is entitled. The Office using its discretion, increased the formula percentage to two percent.

With regard to the issue of whether the Office properly determined its credit against the third party recovery obtained by appellant, the Board finds that the Office properly determined its credit under 5 U.S.C. section 8132.[5] In addition, appellant and her attorney were informed that the Office would use the credit amount of $6,743.79 to offset any future accruing compensation benefits before it would make payments to her. The terms of section 8132 are specific as to what must be charged against the proceeds of a third party recovery and neither the Office nor the Board has authority to enlarge or modify the terms of the Act.

The May 9, 1983 award of the Office of Workers' Compensation Programs is affirmed.

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[5] Section 8132 (5 U.S.C. section 8132) reads as follows:

> "Section 8132. Adjustment after recovery from a third person. If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of the liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the cost of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury. No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to the minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States."

In the Matter of GORDON W. ENGLAND *and* NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, GEORGE C. MARSHALL SPACE FLIGHT CENTER, Huntsville, Ala.

Docket No. 83–1359; Submitted on the Record;
Issued November 14, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH
DAVID S. GERSON

The issues are (1) whether appellant was without fault in the creation of an overpayment of compensation resulting from his divorce from his wife, and if so, (2) whether waiver of the overpayment is warranted.

Appellant, then a 50-year-old experimental metal worker, was injured in a fall on September 13, 1965. He initially received temporary total disability payments intermittently from October 18, 1965 to October 24, 1966. On July 24, 1967 the Office of Workers' Compensation Programs determined appellant's loss of wage-earning capacity based on a 15 percent permanent partial disability due to aggravation of a preexisting condition and began paying him compensation on that basis effective June 6, 1967. Appellant received compensation at the augmented rate because he had dependents. The July 24, 1967 letter notifying him of his rate of compensation contained the following information:

> "If you have no dependents of the class specified in the law, your compensation rate is two-thirds of your loss in earning capacity. If you have dependent(s), the compensation rate is three-fourths . . . Please advise us promptly of any change of address, or change in the status of any dependents."

On June 1, 1970, based on additional medical evidence, the Office began paying appellant compensation for temporary total disability, retroactive to the date the original loss of wage-earning capacity determination became effective. At that time appellant's compensation continued at the augmented rate because he had two dependents in his household—his wife and minor son.

The status of appellant's dependents continued unchanged until appellant's son died on June 19, 1972. Subsequently, appellant obtained a divorce from his wife finalized on March 23, 1977. The first notice from appellant to the Office of this change in the status of his dependents was dated March 23, 1980 and received by the Office on the next day. At that time appellant responded to Office form letter CA-1032 by marking the box labelled "No dependents." Nevertheless, the Office continued to pay and appellant continued to accept compensation at the augmented rate.

On October 2, 1981, the Office notified appellant that his compensation was being adjusted as of September 10, 1981 because of overpayment. On November 20, 1981 the Office computed the amount of the overpayment based on the rate for appellant with no dependents and determined that for the period March 23, 1977 to September 9, 1981 appellant had received an overpayment of $6,748.12.

On February 17, 1982 appellant filed with the Board and application for review of the Office's November 20, 1981 decision. However, by an April 2, 1982 order the Board dismissed the appeal on the ground that there was no final decision of the Office over which the Board could exercise jurisdiction.[1] Accordingly, the case was returned to the Office for futher action and a *de novo* decision on the issue of overpayment.

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[1] Docket No. 82-912, issued April 2, 1982.

By letter decision dated May 21, 1982, the Office issued a final decision in which it found that appellant had received an overpayment in the amount of $6,748.12. The Office notified him that the overpayment would be recovered by deducting $200.00 from each of his compensation payments, beginning with his next check.

The Board finds that appellant was not without fault in the creation of the $6,748.12 overpayment.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment "shall" be made by decreasing later payments of compensation. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [the Federal Employees' Compensation Act] or would be against equity and good conscience." [2]

In order to qualify for this exception, the recipient of an overpayment of compensation must be without fault. If he is not, there is no basis for waiving the overpayment, and adjustments shall be made.

In determining whether an individual is "without fault," what constitues "fault" depends on whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been excepted to know was incorrect." [3]

In finding appellant not without fault in creating the overpayment, the Office applied the third standard to appellent—acceptance of a payment which the payee either knew or should have been expected to know was incorrect.

The Board finds that the evidence establishes that appellant received notice in the Office's July 24, 1967 letter that he was receiving compensation at the augmented rate because his wife and son qualified as dependents. In that same letter, appellant was also advised of the necessity to inform the Office of any changes in the status of his dependents. Accordingly, he either knew or should have known that his compensation was to be reduced when he no longer had any dependents, *i.e.*, when his divorce from his wife became final on March 23, 1977. This knowledge is especially evident in view of the information which appellant was required to furnish the Office every year concerning the status of his dependents, which for the previous ten years had always included at least one dependent—his wife. Since appellant was not "without fault" there is no basis for waiver of the overpayment under 5 U.S.C. section 8129(b) and adjustment must be made.

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[2] 5 U.S.C. section 8129.

[3] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2535, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2-claims.

The decision of the Office of Workers' Compensation Programs dated May 21, 1982 is hereby affirmed.

In the Matter of HUBERT W. PICKENS *and* U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, Kansas City, Mo.

Docket No. 83-1324; Submitted on the Record;
Issued November 14, 1983

Before MARGARET PALLANSCH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant has any disability after May 20, 1983, the date the Office of Workers' Compensation Programs terminated his compensation, causally related to his federal employment.

On January 24, 1975, appellant, then a 51-year-old program analyst, sustained a collapsed left lung after climbing three flights of stairs to reach the site of a meeting. Appellant stated he had caught a cold while on travel status from January 20 through January 24, 1975 and that he had to terminate the January 24 meeting because he had difficulty breathing and focusing his eyes. He was hospitalized from January 24 through January 28, 1975 for treatment of a spontaneous tension pneumothorax. He was again hospitalized from February 5 through February 22, 1975 for treatment of a "recurrent tension pneumothorax" of the left lung. Dr. Michael D. Boggan, a Board-certified surgeon, performed a "left thoracotomy with excision of apical blebs and pleural scarification," on February 13, 1975. Appellant used sick and annual leave from January 27 through April 12, 1975, performed limited duty for four hours a day from April 14, 1975 to November 8, 1975 and used sick and annual leave from November 9, 1975 through February 17, 1976. He retired on disability effective February 18, 1976. Appellant asserted that his recurrent pneumothorax condition was due to tension and stress encountered in his job and submitted statements from his official superior, a coworker, and several employing establishment officials attesting to this.

Dr. Boggan reported on October 15, 1975 that appellant had "the continued presence of moderate emphysematous changes of the lungs," and had "decreased pulmonary function secondary to thoracotomy." He stated that appellant's "high tension work may well have been responsible for the sudden deterioration in his health requiring the above operation [thoracotomy]." In an undated report received by the Office on April 15, 1975, Dr. Boggan stated appellant had "moderate pulmonary emphysema with abnormal pulmonary functions." He stated the thoracotomy had been necessary to excise "the abnormal tissue at the apex of the left lung which had ruptured causing the pneumothorax." He opined that appellant's type of work which involved a great deal of traveling, some by airplane, was "contraindicated." In a December 9, 1975 report, Dr. Boggan stated that concerning "whether his [appellant's] condition is job-related, there is no real scientific data which relates tension to decreased pulmonary function." He stated that persons under chronic stress "if genetically predisposed to development of chronic pulmonary conditions such as emphysema," who live in congested areas with increased air pollutants and use tabacco "will develop accelerated deterioration in pulmonary function."

The Office of Workers' Compensation Programs medical director, who specializes in occupational medicine, reviewed the case record on October 5, 1976 and opined that "the climbing of stairs and the cold while on travel status were competent to precipitate a collapse of the left lung from obvious congenital blebs in the lung at the apex." He stated he was "not aware of this [lung collapse] being caused by emotional stress."

By letter dated October 18, 1976, the Office accepted appellant's collapsed left lung condition as causally related to his activities on January 24, 1975. Appellant received compensation for temporary total disability from February 18, 1976, the date of his disability retirement, through May 20, 1983.[1]

In response to a request of the Office for a progress report, Dr. Boggan stated on February 14, 1977 that appellant had "recovered satisfactorily" from his thoracotomy, that he "suffers from pulmonary emphysema" and "remains disabled" due to the emphysema "especially in view of the fact he has had previous difficulty with spinal injury and surgery." [2]

Dr. P. G. Price who specializes in general and abdominal surgery,[3] reported on June 7, 1979 and May 22, 1980 that appellant was disabled due to chronic obstructive pulmonary disease and the severity of his pulmonary function status. He submitted a May 18, 1979 pulmonary function and chest x-ray report, the latter showing "small nodular densities throughout both lung fields with some containing calcium," which were believed to represent "old granulomatous disease."

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[1] Appellant elected to receive compensation benefits in lieu of his retirement annuity.

[2] Appellant sustained a back injury while in military service which required spinal fusion in March 1945.

[3] Dr. Price on July 7, 1977 excised a benign right renal cyst which appellant claimed was due to his employment-related pneumothorax. This claim, rejected by the Office on May 10, 1979, is not on appeal before the Board.

The Office medical director again reviewed the case file and on May 23, 1980 recommended that appellant be referred to a pulmonary specialist for repeat pulmonary function studies. He questioned the accuracy of the results obtained on May 18, 1979 because the test did not include the use of a bronchodilator and a blood gas study had not been performed.

The Office by letter dated June 22, 1981, referred appellant to Dr. C.M. Harvey, Board-certified in internal medicine, and submitted to the doctor a statement of accepted facts and the case record. Dr. Harvey examined appellant on July 9, 1981 and reported the following history on July 22, 1981:

> "This man was examined because of a disability alleged due to pulmonary emphysema and a spontaneous pneumothorax, which occurred on two occasions in 1975. According to my history, he began smoking at age 19 and quit in 1975. He smoked as many as 40 cigarettes a day for a period of 14 months, about 1944 and 1945, during a period of stress related to back pain, but his usual rate was 20 per day. At the time of his disability he was working in Kansas City and in East St. Louis as an investigator and auditor for a government agency. He had an episode of pneumonia in 1937 during scarlet fever and again had pneumonia in 1942. He suffered a spontaneous pneumothorax with collapse of the left lung on January 24, 1975. According to the patient, the lung again collapsed on February 5, 1975. He was treated initially with a tube thoracotomy. . . He underwent a left thoracotomy at which time the pleural surfaces were rubbed or scarified by rough gauze in order to cause a symphysis between the visceral and parietal pleural surfaces. Apparently the surgery was successful, as he has never had another collapse of the lung. He has never had a collapse of the lung on the other side.
>
> "He has continued to be short of breath and has been told for a good many years that he does have pulmonary emphysema. He claims to have a lot of chest pain, 'like cockleburs' over the left lower anterior chest and over the left infrascapular area. The pain is fairly steady but does come and go somewhat and is not related to exertion. He denies cough. His weight has been steady at 165 to 170 pounds."

Dr. Harvey reported his findings on physical examination and the results of x-rays, complete pulmonary function tests and blood gas studies and concluded as follows:

> "In summary, this man does have pulmonary emphysema of moderate severity and did have a spontaneous pneumothorax in 1975 which required surgical treatment and the treatment was successful since he has not had another pneumothorax.

"It is my opinion that the medical evidence of record does not establish any direct cause or relationship between Mr. Pickens' emphysema and pneumothorax and factors of his federal employment. The most likely cause of his pulmonary emphysema is his cigarette smoking which he maintained for many years. Spontaneous pneumothorax occurs somewhat more frequently in patients with pulmonary emphysema but also occurs in people without pulmonary emphysema and is generally related to the presence of small blisters or blebs on the pleural surface, which break and permit air to escape from the lung through a very tiny opening into the pleural space around the lung, allowing the lung to collapse. At times, spontaneous collapse has been associated with extremes of exertion, but more likely it occurs unrelated to exertion. It is treated exactly as this man's pneumothorax was treated. The thoracotomy was performed because he did have a second pneumothorax and apparently there was an air leak of sufficient size to reduce the possibility of the lung expanding and remaining expanded without surgery. The scarification of the pleural surfaces was carried out to prevent another recurrence.

"In my opinion, the pneumothorax itself and the thoracotomy did not produce any significant increase in the impairment already due to the pulmonary emphysema. X-rays do not show any significant pleural reaction. His diminution in ventilation is obstructive and not restrictive. Any impairment in ventilation due to the thoracotomy would produce a restrictive diminution.

"The pulmonary emphysema can be expected to gradually worsen with increasing age, even though he quit smoking in 1975. It is quite likely that his ventilatory impairment is somewhat worse now than it was in 1975. This, however, is not due to the fact that he had a pneumothorax, but simply to the fact that the natural course of pulmonary emphysema is that of gradual increase in the obstructive ventilatory insufficiency."

* * *

"One final discussion is on order: The evidence for and the validity of Dr. Boggan's statement, 'In most patients following thoracotomy, pulmonary functions are decreased somewhat.' In my experience, in the presence of a thoracotomy tube followed by a thoracotomy for treating spontaneous pneumothorax there has not been any significant impairment of ventilation. This occurs only if [a] complication such as emphysema due to infection would result, causing serious pleural thickening. I believe that there is no evidence from this man's pulmonary function studies that he suffered any increased impairment as a result of his thoracotomy."

Dr. I.E. Kaplan, an Office medical consultant who is Board-certified in internal medicine, reviewed the case record on August 19, 1981 and opined that appellant's emphysema was due to his cigarette smoking and that there was no causal relationship between the emphysema on the one hand and the pneumothorax or factors of appellant's employment on the other. He stated that based on Dr. Harvey's report, any decrease in appellant's pulmonary function from 1975 to 1981 was secondary to progression of the nonemployment-related chronic obstructive pulmonary disease.

By compensation order dated April 28, 1982, the Office terminated appellant's compensation effective May 20, 1983 on the ground that "all disability resulting from the accepted condition, a collapsed lung, has ceased." The Office determined that the opinion of Dr. Harvey represented the weight of the medical evidence and that it did not establish a relationship between appellant's disabling emphysema and his collapsed lung or factors of his federal employment.

Appellant requested a hearing before an Office hearing representative and submitted a May 15, 1982 report by Dr. R. J. Haas, an osteopathic physician who had treated appellant periodically from 1937 to 1968. Dr. Haas reported he had not found appellant to be suffering from emphysema or chronic obstructive lung disease and that it was his belief that appellant's "breathing problems are related to his work situations with the U.S Department of Labor creating stress on the individual."

At the hearing held December 13, 1982, appellant testified that he continued to have pain in his chest in the area of his thoracotomy and that he still had shortness of breath. Appellant's representative asserted that the emphysema had been caused or aggravated by the pneumothorax.

Submitted as exhibits at the hearing were a May 13, 1982 report by Dr. Arvindkumar Bhakta, an internist, and May 11 and December 8, 1982 reports by Dr. Jim D. Dixson, Board-certified in internal medicine. Dr. Bhakta reported May 10, 1982 chest x-ray and pulmonary function tests suggested chronic obstructive pulmonary disease and that appellant "does have significant disability, and the initial episode did start at the time when he was employed by the United States Government." Dr. Dixson reported the following on May 11, 1982:

> "Mr. Hubert Pickens continues to suffer from problems related to emphysema and chronic obstructive lung disease. He is disabled due to two episodes of pneumothorax which he sustained while employed by the . . . [federal government]. He has never completely recovered from this injury in that he has chronic pain in the area over the thoracotomy scar and is chronically short of breath. Over the last year he has made no significant improvement. ***"
>
> "I feel that Mr. Pickens is continuing to be disabled due to the above conditions which started at the time of his injury while employed by the United States Government."

In his December 8, 1982 report, Dr. Dixson stated as follows:

> "Mr. Hubert Pickens has had continual problems related to the emphysema, chronic lung disease as a direct result of disability related to two episodes of pneumothorax which he sustained in 1975 while at work . . . Due to these problems he has had continual shortness of breath and has a propensity to developing recurrent pulmonary infections. He is unable to perform his job due to this condition. He has a great deal of recurrent pain in the chest and lung areas, and has much congestion related to this problem.
>
> "He is unable to perform usual activities and unable to walk for any prolonged distance or exercise due to this problem. He did not have that problem prior to the pneumothoraces.
>
> "Mr. Pickens has continued to suffer a permanent disability from the above condition."

The Office hearing representative by decision dated March 8, 1983 and finalized March 9, 1983 determined that Dr. Harvey's report represented the weight of the medical evidence and established that appellant's present disability due to emphysema had not been caused or aggravated by the pneumothorax.

The Board finds that the weight of the medical evidence establishes that appellant's disability after May 20, 1983 was not causally related to his federal employment.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[4]

The Office met its burden of proof with the detailed well-rationalized opinion of Dr. Harvey, a Board-certified internist, who opined in July 1981 that appellant's disability and pulmonary impairment were due to emphysema which was in turn most likely due to appellant's thirty-three year history of cigarette smoking. Dr. Harvey after reviewing the medical evidence of record and the results of his own testing opined that while someone with pulmonary emphysema may be more likely to have a spontaneous pneumothorax, the spontaneous pneumothorax or factors of appellant's employment did not cause or aggravate the emphysema or lead to a decrease in his ventilatory capacity. Dr. Harvey emphasized that appellant's ventilatory impairment was obstructive and not related to the pneumothorax condition which would produce a restrictive impairment. The worsening of appellant's ventilatory inpairment from 1975 to the time of the 1981 examination was due to the "natural course of pulmonary emphysema."

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[4] *Henry A. Hammett*, 31 ECAB 733.

The Board notes that Dr. Boggan diagnosed appellant's moderate emphysema as early as 1975. The statement of Dr. Haas, an osteopathic physician, that during the years 1937 to 1968 he had never discovered emphysema or chronic obstructive pulmonary disease is not relevant to the question whether appellant's disability after May 20, 1983 was causally related to the pneumothorax or to factors of federal employment. Dr. Haas offers no rationale for his statement that appellant's "breathing problems" are related to stressful work situations and therefore his statement has little probative value.

Dr. Bhakta, an internist, merely noted appellant had significant disability due to chronic obstructive pulmonary disease and did not address whether that disability was causally related to federal employment. His statement that appellant's "initial episode of disability" which was due to the pneumothorax started during federal employment does not establish that the disability after May 20, 1983 due to chronic obstructive pulmonary disease is causally related to that employment.

Dr. Dixson, a Board-certified internist, found appellant to be disabled due to emphysema and chronic obstructive pulmonary disease "as a direct result of disability related to two episodes of pneumothorax which he sustained in 1975 while at work." However, Dr. Dixson failed to explain how these conditions could be related to the pneumothorax which according to Dr. Harvey would have caused a restrictive not an obstructive impairment. The weight of the medical evidence, represented by the opinion of Dr. Harvey, establishes that appelllant's disability after May 20, 1983, was not causally related to the pneumothorax condition or factors of appellant's federal employment.

The decision of the hearing representative of the Office of Workers' Compensation Programs dated March 8, 1983 and finalized March 9, 1983 is hereby affirmed.

In the Matter of VINCENT SIDERINE *and* U.S. POSTAL SERVICE, POST OFFICE, Massapequa, N. Y.

Docket No. 83-1660; Submitted on the Record;
Issued November 15, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant's injury on July 22, 1982 was sustained in the performance of duty.

Appellant, a 54-year-old letter carrier, after completing his duties and clocking out, sustained a sprained left ankle when he stepped off a curb in front of the employing establishment. The sprain was caused by his misstepping on a rain gutter, which is the property and responsibility of the township.

In a July 29, 1982 letter, the employing establishment controverted the claim with the following arguments:

> "Mr. Siderine had ended his tour of duty, left the Massapequa Post Office and was waiting in front of the building for his wife to pick him up. He states that he stepped from the curb into a 'deceptive indentation between the gutter and the asphalt pavement.'
>
> "Please be advised that the town of Oyster Bay (which includes the town of Massapequa) has modified road surfaces to include a rain gutter adjacent to the curbing. This rain gutter, constructed by the town of Oyster Bay, on town property, is the indentation Mr. Siderine cites as the location and cause of his injury. * * *
>
> "Mr. Siderine was not on the clock and not on Postal premises at the time he claims injury; therefore, we have not authorized continuation of pay, and do controvert this claim."

By compensation order dated October 19, 1982 the Office of Workers' Compensation Programs denied appellant's claim on the basis that he "was not in the performance of his duties at the time of injury, nor did the injury occur on Federal premises."

In a letter dated October 21, 1982 appellant requested reconsideration, arguing that the injury occurred within one minute after completing his workshift and approximately 15-25 feet from the employing establishment. He further stated that the injury occurred near the "blue collection boxes," an area that is maintained by and is the responsibility of the employing establishment.

By compensation order dated April 27, 1983 the Office found that the evidence was not sufficient to warrant modification of the prior decision.

The Board finds that appellant was not injured in the performance of duty.

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment. Such injuries are considered the ordinary nonemployment hazards of the journey itself which are shared by all travelers. This rule also applies where an employee is leaving his permanent duty station after work and is injured in an area adjacent to the federal building where he worked but which is not owned or controlled by the federal government.[1]

The evidence establishes that at the time of injury appellant had finished his scheduled tour of duty and left the employing establishment premises. His status at that time was that of a "fixed premises" employee with fixed hours of work coming from work. He was therefore subject to the "going and coming" rule generally applicable to such employees. Although appellant contends that the employing establishment controls the area which surrounds the "blue collection boxes," this area is not owned or controlled by the employing establishment. The area is public property, owned and controlled by the township. The rain gutter which caused appellant's mishap, was constructed by the town, and is maintained by the town.

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[1] *Sam Brock*, 32 ECAB 1636 and cases cited therein.

The decisions of the Office of Workers' Compensation Programs, dated October 19, 1982 and April 27, 1983, are hereby affirmed.

In the Matter of Annette Stonework *and* Smithsonian Institution, National Museum of American History, Washington, D. C.

Docket No. 83-1833; Submitted on the Record;
Issued November 16, 1983

Before E. Gerald Lamboley, George E. Rivers, Willie T. C. Thomas

The issue is whether appellant's fall on September 14, 1982 was sustained in the performance of duty.

On September 14, 1982, appellant, a 41-year-old accounting technician, injured her knees and hands when she fell on the employing establishment premises while on her lunch hour while leaving a postal exhibit where she had purchased stamps for her personal use. She stopped work on September 14, 1982 and returned to work on a part-time basis on September 21, 1982. The case record does not reflect the date appellant returned to her regular work on a full-time basis.

Appellant described the injury as follows on her claim form: "I was in Post Office and the postal clerk asked me to call the man who had left his cane. I went out—stepped off the porch and fell."

Appellant's official superior reported on the reverse of the claim form that appellant's injury had occurred while she "was coming out of Museum's Post Office, having obtained stamps for own use, [and] fell on the wood slab outside the enclosure." The official superior answered "yes" to the form's questions whether appellant was in the performance of duty at the time of the injury and stated that the employing establishment did not controvert the claim.

By compensation order April 13, 1983, the Office of Workers' Compensation Programs rejected the claim on the ground that since the purpose of appellant's trip to the postal facility was to purchase stamps for her own use, the "[i]njury arose from personal reasons and did not arise out of factors of Federal employment." The Office determined that "[p]ersonal injury was not sustained in the performance of duty."

By letter dated May 12, 1983, appellant requested reconsideration of the Office's decision and stated the following:

> "Since the Headville Post Office is an exhibit located in the National Museum of American History, Smithsonian Institution (where I am employed), I consider this accident as having happened while I was on the job.
>
> "The Headville Post Office exhibit shows a variety of sundry items as well as selling stamps to the public. The post office exhibit is under the auspices of the Philatelic Collections (once known as Postal History). The exhibit was acquired in 1961 as a general store; it became an operating post office in 1971.
>
> "I was leaving the exhibit when my injury occurred. There is a step down from the exhibit to the normal museum marble floor. There is no warning sign that such a step downwards is forthcoming. Other people were coming in as I was coming out, so that my attention was diverted and I fell as I stepped aside.
>
> "I work in the building which contains this exhibit. I understand from Dorothy Reed, our Compensation Specialist, that the 'premises rule' covers people for Workers' Compensation during their lunch breaks if they do not leave the premises."

In a May 13, 1983 letter, Dorothy Reed, the employing establishment's employee relations specialist, stated as follows:

> "The Smithsonian Institution concurs with Ms. Annette Stonework's request for reconsideration of her claim.
>
> "She was on the premises of the National Museum of American History during her lunch hour when the injury occurred. She had not departed the premises prior to her purchase of stamps.
>
> "The Smithsonian is a tourist attraction. It includes not only exhibits, but public cafeterias; museum shops in which purchases . . . can be made; an old fashioned ice cream parlor which, when completed, will be an exhibit—but which also sells ice cream; book stores, etc.
>
> "In my building, there is a display platform containing 19th century musical instruments which I sometimes play on my lunch hour, to which tourists may or may not listen. These are facilities which are available to employees.
>
> "My understanding of the premises rule is that when an employee is on the premises of the employer, he/she has the protection of the Compensation Act unless he/she was engaged in an activity which

removed him from the scope of his/her employment. However, an injury on the premise may also be approved if the employee was engaged in something which was a reasonable incident of the employment encompasses personal acts of the employee for his convenience. ***

"The 'Post Office' is a postal exhibit which does, for the convenience of tourists—and staff—sell stamps and will accept small mailings. It has two Postal employees who conduct the postal business behind its antique counter — but, in essence, it is an exhibit of the Smithsonian.

"Buying stamps on one's lunch hour at a facility on the premises is a reasonable incident of employment."

* * *

By compensation order dated August 2, 1983, the Office denied modification of its April 13, 1983 decision. In a June 28, 1983 memorandum, the Office stated that "With the exception that the claimant had not left the museum, the evidence of record shows that the claimant was on her lunch hour and that she had removed herself from the scope of employment because she was purchasing stamps for her personal use."

The Board finds that appellant's fall on September 14, 1982 was sustained in the performance of duty.

It is a general rule of workers' compensation law that, as to employees having fixed hours and place of work, injuries occurring on the premises of the employing establishment, while the employees are going to or from work, before or after working hours, or at lunch time are compensable.[1]

The Board notes that Larson in his *Workmen's Compensation Law* treatise states that "Injuries occurring *on the premises* during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he pleases."[2]

In the present case, appellant's fall occurred while she was on her regular lunch hour on the premises of the employing establishment. These facts are sufficient to establish that her injury was sustained in the performance of duty. The fact that appellant for her convenience used a portion of her lunch hour to purchase stamps for her personal use from a combination exhibit and postal facility on the premises of the employing establishment does not take her injury outside the performance of duty.[3]

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[1] See *Emma Varnerin, M.D.*, 14 ECAB 253 and cases cited therein; *Larson's Workmen's Compensation Law*, vol. I, sec. 15.

[2] *Larson's Workmen's Compensation Law*, vol. IA, sec. 21.21(a).

[3] See the Federal (FECA) Procedure Manual, Chapter 1-805(i)(1)(ii) which states that an injury which occurs on the premises of the employing establishment occurs in the performance of duty if the employee "was engaged in something which was a reasonable incident of the employment," such as "personal acts of the employee for his/her comfort, health, convenience, and relaxation."

The decisions of the Office of Workers' Compensation Programs dated April 13, 1983 and August 2, 1983 are hereby reversed and the case remanded to the Office of Worker's Compensation Programs for the payment of appropriate compensation.

In the Matter of MARTA Z. DeGUZMAN, claiming as widow of AMADEO DeGUZMAN *and* DEPARTMENT OF THE AIR FORCE, CLARK AIR FORCE BASE, Philippines

Docket No. 83-1636; Submitted on the Record;
Issued November 16, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

The issue is whether the Office of Workers' Compensation Programs improperly refused to reconsider its earlier decision on the amount of death benefits to which appellant was entitled.

The case has been before the Board previously.[1] In an April 7, 1980 decision, the Board held that the Office of Workers' Compensation Programs had properly determined that appellant was entitled to approved medical expenses and no more than $6,361.24 in compensation for death benefits and burial expenses for her husband which had been paid in a lump sum.

Appellant, in an August 30, 1982 letter, requested reconsideration. She stated that 20 C.F.R. 25.21 provided that $50 a month compensation be paid to her as a widow.

The Office, in a November 24, 1982 letter, rejected appellant's request for reconsideration on the ground that appellant had not submitted any new evidence nor any new legal arguments of substance. The Office sent appellant a copy of the relevant regulations and informed her that the regulation she relied on was out dated.

The Board finds that the Office properly refused to reconsider its prior decision.

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128. Material which is repetitious or duplicative of that already in the case record is of no evidentiary value and does not constitute a basis for reopening a case.[2]

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[1] 31 ECAB 865. The history of the case up to that point is contained in the previous decision.

[2] *Jerome Ginsberg*, 32 ECAB 31.

Appellant, in support of her request for reconsideration, cited a regulation that stated:

> "(b) The total aggregate compensation payable in any case under par (a) of this section for injury or death or both, shall not exceed the sum of $4000.00 exclusive of medical cost. The maximum monthly rate of compensation in any case shall not exceed the sum of $50.00."

This regulation, was superseded by a new regulation with respect to injuries occuring on or after July 1, 1968, as follows:

> "The total aggregate compensation payable in any case, for injury or death or both, shall not exceed $8,000, exclusive of medical costs and burial allowance. The weekly rate of compensation disability or death shall not exceed $35.00" [3]

However, section 25.21(j) of the regulations provides that only compensation for temporary disability shall be paid periodically; compensation for death benefits is payable in a lump sum. Appellant is therefore not entitled to a monthly or a weekly compensation payment. As explained in the first decision of the Board, the lump sum payment appellant received in compensation for her husband's death is the full amount of compensation to which she is entitled by regulation.[4] She therefore did not submit any new substantial legal argument that would require the Office to reconsider her case.

The decision of the Office of Workers' Compensation Programs, dated November 24, 1982, is hereby affirmed.

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[3] 20 C.F.R. 25.21(a)(2); 25.21(i).

[4] *Felix M. Calimbahin*, 28 ECAB 178.

In the Matter of RUSSELL E. KIMBALL *and* DEPARTMENT OF THE ARMY, Fort Knox, Ky.

Docket No. 83-1617; Submitted on the Record;
Issued November 17, 1983

Before MARGARET PALLANSCH, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's reaction to tobacco smoke constituted a temporary or permanent aggravation of an underlying condition.

On February 1, 1982 appellant, a 47-year-old material sorter/classifier, filed a notice of occupational disease asserting that exposure to cigarette smoke at the employing establishment had caused symptoms of tightness in his chest, shortage of breath, cough, nasal congestion and eye redness since September 21, 1981.

On September 18, 1981 appellant was tested at the employing establishment allergy clinic by Dr. Brian S. Dantzler, who submitted the following September 21, 1981 report:

> "This patient experiences severe nasal congestion, eye redness, buring and lacrimation associated with chest tightness and coughing on exposure to cigarette smoke. This exposure occurs at work in heavy concentration. These symptoms are true physical symptoms and are not psychosomatic. Due to those symptoms and the deleterious effects of cigarette smoke on the heart and lungs of all patients, it is mandatory that cigarette smoke be confined to the break room. If this cannot or will not be enforced cigarette smoking should be barred from the building."

Dr. Dantzler also submitted the following February 2, 1982 report:

> "Mr. Russell Kimball is a patient of mine and was earlier evaluated for allergies and found to not be allergic to tobacco, but has definite respiratory problems when exposed to cigarette or cigar smoke.
>
> "Mr. Kimball has moderately severe symptoms, precipitated by exposure to tobacco smoke. Therefore, cigarette smoke should be avoided, at all costs.
>
> "I recommend that he be allowed to work in a smoke-free environment."

On February 22, 1982, Dr. Larry J. Hall, a Board-certified otolaryngologist, submitted the following:

> "Mr. Kimball has a mild allergic appearing upper respiratory mucosa. He has been skin tested at Ireland Army Hospital and shows very little in the way of reactivity to external allergens. He gives no history of having had difficulty with sinusitis or pulmonary problems secondary to allergic problems. Does have difficulty with direct irritants such as hair sprays, certain perfumes and cigarette smoke.
>
> "I feel that these are direct irritants and not allergens. Although he may be uncomfortable, they will not affect him unduly or should not cause permanent problems if he is exposed to these irritants."

Evidence submitted by the employing establishment shows that smoking is allowed in break areas and various offices in appellant's building, but that no smoking is allowed in appellant's immediate work area. Appellant's supervisor also reported that on February 1, 1982 appellant told him "that he was going home until they did something about the smoking in the building."

An Office medical adviser, who is Board-certified in internal medicine with a subspecialty in pulmonary disease, reviewed the case record and concluded that "the medical evidence does not prove that the job environment precipitates, accelerates, aggravates or causes the allergic reaction."

In a compensation order dated April 22, 1983 the Office of Workers' Compensation Programs rejected appellant's claim on the ground that he had "not discharged his burden of proof in establishing his disability is causally related to factors of his federal employment."

The Board finds that the medical evidence establishes that appellant's reaction to cigarette smoke was only a temporary aggravation which ceased when he left work.

The Board in *James L. Hearn*[1] held that, where employment factors cause only a temporary aggravation of an underlying condition, leaving no permanent residual, compensation is not payable for periods after the aggravation has ceased. This holds true even if the employee is found medically disqualified because of the effect which employment factors, might have on the underlying condition. In those cases, the disqualification of the employee is due to the underlying condition without any contribution by the employment.

In this case, Dr. Dantzler explained in his two reports that appellant's respiratory symptoms were "precipitated by exposure to cigarette smoke." He stated further that appellant should "be allowed to work in a smoke-free environment." Dr. Hall explained that appellant's exposure to irritants such as cigarette smoke "will not affect him unduly or should not cause permanent problems." There is no medical evidence that the underlying sensitivity to cigarette smoke was caused by appellant's employment or that further exposure would cause permanent damage.[2] The medical evidence only shows that appellant had a temporary aggravation of his condition that ended when he stopped work.

The decision of the Office of Workers' Compensation Programs, dated April 22, 1983, is hereby affirmed.

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[1] 29 ECAB 278.

[2] See *Dennis C. O'Neill*, 29 ECAB 151.

In the Matter of CHERYL L. PITTMAN *and* U. S. POSTAL SERVICE, MAIN POST OFFICE, San Diego, Calif.

Docket No. 83-252; Submitted on the Record:
Issued November 21, 1983

Before MARGARET PALLANSCH, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not "without fault" with respect to an overpayment of compensation benefits in the amount of $1,071.43, and therefore the overpayment was not subject to waiver.

On January 22, 1975 appellant, a 21-year-old postal letter carrier, sustained an injury to her lower back, as a result of "lifting three tombstones into a basket to transport them to my truck."[1] She completed her duties for the day, and also returned to work the following day, January 23, 1975. She was on compensatory leave from January 24 through 26, 1975, and sick leave on January 27, 1975. She returned to work on January 28, 1975, but only worked a few hours before stopping because of her back pain.

Appellant was examined by Dr. Brian A. Ewald, a Board-certified orthopedic surgeon, who hospitalized her on February 18, 1975 and put her in traction. She was discharged on February 25, 1975 with a diagnosis of acute lumbar strain with left radiculopathy which the doctor indicated resulted from her employment.

The Office of Worker's Compensation Programs determined that appellant's acute lumbar strain with left radiculopathy resulted from the January 22, 1975 employment injury and began paying appellant compensation for temporary total disability beginning January 29, 1975.

In a form letter CA-653 dated August 18, 1975, the Office asked appellant to complete a form which instructed her to report any employment she had held five years prior to her federal government service, the various titles she held at these jobs, and the nature and extent of her education. This letter further informed appellant that she was entitled to compensation benefits for temporary total disability so long as she was totally disabled; that her doctor would notify it when her temporary total disability ceased; that if she was partially disabled a loss of wage-earning capacity determination would be done based either on her actual earnings if she had secured employment at that time, or what she "should be able to do and earn"; and that in any event it was her responsibility to secure employment suitable to her condition. The letter also informed appellant of the following:

> "You should notify the OFEC [Office of Employees' Compensation—the forerunner of the Office of Workers' Compensation Programs] when you go to work. Your efforts to find work must be reported to this office whenever you are requested to do so. You should therefore keep an accurate record of when and where you applied for work and why you were not hired."

On August 23, 1975, appellant returned her copy of the letter with the requested information.

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[1] Appellant injured her back at work while lifting law books in December 1973. She reinjured it "on many occasions" thereby resulting in "continual back treatments" by a chiropractor beginning May 14, 1974. On June 6, 1975 she underwent a "L4-5 laminotomy, bilateral, foraminotomy, discectomy, followed by transverse process fusion." Her discharge consisted of herniated L4-5 disc with instability. The January 22, 1975 back injury was considered a new injury by the Office.

In a second letter CA-1049 also dated August 18, 1975, the Office informed appellant that after receiving her initial check from the Treasury Department she would be placed on the automatic rolls. The Office again set forth instructions explaining appellant's responsibility to seek work suitable to her "disabled condition" and the consequences for her failure to do so once her total disability ceased. The Office admonished appellant that "ANY COMPENSATION CHECKS YOU RECEIVE AFTER YOU RESUME WORK MUST BE RETURNED TO US."

The Office referred appellant to Dr. Richard D. Perlman, a Board-certified orthopedic surgeon, for a current evaluation. Dr. Perlman examined appellant on May 3, 1978 and in a report of the same date stated:

> "DIAGNOSIS: Status post disc excision at L4-5; status post healed transverse sacrum.
>
> "OPINION: On the basis of the current examination, utilizing the AMA's [American Medical Association] *Guides to the Evaluation of Permanent Impairment*, Mrs. Pittman's impairment consists of 20%. This finding is based upon the residuals of an intervertebral disc lesion removed with residuals of fusion of 3 lumbar vertebrae, loss of dorsolumbar spine extension, and residual lumbar radicular pain.
>
> "Mrs. Pittman hopes to return to school for retraining in the fall. I think this is appropriate. Dr. Ewald's suggestion that she be restricted from lifting on a regular basis more than 22-25 lbs is also quite appropriate.
>
> "* * * I feel that no further treatment is indicated at this time but further supportive treatment may be required in the future."

On September 30, 1980 the Office requested that Dr. Perlman reexamine appellant, which he did on December 1, 1980. In a report of the same date Dr. Perlman reported:

> "My opinion as to her degree of impairment has not changed.
>
> "However, I think it is probably unrealistic to hope that she will return to a work program without some prior training. Whatever the rehabilitation plan, I think the program should consist of periods of approximately equal amounts of sitting, standing, and walking. If such work is available on the open market or through your services, I think the program might be successful. However, I think Mrs. Pittman's situation is ideal for a chronic pain management program, and would suggest that consideration be given to this form of treatment prior to attempting once again to have her receive retraining."

Dr. Perlman also submitted a completed work tolerance limitations sheet which set forth appellant's work restrictions, and indicated that she was capable of working an eight-hour day.

The record reveals that on October 22, 1981 an Office rehabilitation specialist informed the Office that appellant was reemployed by the postal service on September 8, 1981 as a manual distribution clerk at the same grade level.[2]

By letter dated October 27, 1981 the Office informed appellant of the following:

> "We have just been notified that you returned to employment with the Postal Service 9/8/81. Therefore your entitlement to compensation ceased as of that date.
>
> "You will shortly receive a compensation pay representing disability compensation for the period 10/8/81-11/4/81. You should *return that check* to this Office. You will be contacted in the near future concerning recollection of the overpayment that has occurred for the period 9/8/81-10/7/81." (Emphasis that of the Office).

Appellant returned the check for compensation benefits for the period October 8, 1981 through November 4, 1981 to the Office. The amount of this check was $998.80.[3]

The employing establishment's injury compensation supervisor informed the Office on November 25, 1981 that appellant was "brought back to clerk, modified work assignment and work case." The compensation supervisor also submitted a copy of appellant's leave analysis which demonstrated that appellant worked 3.50 hours on September 8, 1981, 3.58 hours on September 9, 1981, and that she was in a leave without pay status for 4.50 hours and 3.58 hours for September 8 and 9, respectively, because of her back problems.

By letter dated December 3, 1981 the Office informed appellant that before it could authorize compensation for the hours she was in a leave without pay status on September 8 and 9, 1981, she had to submit medical evidence establishing a causal relationship between that period of disability and the January 22, 1975 employment injury. However, the Office authorized Dr. Perlman to treat appellant for residuals of her employment injury.

By letter also dated December 3, 1981 the Office informed appellant that there was an overpayment of compensation in her case, in the amount of $1,071.43 which was created because she returned to "full-time duty " on September 8, 1981 but received disability compensation benefits through October 7, 1981. It further informed appellant that it had made a preliminary finding that she was with fault in the creation of the overpayment for the following reasons:

> "When you were placed on our automatic payroll you were informed by letter CA-1049 dated 8/18/75 that upon return to work you were

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[2] Appellant was reemployed in a branch of the postal service other than the one she was injured in.

[3] The record reveals that the Office deducted $1.60 every four weeks for optional life insurance.

> to notify this Office immediately and that you were to return all compensation received after returning to duty."

The Office invited appellant to submit any evidence refuting the amount or fact of overpayment, and supporting any contention that she was without fault in the creation of the overpayment. It also informed appellant that she was entitled to a hearing on the issues of the preliminary finding of fault, or a determination of whether or not the overpayment should be waived. Moreover, the Office explained the procedures in the event she was found to be without fault in the creation of the overpayment.

By letter dated December 18, 1981 appellant responded to the Office's notification of overpayment stating in part:

> "I thought this program was the best thing you people could do for us and myself. I think you people are very unjust for telling me I owe you for more money than you sent me. I was also told that you people would be notified by my workmen's compensation supervisor, . . . when I return to work because it would get to you quicker than me writing. * * * I do want a hearing . . ."

In response to the Office's request for medical evidence establishing a causal relationship between her absences from work on September 8 and 9, 1981 and the January 22, 1975 employment injury appellant stated:

> "I was never paid for these hours I worked. The first two days (9-8 & 9-9) were the first days that I was brought back to work at the post office."

A hearing was held before an Office hearing representative on April 27, 1982. At the hearing appellant testified that she notified the injury compensation supervisor that she had been reemployed; that the supervisor informed appellant that she would notify the Office of her return to work because "it would be sent to them quicker by her than us writing a letter, so I just didn't do it"; that she sent back the second check (October 8 through November 4, 1981) after receiving notification of an overpayment; and that the first check assisted her through financial problems. In response to the question of "[D]o you agree that you were with fault in the creation of the overpayment?," appellant replied:

> "Well . . . Yes, I should have probably sent it [the first check] right back but at the time I needed it to get back and forth to work, which [is] what they wanted me to do was to work."

The hearing representative then secured information from appellant concerning her assets, liabilities, and financial obligations.[4]

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[4] Appellant submitted a March 8, 1982 decree from the United States Bankruptcy Court in the Southern District of California, discharging her from indebtedness. However, appellant testified at the hearing that she did not list the Department of Labor as one of the creditors whose debts were to be discharged.

By a decision dated July 21, 1982, and finalized July 30, 1982, the Office hearing representative found that appellant was at fault in the creation of the overpayment, and therefore there was no basis for waiver of the overpayment. He further found that since her monthly expenses ranged from $840.00 to $880.00, which, he stated, did not exceed her monthly income, she would be capable of paying $50.00 per month until the total amount of the $1,071.43 overpayment had been repaid.

In a letter dated August 18, 1982, appellant informed the Office *inter alia*, that she received two checks for $998.80 apiece; that since she returned one of the checks, she did not owe the $1,071.43 claimed; that the injury compensation supervisor was to blame for the late notification the Office received of her return to work; and that therefore the Office was "at fault" for forwarding the checks. Appellant requested an appeal and asked the Office to explain how it arrived at the $1,071.43 figure, and stated that she would not sign an authorization to have money deducted from her check to repay the overpayment until the Office explained how it arrived at that figure.

The Office forwarded this letter to the Board which was docketed as an appeal on September 8, 1982.

By letter dated November 5, 1982 the Office addressed appellant's question regarding the amount of overpayment as follows:

> "Your regular 28 day compensation payment was in the amount of $1000.00. (You received a net amount of $998.00 after optional life insurance deduction). The payments issued at that time were for the periods 8/13/81-9/9/81 and 9/10/81-10/7/81. You returned to duty 9/8/81. Therefore you owe the entire amount of the 10/7/81 check ($1000.00) plus the final two days of the 9/8/81 check ($71.43)."

The Federal Employees' Compensation Act, 5 U.S.C. section 8129(b) provides for waiver of an overpayment only under the following circumstances: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[5]

In determining whether an individual is "without fault," what constitutes "fault" depends on such circumstances as whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[6]

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[5] *William W. Rodgers*, 30 ECAB 809; *Wanda L. Brown*, 33 ECAB 1133.

[6] Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2 - claims. Pursuant to *Califano V. Yamasaki*, 42 U.S. 682, 99 S. Ct. 2545, the Office established procedures set forth in the Procedures Manual to be followed in handling overpayment of compensation cases.

In the present case it is apparent that the Office applied the third standard to appellant — acceptance of a payment which the payee either knew or should have been expected to know was incorrect — in finding appellant at fault in creating the overpayment.

After a careful review of the evidence, the Board finds that the weight of the evidence establishes that appellant was not "without fault" in receiving the overpayment in issue.

Appellant received both of the Office's August 18, 1975 form letters CA-653 and CA-1049, which informed her that she was obligated to notify it when she returned to work. Letter CA-1049 specifically instructed appellant that any compensation checks she received after resuming work "MUST BE RETURNED." When appellant resumed her employment on September 8, 1981 she stated that she informed the employing establishment's injury compensation supervisor that the Office had to be notified of her return to work; however appellant failed to notify the Office in a timely fashion. Thus, when the Office was finally informed of appellant's reemployment, it had already issued the compensation checks for the period August 13 through September 9, 1981, September 10 through October 7, 1981, and October 8 through November 4, 1981. Appellant returned the latter check after receiving the Office's notification of an overpayment. However, she testified that she kept the check for the period September 10 through October 7, 1981 because, "I needed it to get me back and forth to work." Moreover, when the hearing representative asked appellant did she believe she was at fault in the creation of the overpayment, appellant replied "Well . . . Yes, I should have probably sent it [the September 10 through October 7, 1981 check] right back * * *." She further testified that since the injury compensation supervisor stated that she would notify the Office of appellant's reemployment because " it would be sent to them quicker by her than us writing a letter, . . . I just didn't do it."

The Board notes that by appellant's own admission she knew or should have known that the payments she received after her return to work on September 8, 1981 were "incorrect." Under these circumstances, the Board finds that in retaining additional benefits after her return to work on September 8, 1981, appellant was not without fault within the meaning of section 8129(b).

The Board further finds that the case is not in posture for decision with respect to the issue of amount of overpayment.

As was noted previously, appellant contends on appeal that she only received $998.80 every four weeks; that the September 10 through October 7, 1981 and October 8 through November 4, 1981 checks were both for that amount; and that since she returned the latter check, she only owed $998.80 and not $1,071.43. In that regard, the Board notes that by letter dated November 5, 1982, which was approximately two months after appellant's appeal was docketed before the Board, the Office informally attempted to explain how it arrived at the $1,071.43 amount. The letter stated in part that appellant owed $1,000.00 for the period September 10 through October 7, 1981 and that she owed $71.43 for September 8 and 9, 1981 when she returned to work. However, this explanation was not in the form of a final decision regarding the amount of overpayment as is required by the Office's own standards.[7]

Further, the Board notes that the record contains a xerox copy of the check appellant returned for the period October 8 through November 4, 1981, which was in the amount of $998.80. The Board further notes when appellant began receiving compensation benefits, the Office notified her that $1.60 was to be deducted from her benefits every four weeks for optional life insurance. Since the amount of overpayment is unclear from the record, and the Office has not issued a final decision as to this issue, the Board is unable to make a determination as the whether appellant owes the $1,071.43 the Office seeks to recoup.

The case will therefore be remanded to enable the Office to make a *de novo* determination regarding the amount of overpayment, which should entail detailed findings of fact and supporting rationale in explaining how it arrived at the $1,071.43 amount.

The decision of the Office of Workers' Compensation Programs dated July 21, 1982, finalized July 30, 1982, is affirmed with respect to the fact of overpayment and a finding of not without fault. The decision is set aside for a *de novo* decision with respect to the amount of overpayment.

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[7] See *Joseph H. Marshall*, 33 ECAB 1159.

In the Matter of ARTHUR KELLY, JR. *and* DEPARTMENT OF THE NAVY, HUNTERS POINT NAVAL SHIPYARD, San Francisco, Calif.

Docket No. 83-1721; Submitted on the Record;
Issued November 23, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS,
WILLIE T. C. THOMAS

The issue is whether appellant's employment-related exposure to asbestos caused a disabling pulmonary condition or a permanent impairment of his lungs.

On June 22, 1981 appellant filed a claim for an injury to his lungs which he attributed to his exposure to asbestos in his work as a pipefitter and pipefitter foreman from 1951 to October 16, 1973. Appellant retired on disability effective December 18, 1974 based on his inability to perform the duties of his position due to arteriosclerotic heart disease and an anxiety reaction.

In an August 27, 1981 report Dr. Carl Gak, an internist, stated that a June 2, 1981 chest x-ray showed clear lung fields except for pleural thickening and a small calcified pleurodiaphragmatic plaque.

The Office of Workers' Compensation Programs referred appellant, with a statement of accepted facts and an asbestos exposure history, to Dr. Oscar Scherer, who is Board-certified in pulmonary disease, for an examination and evaluation of his pulmonary condition. Dr. Scherer's October 6, 1982 report was accompanied by reports from Dr. Edward Drasin, a Board-certified radiologist, regarding a chest x-ray done on August 11, 1982 and a CT (computerized tomography) scan done on September 1, 1982. Dr. Drasin stated that the chest x-ray showed bilateral pleural plaques in the mid-lung fields and no definite calcifications, and that the CT scan showed bilateral paraspinal pleural thickening and possibly very early pleural plaque formation.

In his October 6, 1982 report Dr. Scherer stated that a resting pulmonary function study, the results of which he submitted, was within normal limits. Dr. Scherer diagnosed "Bilateral paraspinous pleural thickening probably secondary to asbestos exposure. No definite plaques or parenchymal changes demonstrated." Dr. Scherer concluded:

> "The patient does not have definite plaques on the CT scan. He does, however, demonstrate paraspinous pleural thickening which is the earliest change that has been associated with asbestos fiber inhalation. The degree of pleural changes could in no way cause any significant symptomatology or pulmonary limitation. The patient has no symptomatology of shortness of breath and refuses to have an exercise study. There is no reason to expect that he has any limitation in his pulmonary system. He does, however, require follow-up examinations on a three to five-year basis."

The Office referred the case record to Dr. Horton C. Hinshaw, a Board-certified internist, for an evaluation of appellant's pulmonary condition. In a November 22, 1982 report Dr. Hinshaw stated:

> "I have reviewed the file, the principal information being the report by Dr. Scherer of October 6, 1982. There has been significant exposure to asbestos. There is a 20-pack year history of smoking. He does not have any respiratory complaints. He does not have any shortness of breath on exertion of abnormal degree. Hence, his

> symptoms would be within Class 1 of the AMA Guidelines. Chest x-rays do reveal some evidence of pleural thickening, most likely attributable to exposure to asbestos. Resting pulmonary function studies are normal. Forced vital capacity is 93 percent of predicted, FEVI is 106 percent, total lung capacity 98 percent of predicted and diffusing capacity 94 percent of predicted. Both his symptoms and his pulmonary function studies would be within Class 1 of the AMA Guidelines.
>
> "A diagnosis of bilateral pleural thickening proximately caused by exposure to asbestos is indicated on the basis of the information in the file. He is not disabled from performing the full duties of his position, although further significant exposure to asbestos should be avoided. Both symptoms and objective studies indicate he would be classified as AMA Class 1 with 0 percent impairment."

Appellant submitted a December 14, 1982 report from Dr. Estelle Baer, a Board-certified internist, who stated that appellant noted a gradual onset the past six years of dyspnea on exertion. Based on a July 19, 1982 chest x-ray Dr. Baer diagnosed "pleural changes consistent with past exposure to asbestos."

By a decision dated June 6, 1983 the Office found that appellant had sustained pulmonary injury consistent with employment-related exposure to asbestos, but that there was no evidence of disability or of impairment using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. The Office authorized periodic medical examinations at the Office's expense.

The Board finds that appellant does not have a disabling pulmonary condition or a permanent impairment of his lungs causally related to his exposure to asbestos at work.

Dr. Hinshaw, an Office medical consultant on pulmonary cases, explained how he applied the American Medical Association's *Guides to the Evaluation of Permanent Impairment*[1] to Dr. Scherer's findings to arrive at a Class 1, zero percent impairment. There is no evidence that appellant has a permanent impairment of his lungs due to employment-related asbestos exposure.

There is no evidence that appellant's employment-related asbestos exposure caused a disabling lung condition. Dr. Scherer stated that the degree of pulmonary changes shown by x-ray and CT scan "could in no way cause any significant symptomatology or pulmonary limitation." Dr. Hinshaw concluded that appellant was not disabled from performing the full duties of his former position.

The June 6, 1983 decision of the Office of Workers' Compensation Programs is affirmed.

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[1] These *Guides* have been adopted by the Office and approved by the Board as an appropriate standard for evaluating schedule losses under the Federal Employees' Compensation Act.

In the Matter of EVELYN L. WHITE *and* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, Ky.

Docket No. 83-1428; Submitted on the Record;
Issued November 23, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

By compensation order dated March 31, 1981 the Office of Workers' Compensation Programs rejected appellant's claim for compensation on the ground that she "failed to discharge her burden of proof to show that her disability beginning May 19, 1980 is a residual of the November 18, 1976 [employment] injury." A letter of the same date from the Office accompanying the compensation order informed appellant that if she disagreed with the decision she could "follow any one of the [following] courses of action": submit new evidence and request reconsideration, ask for a hearing before an Office hearing representative within 30 days after the date of the decision, or request review of the decision by the Employees' Compensation Appeals Board.

Appellant requested reconsideration and submitted a June 16, 1981 report from Dr. Irvin Warth, an orthopedic surgeon, and a description of her job duties and of problems she allegedly had with her supervisors.

On February 5, 1982 the Office issued a compensation order denying appellant's application for review on the ground that "[t]he evidence submitted in support of the application for review is found to be lacking in substantial probative value and is not sufficient to warrant review of the prior decision." In a letter accompanying this decision, the Office informed appellant that with new evidence she could request reconsideration again or "you may also request a hearing within thirty (30) days of the date of the enclosed compensation order."

By letter dated March 4, 1982 appellant requested a hearing before an Office representative. This request was denied by the Office in a letter decision dated April 1, 1982. In its letter the Office explained that the request for a hearing was denied because "the decision of the District Office was rendered on March 31, 1981 and your request for a hearing was dated March 4, 1982. Since your request was not made within 30 days you are not as a matter of right entitled to a hearing on your case." The Office proceeded to explain that her request was denied "on the basis that section 8124 [of the Federal Employees' Compensation Act] provides that prior to review under section 8128" she could request a hearing on her claim, that she had requested such review and it was denied, and that any further medical evidence could be submitted in writing and "a hearing will serve no useful purpose."

By letter dated May 17, 1982 appellant again requested reconsideration and submitted a September 2, 1981 report from Dr. Carl F. Schilling, a general surgeon, and an emergency room record from Deaconess Hospital.

By compensation order dated August 2, 1982 the Office denied appellant's application for review on the ground that the evidence submitted was found to be of a repetitious nature lacking substantial probative value and was not sufficient to warrant review of the prior decision.

By letter dated March 30, 1983 appellant again requested reconsideration and submitted a February 21, 1983 report from Dr. Warth.

On April 22, 1983 the Office issued a compensation order denying appellant's application for review on the ground that the evidence was lacking in substantial probative value and was not sufficient to warrant review of the prior decision. In a letter accompanying this decision, the Office informed appellant that she could submit new evidence and request reconsideration, or request review of the decision by the Appeals Board. It explained that "Reconsideration may be requested at any time, whether or not a hearing has been held. Where reconsideration is initially requested, you are not entitled to a hearing."

The Board finds that the Office's denial of appellant's request for a hearing was improper under the facts of this case.

Section 8124(b)(1) of the Federal Employees' Compensation Act[1] dealing with a claimant's entitlement to a hearing before an Office representative states that "Before review under section 8128(a)[2] of this title, a claimant for compensation not satisfied with a decision of the Secretary. . . is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

In its April 1, 1982 letter decision denying appellant's request for a hearing, the Office properly interpreted section 8124(b)(1) of the Act as requiring a request for a hearing to be made within 30 days of an Office merit decision and "before review under section 8128(a)" (a request for reconsideration). However, under the facts of this case appellant cannot be held to that standard. The Office's February 5, 1982 compensation order and explanation of appellant's further rights before the Office and Board did not explain the order of procedure to which the Office later held appellant. It was not until April 22, 1983, one year after the denial of appellant's request for a hearing, that the Office pointed out that a hearing before an Office representative was a matter of right only if the request was filed by appellant within 30 days of its March 31, 1981 merit decision and before a request for reconsideration. The Office further mislead appellant in its February 5, 1982 and August 2, 1982 compensation orders when it again informed her of her right to a hearing if a request was filed within 30 days of those compensation orders.

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[1] 5 U.S.C. section 8124(b)(1).

[2] This section of the Act gives a claimant the right to submit a written request for review of an Office decision stating reasons why the decision should be changed and accompanied by evidence not previously submitted to the Office. 20 C.F.R. 10.136.

The record shows that appellant's request for a hearing was filed on March 4, 1982, within 30 days of the Office's February 5, 1982 compensation order. Under the facts of this case it would be inequitable to hold appellant to a procedure incorrectly explained to her by the Office. In denying appellant's right to a hearing in the April 22, 1983 compensation order, the Office properly explained the procedure to appellant, however, this explanation was subsequent to holding appellant to such procedure. Therefore, the Office's April 22, 1983 decision is set aside and the case is remanded to the Office for scheduling of a hearing, to be followed by a *de novo* decision.

The April 22, 1983 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action in accordance with this decision of the Board and a *de novo* decision.

In the Matter of ROSCOE LACY *and* DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

Docket No. 83-1720; Submitted on the Record;
Issued November 23, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant has an employment-related pulmonary condition which caused disability or permanent impairment.

On April 2, 1982, appellant, then a retired 63-year-old equipment cleaner and laborer, filed a claim for compensation asserting he had asbestosis. Appellant was exposed to asbestos in federal employment from August 25, 1952 to November 14, 1981, the date he retired. The employing establishment described the degree of appellant's asbestos exposure as "moderate," and the frequency or duration as "secondary."[1]

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[1] The employing establishment defined "moderate" as "asbestos dust visible on floor and work surfaces" and "secondary" as "worked in conjunction with employees with primary exposure," that is, worked with employees who worked directly with asbestos on a regular basis.

The case record contains appellant's medical and personnel records from the employing establishment and a previous federal employer for the period August 1951 to December 1981. The records include a July 7, 1977 report of a "normal" chest x-ray.

Appellant's representative on September 23, 1981 submitted a typed unsigned statement from appellant in which appellant stated that his main responsibility was to break up decks including the asbestos beneath them and "to sandpaper and clean out areas covered with asbestos." Appellant stated he had never smoked.

Appellant's representative submitted a September 3, 1981 report from Dr. Herman C. Schoen, Board-certified in internal medicine, which was addressed to the representative and which concerned a July 10, 1981 examination. Dr. Schoen reported as follows:

> "*PRESENT ILLNESS:* On specific questioning, Mr. Lacy indicated that he has shortness of breath with exertion and he stated that he has an occasional cough which is nonproductive of sputum. He stated that he had a chest x-ray at Kaiser and 'they say I'm alright.' He also indicated that he had a previous history of pneumonia but that was [a] 'long time ago.'
>
> "On specific questioning, Mr. Lacy denied hemoptysis. He denied that he had ever been told that he had asbestosis on any of the chest x-rays which have been taken.
>
> "*PERSONAL HISTORY:*
>
> "*** He does not smoke and has never smoked. He denied allergies. He was taking no medication.
>
> "*REVIEW OF SYSTEMS:*"
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> * * *
>
> "RESPIRATORY: See the Present Illness [section of report]. He denied cough, sputum, asthma, wheezing, but he indicated that he had exertional dyspnea.
>
> "CARDIOVASCULAR: He denied chest pain, but he stated that he has shortness of breath with exertion and occasional swelling of his ankles. Otherwise, he denied cardiovascular symptoms."
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> * * *
>
> "*Chest x-rays:* Four views of the chest were obtained including right and left obliques. There is bilateral pleural thickening and some slight increase in a fibrotic interstitial infiltrate and there is some interstitial nodularity noted as well. This chest x-ray is virtually diagnostic of pulmonary asbestosis.
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> "*Spirometry:* The patient's forced vital capacity was 4.49 liters which represents 90% of predicted for his age, sex and size. The FEV1 was 3.08 liters which is 89% of predicted for his age, sex and size FEV1/FVC ratio is 69% which is predicted for his age, sex and size.

These pulmonary function studies are virtually within normal limits and there is a very minor diminution in the forced vital capacity.

"DISCUSSION:"

* * *

"Mr. Lacy has a very strong history for exposure to asbestos. His exposure to asbestos has been over a 30-year period in the course of his occupational duties for the Long Beach Naval Shipyard and his job at the Long Beach Naval Shipyard was one in which there was an extremely heavy exposure to asbestos, working as a laborer. In addition, his chest x-ray is virtually diagnostic of pulmonary asbestosis. He has pulmonary fibrotic stranding and an increase in interstitial nodularity and there is thickening of the pleura bilaterally. His pulmonary function studies are virtually within normal limits. There is a slight diminution in the forced vital capacity but they are, otherwise, unremarkable. It is my opinion that Mr. Lacy's history of heavy exposure to asbestos combined with the chest x-ray picture, even with normal pulmonary function studies, make the diagnosis of asbestosis virtually incontrovertible.

"When fine fibers of asbestos are inhaled into the lung, they set up a reaction which is characterized by nodularity and fibrosis. In addition, the pleura is affected and there is pleural thickening which in time may calcify, forming pleural plaques. It is also well-known that patients with asbestos exposure are highly susceptible to the development of malignancies. They are susceptible to malignancies of the lung, the oropharynx and the gastrointestinal tract. This is true whether the patients are cigarette smokers or noncigarette smokers but the cigarette smokers are much more highly susceptible to malignancies of the lung than are the nonsmokers. In addition, patients with asbestos exposure are peculiarly susceptible to the development of mesotheliomas and, indeed, this is a malignancy of the pleura which is seen only in asbestos exposed individuals.

"It is obvious from the above that Mr. Lacy, who has clear-cut signs of pleural asbestosis and some signs of pulmonary asbestosis on his chest x-ray, requires frequent intermittent medical observation for the development of all of the complications of asbestosis. He must be carefully observed for all of the potential problems of this condition.

"Insofar as his present disability is concerned, I would be of the opinion that Mr. Lacy falls into category 2 of the American Medical Association guidelines for disability of the individual with pulmonary impairment. I believe that this category best fits his description since he has a positive chest x-ray and he has a great deal in the way of symptomatology. His pulmonary function studies are not quite in the range of category 2 but when taking his entire picture

> into account including his subjective complaints, I believe that this is the class which fits him best. In addition to this disability, it is my opinion that Mr. Lacy should be restricted from working under circumstances where he is exposed to dust, fumes, respiratory irritants or known pneumotoxins. He has a condition which is progressive and will become worse with the passage of time and because of this, I believe that every effort should be made now to preserve as much functioning lung tissue as possible. Therefore, he should be restricted as I have indicated and in particular, he should be restricted from working under circumstances where he has any further exposure to asbestos."

By letters dated August 20, 1982, the Office of Workers' Compensation Programs referred appellant to Dr. Irvin S. Belzer, Board-certified in internal medicine and pulmonary disease, for a complete medical evaluation. The Office submitted to Dr. Belzer the case record and a statement of accepted facts. Dr. Belzer examined appellant on September 2, 1982, reviewed a September 3, 1982 chest x-ray and September 9, 1982 pulmonary function test results and reported as follows:

> "*** Mr. Lacy is a 63-year-old, right-handed . . . man who states that he retired from his position in the Naval shipyards because of longevity. Subsequent to his retirement, Mr. Lacy states he found that one of his coworkers had the diagnosis of asbestosis. Because of Mr. Lacy's similar work history and the strong possibility that he might also have the disease, he sought attention from a local physician in Long Beach, California.
>
> "Mr. Lacy states that he worked for approximately 30 years as an equipment cleaner in the Naval shipyards. He worked in his job in the Naval shipyards at Long Beach from August 15, 1931 to November 14, 1981.[2] In that position, he states that he had to clean old paint off the walls of compartments where asbestos insulation was surrounding equipment and many times he had to use sandpaper to grind off the asbestos. He states that oftentimes he was exposed to heavy asbestos dust. Within engine rooms and fire rooms his job was to clean up the ashes or debris and insulation that surrounded the pipes and that these pipes often were laden with asbestos. He states that initially no masks were required. Once a mask became required, he would use his mask on a conscientious basis. However, oftentimes on going to lunch or returning from lunch or at 'break-time' he would be exposed to heavy clouds of presumably asbestos dust. Mr. Lacy states that in these 30 years he worked approxi-

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[2] Although Dr. Belzer's report incorrectly lists 1931 instead of 1952 as the date of appellant's first asbestos exposure, it correctly lists 1981 as the date of his last exposure and correctly refers to his approximately 30 years of asbestos exposure.

mately 48 to 50 weeks a year and for approximately three days each week he would be involved in the occupations described above. Otherwise, he states, he was often involved in sandblasting the hulls of ships which were dry docked and that this work did not require him to wear any masks.

"Mr. Lacy denies any significant medical problems. *** He denies any pulmonary symptoms. Specifically, he denies any dyspnea on exertion, paroxysmal nocturnal dyspnea, chest pain, chills, fevers, rigors, tuberculosis or exposure to tuberculosis or coccidioidomycosis. He states that he does have some cough, usually on arising in the morning, but that this is not a persistent problem and has never required him to seek medication, nor does this problem last more than three months per year. In the late 1950's, Mr. Lacy did have pneumonia which required him to be off work for approximately three weeks. Of interest is that since retiring from work, on November 14, 1981, his weight has gone from 184 pounds to 165 pounds. This weight loss has occurred despite a good appetite.

"*** Mr. Lacy denies smoking whatsoever.

"The physical examination in my office revealed a well-nourished, well-developed, slender male who appeared to be in no acute or chronic distress as he sat and spoke."

* * *

"*** The chest was symmetrical. Auscultation of the lungs revealed bronchovesicular breath sounds with a few scattered rhonchi on forced exhalation. Tactile and vocal fremitus were normal. The cardiac evaluation revealed no gallop rhythms or murmurs. The abdomen was soft without hepatosplenomegaly. There was no peripheral cyanosis, clubbing or edema. The deep tendon reflexes were four + and bilaterally symmetrical.

"The laboratory data consisted of chest x-rays, spirometry studies and an SMA screen. The chest x-ray demonstrated no acute pulmonary infilitrates and there was a normal cardio-thoracic ratio of 12/29 cm. No specific pleural thickening was identified and no specific increased interstitial changes were felt to be present. The spirometry studies were entirely within the normal limits, both before and after the use of inhaled bronchodilator. The electrocardiogram demonstrated only nonspecific repolarization changes. The SMA screen showed an essential normal blood count, thyroid studies, liver function tests and renal studies thus excluding other systemic illnesses as a sources of Mr. Lacy's symptoms.

"It is my overall impression that while Mr. Lacy has had a strong exposure to asbestos and is potentially susceptible to the development of asbestos and/or its complications, there is no objective evi-

> dence of this disease entity at this time. I feel that Mr. Lacy has no specific identifiable lung disease."

Dr. Belzer submitted copies of the September 1982 chest x-ray and pulmonary function test reports.

Dr. Judd Shellito, an Office medical consultant who is Board-certified in internal medicine and pulmonary disease, reviewed the case record and concluded as follows on November 28, 1982:

> "Medical records are reviewed in the above-named claimant regarding asbestos-related pulmonary disability. The claimant is a 62-year-old male who received exposure to asbestos while employed at the Long Beach Naval Shipyard as an equipment cleaner/laborer from 1951 to 1981. Asbestos exposure is estimated as being moderate in degree and secondary in frequency. There is no history of cigarette smoking. Included in the medical records is an internal medicine evaluation from Dr. H. Schoen dated September 3, 1981, and a more current evaluation from a pulmonary specialist, Dr. I. Belzer, dated September 15, 1982. There are no complaints of dyspnea on exertion. Physical examination revealed no evidence of clubbing or abnormal pulmonary sounds. The chest x-ray showed no pleural or parenchymal abnormalities. Spirometry was normal. Specifically, the forced vital capacity was 4.8 (124% of predicted), the FEV1 3.7 (128% of predicted), and the FEV1 to forced vital capacity ratio was 77%.
>
> "(1) According to the medical evidence available at this time, no condition or disability was caused by the accepted conditions of employment.
>
> "(2) The diagnosis is established as asbestos exposure without current evidence of asbestos-related pulmonary disease. No pleural abnormalities have been demonstrated on the most current chest x-ray. There is insufficient evidence to support a diagnosis of parenchymal asbestosis in the face of a normal physical exam, normal lung markings on chest x-ray and normal pulmonary function tests.
>
> "(3) The claimant is not disabled from his position due to disease resulting from exposure to asbestos while in federal employment.
>
> "(4) The percentage of respiratory impairment utilizing AMA criteria is 0%."

By compensation order dated May 6, 1983, the Office rejected the claim on the ground that appellant "has no pulmonary disease or condition resulting from exposure to asbestos in the performance of duty."

The Board finds that the medical evidence fails to establish that appellant has an employment-related pulmonary condition which causes disability or permanent impairment.

There is some support for appellant's claim in the report of Dr. Schoen, a Board-certified internist. His reasoning however, that appellant has a Class 2 impairment based on the criteria of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* in spite of appellant's having pulmonary function test results which are "virtually within normal limits" is not persuasive.

Dr. Belzer, Board-certified in both internal medicine and pulmonary disease, reported appellant denied any pulmonary symptoms, that pulmonary function tests were "entirely within the normal limits," and that his chest x-ray showed "no acute pulmonary infiltrates," no specific increased interstitial changes." He opined that at the time of examination there was "no objective evidence" of asbestosis and cautioned that appellant was "potentially susceptible to the development of asbestos and/or its complications" because of his "strong exposure to asbestosis." Dr. Shellito, also Board-certified in both internal medicine and pulmonary disease and an Office medical consultant, reviewed the entire case record and opined that the established diagnosis was "asbestos exposure without current evidence of asbestos related pulmonary disease." He concluded that in light of the "normal physical exam, normal lung markings on chest x-ray and normal pulmonary function tests," as reported by Dr. Belzer, the pulmonary specialist, there was "insufficient evidence to support a diagnosis of parenchymal asbestosis."

The decision of the Office of Workers' Compensation Programs dated May 6, 1983 is hereby affirmed.

In the Matter of JUDGE BOYKIN *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 83-1741; Submitted on the Record;
Issued November 23, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant has a pulmonary condition causally related to his exposure to asbestos during his federal employment.

Appellant was employed as a laborer, brakeman, conductor, and engineman at Hunters Point Naval Shipyard from 1952 to 1974 and as a crane operator at the above-captioned employing establishment from 1974 until his retirement in 1980 at the age of 56. He filed a claim alleging that he had a pulmonary condition resulting from exposure to asbestos during the above employment.

In support of his claim, appellant submitted a February 13, 1981 report from Dr. Reuben R. Merliss, a Board-certified internist of professorial rank. After relating the history and appellant's age,[1] Dr. Merliss reported the values obtained from various tests of ventilatory function. Dr. Merliss also stated that a Board-certified radiologist interpreted a July 2, 1980 chest x-ray as demonstrating 1/1 bilateral profusion and bilateral lateral pleural thickening. The doctor concluded that appellant had asbestosis of a class III impairment, based upon the AMA *Guides to the Evaluation of Permanent Impairment.*

The Office of Workers' Compensation Programs referred appellant, with the case record and a statement of accepted facts, to Dr. Jeffrey A. Golden, a Board-certified specialist in pulmonary disease and professor of medicine at the University of California Medical Center at San Francisco. In a January 5, 1983 report, after relating the history and appellant's age, Dr. Golden included the results of the tests of ventilatory function. Dr. Brian J. Salmen, a Board-certified radiologist, reported that a January 4, 1983 chest x-ray revealed no evidence of active disease. On the basis of these tests, history, and his findings, Dr. Golden stated that appellant did not have asbestosis but a mild obstructive lung disease consistent with the history of cigarette smoking.

Dr. Judd Shellito, Board-certified in pulmonary disease, reviewed the case record at the request of the Office. He opined that appellant had no employment-related lung condition. He stated that the report of Dr. Golden was more reliable than that of Dr. Merliss because it was more recent, its tests revealed more normal results, and the tests it was based upon were performed at a nationally-renowned laboratory. He concluded that the "percentage of respiratory impairment utilizing AMA criteria is 0%."

In a July 8, 1983 compensation order, the Office found that appellant was "exposed to hazardous levels of asbestos" at work. It denied the claim on the ground that the evidence failed to establish that appellant had a "pulmonary condition or impairment" resulting from this exposure.

The Board finds that the case is not in posture for decision as there is an unresolved conflict in the medical evidence.

Dr. Merliss, a Board-certified internist of professorial rank, based upon the history, an x-ray interpretation by a Board-certified radiologist, and the results of tests of ventalitory function, opined that appellant had an asbestos-related pulmonary condition. Dr. Merliss rated this impairment as class III under the AMA *Guides*.

Dr. Golden, as did Dr. Merliss, based his opinion on the history, an x-ray interpretation by a Board-certified radiologist, and the results of ventilatory function tests. Contrary to Dr. Merliss, he concluded that appellant did not have asbestosis but rather a mild obstructive lung disease consistent with his history of cigarette smoking.

To resolve this conflict, the Office should refer appellant, with the case record and a statement of accepted facts, to a specialist Board-certified in pulmonary disease. The Office should explain to the specialist the medical evaluation guidelines it established for asbestosis examinations in the Federal Procedure Manual, Chapter 2–806(18), and request that his report conform to these guidelines. The Office should then make a *de novo* decision.

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[1] Dr. Merliss incorrectly reported appellant's age as 55. At the time, appellant was 56.

The July 8, 1983 decision of the Office of Workers' Compensation Programs is reversed; the case is remanded for further development in accordance with this decision.

In the Matter of LEWIS E. ROBINSON *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, Miami, Fla.

Docket No. 83–1670; Submitted on the Record;
Issued November 28, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant did not sustain an injury while in the performance of his federal employment.

On March 8, 1982 appellant, a 40-year-old patrolman, filed a claim alleging "stress, causing severe headaches" commencing January 13, 1982 which he attributed to his federal employment. In a statement dated March 9, 1982 appellant further alleged as follows:

> "The first time I can recall experiencing a headache of this magnitude, was after an automobile accident on May 31, 1981.[1] At that time I was driving the police car when it was hit in the rear. I suffered whiplash and the back of my head hit the protective shield behind the driver's seat. I was treated in the Emergency Room of this hospital and given medication for the pain. However, I noticed whenever I was upset or angry the severe headaches would return. At that time, I felt they were related to the automobile accident. So, I continued to go to the personnel physician for the pain. I was examined by the neurologist on two different occasions. Both times I was told, there was no damage to my brain. But, the pain continued. On my last trip to the Neurology Clinic, I was told, 'you have to learn to relax.' I had been taking Tylenol #3 for the pain and valium to help me relax.

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[1] Appellant amended his claim to reflect the fact that the automobile accident occurred on March 31, 1981.

> "This was the remedy until October or November, at that time I realized that the medication was not as effective as it was in killing the pain. I went back to the personnel physician and advised her that the pain was returning two hours after I take the medication. I did not want to become dependant on the medication. I wanted to find out what was causing the headaches. At that time, I felt as though I was fighting the problem rather than eradicating the cause. I told the doctor I did not think I should continue to take the drugs. She told me there was nothing else that she could do for me.
>
> "On December 31, 1981, I was given a disciplinary action that I felt was grossly unfair.[2] In trying to deal with this injustice, I developed the most intense headache I have ever had. I was out of work six days due to this illness. On January 18th, while I was out sick, I went to the personnel physician who advised me to seek the advice of an outside doctor. I got an appointment with Jackson Memorial Hospital Health Center for January 21st. I have seen the doctor every week since then. On March 8, 1982, I was told by my doctor that the headaches were caused by stress related to my job."

In support of his claim appellant submitted his medical records from the employing establishment medical center. A progress note dated March 31, 1981 indicated appellant was treated for "severe pain in shoulder, neck and headache due to car accident while on duty." Thereafter, appellant was treated for recurrent complaints of headache.

In a report dated March 25, 1982 Dr. A. L. Nealy, a resident in psychiatry, stated:

> "Mr. Lewis Robinson has been followed as a patient since January 21, 1982, by me on a weekly basis. He has been diagnosed as suffering from severe stress induced headaches that are directly work related. A change in shift is recommended to alleviate this condition by changing the environment that is a factor involved in this stress."

On April 26, 1982 appellant was admitted to the Veterans Administration Medical Center with complaints of chest pain following an alleged confrontation with his supervisor. Hospital records indicate that a myocardial infarction was ruled out by an electrocardiogram and x-rays revealed no significant abnormality.

On May 4, 1982 appellant filed a notice of a recurrence of disability commencing April 26, 1982 alleging headaches and a heart condition associated with his federal employment. Appellant utilized 120 hours of sick leave for intermittent periods between April 22, 1981 to May 2, 1982; annual leave between May 3 to 9, 1982 and was absent without leave after June 4, 1982.

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[2] Appellant alleged harassment and racial discrimination as the cause of his employment stress, arising from an incident in August, 1981 when he reported that a fellow employee was responsible for thefts at the Veterans Administration. A note from the Office of Workers' Compensation Programs claims examiner indicated that the fellow employee was exonerated and on December 31, 1982 appellant was given a reprimand by his supervisor. Appellant thereafter appealed from the reprimand alleging that it was racially motivated and filed a discrimination complaint on February 25, 1982. An EEO investigation was conducted and concluded there was no discrimination.

In a medical progress report dated June 2, 1982 appellant's condition was diagnosed as atypical chest pain and depression which was attributed to the stress of his employment. However, there was no objective data found to support a diagnosis of heart disease.

By letter dated June 14, 1982 appellant's attorney submitted a deposition, dated May 19, 1982, from Dr. Nealy who diagnosed "stress-induced psychosomatic headaches that are directly job related which is superimposed on an obsessive-compulsive personality." The physician further indicated that appellant's condition deteriorated shortly after a conflict with his supervisor which resulted in a reprimand.

On June 24, 1982 appellant's attorney submitted the June 18, 1982 report of Dr. Nealy, who stated:

> "Mr. Robinson was advised not to return to work as of June 3, 1982, until his present condition stabilized. I would also like to reiterate a previous recommendation that he refrain from the shift viewed as stressful to him. This advice apparently went unheeded and appeared instrumental in his suffering cardiac symptoms."

In a report dated August 9, 1982 Dr. William Corwin, a Board-certified psychiatrist, indicated that he examined appellant on July 27 and 28, 1982 and concluded, as follows:

> "I believe he is suffering from an anxiety and depressive neurosis. This appears to be related to stressful factors in his work and his reactions to the pressures of his work. One would also have to consider the possibility of a post-traumatic stress disorder, chronic, with the earlier [military] combat stresses playing role in the present symptoms. It is my opinion that he cannot return to his job as a police officer at the VA hospital. It would be to his advantage to continue with psychiatric treatment as well as observations for any physical ailments that may develop."

By compensation order dated August 19, 1982 the Office rejected appellant's claim finding that the factual and medical evidence of record did not establish fact of injury in the performance of duty.

By letter dated August 23, 1982 appellant, through his attorney, requested a hearing before an Office representative. At the hearing held on February 14, 1983 appellant submitted the February 10, 1983 report of Dr. Nealy, who stated:

> "My evaluation of Mr. Lewis Robinson in January 1982 revealed a direct relationship between the conflict at work and his subsequent

somatic symptoms including severe headaches, insomnia, dizziness and anginal attacks. With the understanding that Mr. Robinson had not experienced a similar response to this extent, his symptoms would emphasize the manner in which he perceived the threat. Having obtained a history that his symptoms were severe enough to require tranquilizers (Valium) and narcotic analgesics (Tylenol No. 3) Mr. Robinson was advised to change work shifts as the conflict was stated to have been with his superiors on the day shift. His cardiac symptoms appeared after returning to the same conditions. The above emotional reactions were precipitated and aggravated by the conditions of his employment. As best ascertained there were no other precipitating events."

In a decision dated May 13, 1983 and finalized on May 23, 1983 the Office hearing representative affirmed the August 19, 1982 compensation order finding that the evidence submitted indicated that appellant's emotional condition was self-generated and did not arise out of or in the course of his federal employment.

The Board finds that the case is not in posture for decision.

There is medical evidence in the record in support of appellant's claim of a causal relationship between his disability and his federal employment in the form of reports from Dr. Nealy, then a psychiatric resident, and Dr. Corwin, a Board-certified psychiatrist. On the other hand, there is no medical evidence in the record to dispute the findings of the two physicians. The case was not evaluated by an Office medical adviser, nor was it referred to a medical specialist.

While the reports of Drs. Nealy and Corwin lack sufficient rationale to discharge appellant's burden of proving by the weight of the reliable, substantial, and probative evidence that his headaches and emotional condition were causally related to his employment, they constitute sufficent evidence in support of appellant's claim to require further development of the record by the Office.[3]

The Office should direct appellant to specify in writing those job factors and employment conditions which he alleges were stressful and contributed to his condition. Appellant should describe specific events, dates, and the parties involved within his allegations, and the employing establishment should be requested to comment on his statement. The Office should then prepare a statement of accepted facts[4] and transmit it with the case record to a Board-certified specialist with a request to evaluate the evidence and provide a rationalized opinion on the issue of whether appellant's emotional condition is causally related to factors of his federal employment as described in the statement of accepted facts and if so, the duration of such relationship. The Office should than make a *de novo* decision based on the augmented record.

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[3] *Horace Langhorne*, 29 ECAB 820.

[4] In preparing the statement of accepted facts, the office should do so in light of the principles set forth by the Board in *Lillian Cutler*, 28 ECAB 125.

The decisions of the Office of Workers' Compensation Programs dated August 19, 1982 and May 13, 1983 are set aside, and the case is remanded to the Office for further proceedings consistent with this decision.

In the Matter of EDGAR DILLON *and* DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alameda, Calif.

Docket No. 83-1559; Submitted on the Record;
Issued November 29, 1983

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant sustained a compensable hearing loss causally related to his federal employment.

On August 16, 1977 appellant, then a 57-year-old sheet metal mechanic, filed a claim for a schedule award alleging a loss of hearing, which he attributed to his federal employment. His job at the employing establishment began in July 1949, and as far as the record shows, continues to the present.

In support of his claim for compensation, appellant submitted copies of his medical records from the employing establishment's medical unit and a June 27, 1978 audiogram and attached report from Dr. August Reich, an otolaryngologist. The doctor concluded that appellant had a mild bilateral sensorineural hearing loss due to noise exposure and age.

The employing establishment submitted an occupational noise exposure summary for appellant. This information revealed that appellant had been exposed to noise levels ranging from 52 dBA (decibels on the average) to 107 dBA.

An Office of Workers' Compensation Programs medical adviser reviewed the case recorded on December 10, 1980 and recommended that appellant be referred for a current otologic and audiological examination because of his continued exposure to hazardous noise.

Accordingly, the Office referred appellant to Dr. E. David Manace, a Board-certified otolaryngologist, who first examined appellant on February 25, 1982, and reported the following:

> "*OTOLARYNGOLOGIC EXAMINATION: Ears:* The tympanic membranes are normal and mobile bilaterally. *Nose:* The nasal septum is midline; there is no intranasal pathology. *Mouth and Phar-*

ynx: The tonsils are benign. *Neck:* There are no palpable cervical lymph nodes.

"*OTOLOGIC TESTS: Audiogram:* Mr. Dillon's pure tone audiogram (ANSI-69 Calibration) of February 25, 1982 is shown below:

Hz.	500	1,000	2,000	3,000
Right Ear	30	30	30	15
Left Ear	25	20	20	15

"*Medico-Legal Audiologic Evaluation:*

"At San Francisco Audiology, Mr. Dillon's speech reception threshold was 10 dB. in the right ear and 20 dB. in the left. His speech sound discrimination scores were 100% bilaterally.

"Mr. Dillon's responses were not considered reliable and, therefore, should not be used for rating purposes.

"*DISCUSSION AND CONCLUSIONS:*

"Mr. Dillon has bilateral high-frequency sensorineural hearing losses the audiometric characteristics of which are consistent with occupational noise exposure. Because of the unreliability of Mr. Dillion's audiometric responses, the exact extent of the hearing losses are not at present known.

"Mr. Dillon gives a history of excessive noise exposure incurred while working as sheetmetal worker at Alameda Naval Air Station of sufficient intensity and duration to expect ear injury. The noise survey estimates also indicate potentially ear hazardous noise levels for Mr. Dillon's job location. The majority of noise-induced ear injury is expected to have occurred prior to the regular use of ear protection on the job in 1967.

"Mr. Dillon's noise-induced hearing losses are permanent, stable, irreversible and may be rated. They are, however, not amenable to medical or surgical treatment.

"Because of the unreliability of Mr. Dillon's test responses, it is recommended that he return to the San Francisco Hearing and Speech Center for a more detailed audiometric testing to include special tests for nonorganic hearing loss and possibly brain stem auditory responses. Following receipt of these additional test results, I will forward a final and supplemental report concerning his status, ratability and treatability of this man's hearing losses."

Due to the unreliability of appellant's first test results, appellant was reevaluated on September 14, 1982. In an October 25, 1982 report, Dr. Manace reported the following:

> "Following careful instruction, Mr. Dillon was able to achieve significantly better voluntary threshold hearing responses on September 14, 1982 as compared with earlier testing February 25, 1982. Bekesy lengthened off time tracings were negative for nonorganic

hearing loss and the current tests are considered an accurate representation of Mr. Dillon's true hearing acuity.

"*OTOLOGIC TESTS:*

Audiogram: Mr. Dillon's pure tone audiogram (ISO Calibration) of September 14, 1982 is shown below:

Hz.	500	1,000	2,000	3,000
Right Ear	15	15	15	10
Left Ear	20	20	15	20

"In this audiogram, the monaural hearing impairment for the right ear is 0%; for the left ear 0%: and the binaural hearing impairment 0% (Permanent Disability Rating Bureau, Industrial Accident Commission, Memorandum of August 18, 1965).

"*Medico-Legal Audiologic Evaluation:*

"At San Francisco Hearing and Speech Center, Mr. Dillon's speech reception threshold was 10 dB. in the right ear and 12 dB. in the left. His speech sound discrimination scores were 92% on the right and 100% on the left. The candidate was considered a reliable test subject and the above audiometric results may be used for rating purposes.

"*DISCUSSION AND CONCLUSIONS:*

"Mr. Dillon has essentially normal hearing in both ears with minor, nonratable bilateral, high frequency losses above 3,000 cycles per second.

"Although not ratable, Mr. Dillon's high frequency auditory losses are attributable to the cumulative effects of occupational noise exposure. My conclusions remain the same as outlined in our original report that noise exposure at the Alameda Naval Air Station was of sufficient intensity and duration to expect ear damage. Following the regular use of ear protection in 1967, I would assume no further noise-induced ear injury occurred.

"These noise-induced hearing losses are permanent, stable, irreversible and are not amenable to medical or surgical treatment.

"Because of the excellent speech reception in both ears and mild nature of the high frequency auditory losses, Mr. Dillon is not considered to have a sufficient hearing impairment to warrant hearing aid amplification."

On November 8, 1982, an Office medical consultant, Dr. David N. Schindler, a Board-certified otolaryngologist, reviewed the case record and applied the Office's standardized procedures to Dr. Manace's September 14, 1982 audiogram. He reported that appellant had a mild high-frequency neurosensory hearing loss consistent with acoustic trauma of noise exposure. However, when calculated for schedule award purposes, appellant had a "0% monaural loss in the right ear and a 0% monaural loss in the left ear, for a 0% binaural neurosensory hearing loss."

By letter decision dated April 29, 1983 the Office rejected appellant's claim because a compensable hearing loss had not been established.

The Board finds that the medical evidence establishes that appellant did not sustain a compensable hearing loss causally related to his federal employment.

The Office evaluates industrial hearing loss in accordance with the standards of the National Institute for Occupational Safety and Health, using the frequencies of 1,000, 2,000, 3,000 cycles per second. These standards are found in Chapter 6 of *Occupational Exposure to Noise.*[1] Using these and other standards adopted by the Office and approved by the Board,[2] the hearing loss in either ear must exceed an average at these frequencies of 25 decibels when the audiogram is based on an ISO-ANSI calibration, as was the case here, in order for there to be a compensable loss under the Federal Employees' Compensation Act. The first 25 decibels are discounted as having no significance with respect to the ability to hear everyday speech under everyday conditions.

The Board finds that the Office properly applied its standardized procedures to Dr. Manace's September 14, 1982 audiogram,[3] and that under these standards appellant did not have a ratable loss of hearing. The evidence establishes that appellant has a hearing loss, but not sufficiently large to be ratable for the purpose of entitlement to compensation under the Federal Employees' Compensation Act.

The decision of the Office of Workers' Compensation Programs, dated April 29, 1983, is hereby affirmed.

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[1] *Occupational Exposure to Noise*, published in 1972 by the U.S. Department of Health, Education and Welfare, Health Services and Mental Health Administration, National Institute for Occupational Safety and Health. The National Institute was established by section 7(a) of the Occupational Safety and Health Act, 84 Stat. 1597.

[2] For a discussion of the Office's standardized procedures, see *Richard Beggs*, 28 ECAB 387.

[3] The September 14, 1982 audiogram appears most reliable because it was the most current evaluation of appellant's hearing loss and it was rated as reliable; whereas, appellant was exposed to noise after Dr. Reich's June 27, 1978 audiogram, and the February 25, 1982 audiogram was considered unreliable.

In the Matter of HERBERT R. OLDHAM *and* U. S. POSTAL SERVICE, POST OFFICE, Fort Lauderdale, Fla.

Docket No. 83-1251; Submitted on the Record;
Issued November 29, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to compensation after March 23, 1983 for the reason that he refused suitable employment.

Appellant, a 44-year-old letter carrier, filed a claim alleging that on February 6, 1976 he hit his head on the top of a jeep while getting into it. He did not stop work at that time.

On February 9, 1976 appellant complained to his supervisor of having a stiff neck and received authorization for medical treatment. He was referred to Dr. H. Donald Hill, a general practitioner, who treated him on that date and diagnosed a sprain of the cervical spine. The doctor indicated by report dated March 24, 1976 that appellant was being seen in consultation with Dr. James M. Wallquist, a Board-certified orthopedic surgeon, and that x-rays taken of his cervical spine were reported as negative. Dr. Hill indicated that appellant could return to light-duty work on March 29, 1976 unless contraindicated by the consulting orthopedist. In a separate work tolerance limitation form Dr. Wallquist indicated that appellant was capable of partial tolerance for walking, standing, and sitting for one hour a day, lifting restricted to below 15 pounds, with total restrictions on pushing, pulling, stooping, kneeling, bending, climbing, operating motor vehicles, and reaching above the shoulder.

On April 2, 1976 appellant returned to work. He received continuation of pay for the period of February 7 to March 22, 1976 and intermittent compensation for temporary total disability after March 23, 1976.

> In a report dated April 9, 1976 Dr. Wallquist stated:
>
> "I had the pleasure of examining the above-named patient today April 6, 1976 and the following is my report.
>
> "Chief Complaint: 46-year-old male, postal employed, with neck pain.
>
> "Present Illness: Patient was well until February 6, 1976, when, while performing his customary job as a postal employee, he states he struck his forehead against the door of the mail truck while getting into the vehicle sustaining hyperextension type of injury. Patient states he continued to work with some increasing pain and neck spasm with referred pain to the left shoulder and lateral arm. He denied true paresthesia numbness of the upper left extremity, no prior history of cervical strain. Patient was initially seen by his private physician, Dr. Donald Hill and treated on an outpatient basis with physical therapy with only minimal improvement. He returned to work after two weeks of conservative treatment, but because of a flare up, he was admitted to the hospital for treatment.
>
> "Patient was seen by me for the first time in consultation while this patient was in the hospital on March 14, 1976. An orthopedic evaluation examination was performed, which at that time revealed tenderness and mild spasm in the left posterior cervical region extending into the left trapezius and to the superior medial angle of

> the left scapula. There was restriction on extension, left lateral bending, and chin rotation and no other objective neurologic findings.
>
> "An x-ray was obtained of the cervical spine which showed mild degenerative changes, but no evidence of fracture, subluxation or congenital anomalies.
>
> "Patient was treated for his chronic strain with traction and improved and was subsequently discharged on March 27, 1976. He was to be followed on an outpatient basis. Since his discharge, the patient has had waxing and waning type pattern of recurrent neck pain, but no upper extremity paresthesia or numbness.
>
> "The patient has been returned to light duty and has performed his job in casing mail, working about two hours a day. He has had a.m. stiffness in his neck and also extending to his low back region with no associated radicular type symptoms. He is not wearing a cervical collar, he is not taking any medication for pain in two days. He denies persistent paresthesia in the upper or lower extremities.
>
> "Physical examination today revealed some restricted range of motion of the neck with forward flexion, except the chin lacks two fingerbreadths from touching the chest, some mild restriction on lateral bend and extension beyond ten degrees. There is some pain over the posterior spinous processes of the lower cervical and upper thoracic vertebra, but no pain over the scapula region. The patient has mild tenderness over the L4-L5 area, but no other objective findings suggest radiculopathy of the lower extremities.
>
> "X-rays: Lumbar series were taken today which showed mild calcification of the abdominal aorta and without significant joint involvement or disc space narrowing.
>
> "Impression: Chronic cervical sprain to mild lumbar strain.
>
> "Treatment: Patient was prescribed Indocin, Darvocet and will continue on physical therapy and a light-work schedule as he is doing at the present time. He will be see again in one week."

Appellant continued to complain of intermittent neck pain and was unable to resume full-time duties on April 14, 1976. On April 19, 1976 Dr. Wallquist stated appellant was totally disabled from work and was referred to Dr. John R. McCormick, a Board-certified neurologist, for consultation to rule out a disc at the C5-6 level. On May 6, 1976 Dr. McCormick performed an electromyogram which indicated that a C5-6 nerve root lesion was a possibility. In an attending physician's report dated May 20, 1976 Dr. Wallquist found appellant totally disabled due to a chronic cervical sprain and mild lumbar sprain and recommended appellant continue on a conservative treatment program.

On June 14, 1976 Dr. Wallquist released appellant to resume normal full-time work duties beginning June 15, 1976. However, a subsequent report from the physician dated June 18, 1976 found appellant to be totally disabled from work due to recurrent cervical radiculitis. On June 26, 1976 appellant was hospitalized for "another trial of conservative" treatment. Appellant received compensation for intermittent periods of disability between April 9 and July 16, 1976, and continuously thereafter.

In a progress report dated July 14, 1976 Dr. Wallquist indicated that appellant had been hospitalized from June 26 to July 8, 1976 and that a neurological examination was normal. On August 18, 1976 Dr. Wallquist referred appellant back to Dr. McCormick for further neurological examination.

In a report dated August 20, 1976 Dr. McCormick stated that appellant underwent an electromyogram which indicated evidence of some slight polyphasia in all muscles sampled which suggested a diffuse brachioplexopath which was resolving. He stated that disc disease remained a possibility, but the diffuse polyphasia would suggest improvement. Thereafter appellant underwent periodic examinations by Dr. Wallquist. In a report dated December 7, 1976 the physician stated:

> "This patient was seen today. He is about ten months since injury. He essentially has plateaued off in the last six to eight weeks. As long as he does not do anything requiring pulling, pushing with his left arm, or overhead usage he is relatively comfortable. He is taking three to four Empirin #3 a day and has some increase in pain at night.
>
> "Physical exam: The patient has tenderness to palpation over the supraclavicular fossa in the area of the brachial plexus and also over the posterior cervical region in the area primarily of the C5-6 disc. There is pain with decreased strength on forward flexion, abduction and extension of the shoulder against resistance. He also has pain on attempted overhead elevation. He can only actively get his arm overhead to about 120 degrees. There is no evidence of fasciculation or atrophy. Motor strength, reflexes and sensation are symmetrical.
>
> "Impression: Chronic cervical strain. Cervical disc disease C5-6 with C5-6 radiculopathy, left upper extremity, secondary to #1."

Dr. Wallquist stated that appellant would be continued on conservative treatment and recommended referral to vocational rehabilitation for job training in another area.

On April 15, 1977 an Office of Workers' Compensation Programs medical adviser reviewed the record and suggested that appellant be referred for an orthopedic evaluation to determine whether his current condition was causally related to his employment.[1] Appellant retired on a disability effective April 18, 1977.

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[1] Both the Office claims examiner and the Office medical adviser make reference in their memoranda dated April 15, 1977 to a medical report dated January 21, 1977 by a Dr. Luton. The Board notes that the report is not contained in the record and, on remand, the Office should attempt to obtain a copy for the record.

Appellant was referred by the Office to Dr. Daniel E. Stalker, a Board-certified orthopedic surgeon, together with a statement of accepted facts and copies of the medical reports. In a report dated May 8, 1978 he stated:

> "On examination, he tends to sit on the examining table with a poor posture, with his head held forward. He rotates about 60 degrees in each direction. He complains of pain on rotation in both directions. It is difficult to tell how much of this is voluntary and how much is actual tightness, because he does not have any spasm. On looking upward, he gets the chin about ten degrees above the occiput. On flexion he can almost touch the sternum. Sensation seems normal in both hands today. He has decreased left triceps at about 1+, whereas the right is 2+. The biceps are equal at 2+. Both arms and forearms are equal circumference.
>
> "X-rays were taken of the cervical spine. These reveal very minimal arthritic changes; no real narrowing of the joint or disc spaces. The oblique views do not show any particular encroachment of the neural foramina.
>
> "IMPRESSION: This man has evidence of very mild radiculitis, probably at the 6th nerve root on the left. I feel that he has a ratable disability of approximately ten percent of the body.
>
> "The patient states that he has an appointment with Doctor Wallquist next week, and that he is considering having a myelogram. I feel that this is indicated, and if it is positive I feel that surgery is indicated. However, I do not get the impression that even if he had a neck fusion and no longer had the radiculitis that he would be very eager to return to work."

On September 25, 1978 the same Office medical adviser reviewed Dr. Stalker's report and requested that he clarify his remarks to indicate whether or not appellant's cervical condition is causally related to the accepted employment injury.

In a subsequent report dated November 15, 1978 Dr. Stalker stated:

> "It is my opinion that striking one's forehead on the roof of a vehicle upon entering could produce adequate trauma to cause herniation of a cervical disc with subsequent radiculopathy.
>
> "It may be of interest that Campbell's Operative Orthopedics, which is a standard textbook, states that cervical disc disease is degenerative in nature and almost never due to trauma. I realize that this opinion is at variance with the usual workmen's compensation determination."

On July 26, 1979 Dr. Wallquist submitted a work tolerance limitation form which indicated that appellant was capable of walking, sitting, and standing for two hours, with partial restrictions on stooping, kneeling, pulling, pushing and reaching above the shoulder and total restrictions on repeated bending and climbing.

On May 7, 1980 Dr. Harry L. Collins, an Office consultant in orthopedic surgery, reviewed the work tolerance limitations and stated that Dr. Wallquist should clarify his report.

On January 22, 1981 the Office referred appellant to Dr. Ronald Grober, a Board-certified orthopedic surgeon, for an evaluation of his cervical condition and an opinion on the extent of any disability remaining as a result of the employment injury. In a report dated May 8, 1981 Dr. Grober stated:

> "As I was only involved in providing physical therapy to this patient and was never his treating physician, I cannot comment as to his work status. I would suggest you contact one of his previous primary physicians. During our brief relationship, he did seem to be primarily concerned with secondary gain and perpetuating his disability."

On July 13, 1981 the Office referred appellant back to Dr. Wallquist for a progress report. In a report dated July 30, 1981 the physician responded:

> "This patient returns today as per instruction for his annual checkup. Since his last visit, his symptoms have been stable with some episodes of flareup in the neck and left arm. He has been using over the counter medications as necessary and expresses some increased discomfort in the left arm which varies as to intensity depending upon the amount of usage with the extremity. He has had no change in his overall clinical picture. He is not working.
>
> "Physical Examination: His neck is supple. There is expressed tenderness on palpation along the left posterior cervical region, extending into the trapezius. His head compression test and shoulder depression test are positive. Tinel Sign is negative. Adson's Maneuver is negative. He expresses some discomfort with overhead elevation, but otherwise, there is no evidence of atrophy or fasciculations or radiculopathy.
>
> "Impression: Chronic cervical brachial pain without objective findings for radiculopathy.
>
> "Treatment: I feel this patient's clinical condition has remained stable over the past couple of years and on this basis do not anticipate any significant deterioration. I feel he is at maximum medical improvement and on the basis of physical examination, requires no additional treatment or diagnostic studies. He has a ten percent permanent partial disability to the body as a whole on the basis of his residual complaints and findings.
>
> "As far as work is concerned, I think he could work in some type

> of light duty such as security guard or dispatcher, which would not require repetitive bending, lifting, pushing, pulling heavy loads, climbing or working overhead."

Dr. Wallquist attached to his report a work restriction evaluation form on which he indicated that appellant was capable of working eight hours a day subject to the following restrictions: sitting for four hours; walking for two to eight hours; standing for four hours; no lifting, bending, squatting, climbing, kneeling, or twisting; and lifting restricted to less than ten pounds.

On November 25, 1981 a second Office medical adviser reviewed Dr. Wallquist's report and found appellant was capable of performing remunerative employment for eight hours a day.

In a note dated December 16, 1981 the Office claims examiner indicated that the employing establishment would be contacted to see whether a light-duty position could be offered appellant.

On January 27, 1982 an Office rehabilitation specialist notified appellant of the Office's effort to return him to suitable employment. He was subsequently referred to the employing establishment for consideration under the Joint Office-Postal Service light-duty reassignment program.

On June 3, 1982 appellant was referred to Dr. Martin W. Spiegler, an orthopedic surgeon, for an evaluation of his physical limitations. In a report dated June 15, 1982 Dr. Spiegler stated:

> "This a a 51-year-old man with the chief complaint of pain in his neck and left arm. He had struck his head while getting into a postal vehicle in February of 1976. He developed neck pain thereafter and has been treated by Dr. Wallquist, an orthopedist in Ft. Lauderdale. He had been placed in traction twice as an inpatient which helped considerably. An EMG [electromyogram] was performed which showed cervical radiculopathy on the left. However, since his pain eventually moderated somewhat surgery was not considered advisable.
>
> "Currently pain is centered in the left posterior cervical region with radiation to the left occiput proximally, and the left shoulder blade, left arm and the ulnar aspect of the left hand distally.
>
> "Physical examination shows restriction of motion in all planes by pain. Approximately 50% restriction is noted in all directions. There is mild, indefinite spasm in the paraspinous muscles posteriorly. There are no deformities.
>
> "Neurological examination shows no change in sensory, motor or reflex function over either upper extremity. The station and gait are normal. The cranial nerves appear to be intact. There is no atrophy noticed.
>
> "X-ray examination shows no acute bony change in the neck.
>
> "Opinion: If this patient's history is correct with respect to a

> positive EMG, I believe his history is consistent with cervical radiculopathy. Consequently he should not participate in activities involving overhead reaching, twisting of the neck, requirements to hold the neck fixed in one position for prolonged periods, or lifting and repetitive movement of the left upper extremity. However, the thoracic and lumbosacral region of the spine is not involved nor is the right upper extremity. There would be no restrictions to the lower extremities either. I have filled out a work restriction form which I believe will help in reassigning work activities to this patient."

Dr. Spiegler attached to his report a work restriction evaluation form in which he indicated appellant was capable of working eight hours a day subject to the following restrictions: eight hours continuous sitting, walking, squatting, climbing, kneeling, and standing; two hour intermittent lifting and bending; one hour intermittent twisting; lifting restricted to less than ten pounds with no reaching above the shoulder and left hand restrictions.

On February 18, 1983 the employing establishment offered to reclassify appellant as a modified distribution clerk. The employing establishment stated that the position was tailored to meet appellant's physical limitations; however, the job offer did not describe the physical demands required of the job. On March 9, 1983 appellant declined the proffered position by letter stating that the job description was vague. On March 14, 1983 the employing establishment advised the Office of appellant's decision and recommended that his compensation be terminated.

By compensation order dated April 19, 1983 the Office terminated appellant's compensation effective March 23, 1983, finding that he had refused suitable employment.

The Board finds that the case is not in posture for decision and must be remanded to the Office for further development.

The Office found appellant was not entitled to compensation under 5 U.S.C. section 8106(c)(2) on the ground that he refused to accept suitable work when offered to him. However, to justify such action, the Office must show that the work offered was suitable.[2] The Office failed to make that showing in this case.

While the medical evidence of record indicates that appellant is capable of returning to limited duty employment, the employing establishment failed to describe the physical requirements of the position of modified distribution clerk. It is well-established under Board precedent that in order for the Office to meet its burden of showing that the work offered was suitable both the job duties and the physical requirements of the job need to be fully described.[3] Nor does the evidence establish that the requirements of the position offered appellant were reviewed by a physician to determine whether the duties were within his physical capabilty.

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[2] *Thomas W. Bell*, 35 ECAB.

On remand, the Office should request that the employing establishment describe the physical requirements of the position offered appellant. The Office should also verify that the position is still available and offered to appellant. After such further development as deemed necessary the Office should make a *de novo* decision.[4]

The decision of the Office of Workers' Compensation Programs dated April 19, 1983 is set aside and the case remanded for further action in accordance with this decision.

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[3] *Bertha L. Buckner*, 31 ECAB 1434; *Robert Bledsoe*, 34 ECAB 144; *Liller Mark*, 33 ECAB 1656; *Hattie H. Chambliss*, 34 ECAB 453.

[4] The Board notes that FECA Program Memorandum No. 77, dated May 9, 1983, provides with regard to the application of 5 U.S.C. section 8106, as follows:

> "Where there is a written offer of employment which specifies duties and physical limitations, it is sufficient to determine that the offer is suitable to the claimant's disabled condition and made in good faith. It is not necessary, before applying 5 U.S.C. 8106 for a refusal to accept the position, to ascertain whether this work is reasonably available in the open labor market, or to compute a compensation rate based on the salary of the offered job. The Office should prepare a compensation order, the findings of which include a description of the offered work, that it was suitable to the employee's disabled condition, and that it reflected the employee's capacity to earn wages."

In the Matter of ELIZABETH F. KEOUGH, claiming as widow of JEREMIAH KEOUGH *and* DEPARTMENT OF THE NAVY, NEW YORK NAVAL SHIPYARD, Brooklyn, N.Y.

Docket No. 83–1265; Submitted on the Record;
Issued November 30, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly computed appellant's survivor compensation benefits.

On December 16, 1978, the employee filed a claim for compensation alleging he had contracted an "asbestos tumor" as a result of his federal employment as a shipfitter. The employee had previously retired on civil service disability effective January 18, 1963. His salary at that time was $3.22 per hour. The following notation was placed on his personnel folder retirement form:

"On 09-18-62 you were reported by the Medical Officer of the Ship-

> yard as being permanently fit for limited duty. Limitation: No work in eye hazardous areas or on unprotected elevated platforms. There is no position in the Shipyard meeting the limitation imposed by the Medical Officer to which you can be reassigned."

The case record indicates that the employee was employed as a salesman for Lindsley, a company in private industry, from May 1969 through May 1978. At this time he was not exposed to asbestos. His payrate in 1978 was between \$3.40 and \$3.50 per hour.[1]

On June 23, 1978, Dr. Julian F. Garcia, a Board-certified pathologist, performed a bronchoscopy biopsy on the employee. The final diagnosis was "infiltrating, poor-differentiated, epidermoid carcinoma, left upper lobe bronchus."

In July 1978 the employee began seeing Dr. James Cohen, a Board-certified internist, who diagnosed his condition as "metastatic carcinoma of the lung of the squamous cell variety." Dr. Cohen related the employee's condition to his employment as a shipfitter in the following manner:

> " . . . there is a much higher incidence of squamous cell carcinoma of the lung in patients who have been exposed to asbestos.
>
> "Mr. Keough has, on his x-ray, some changes, which are consistent with the diagnosis of asbestosis in addition. His current symptomatology, however, is not related to asbestosis changes, but to carcinoma, which was contributed to, in some degree, asbestos exposure."

The employee died on January 28, 1979 as a result of "squamous cell carcinoma of the lung with metastases."

On March 19, 1979, appellant (the employee's widow) filed an Office of Workers' Compensation Programs form CA-5 claim for compensation.

On August 14, 1979, an Office medical adviser reviewed the case record and opined that the employee's death was proximately caused by the conditions of his federal employment. He stated the diagnosis as "squamous cell carcinoma of lung with metastases." He further stated that the medical evidence shows that total disability due to factors of federal employment began on October 20, 1978.

In a letter dated July 31, 1980, the Office notified appellant that the claim made by her late husband had been accepted as being causally related to his federal employment. She was requested to submit the following documents before further action could be taken on the case: (1) the decedent's certified divorce decree from his former spouse; (2) appellant's certified divorce decree from her former spouse; and (3) the paid funeral bill, indicating who paid funeral expenses. The case record contains the requested documents.

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[1] A handwritten notation on the bottom of an August 13, 1982 letter from the Office of Workers' Compensation Programs to Mr. Richard Evans at Lindsley indicates the employee's pay rate as \$3.40 per hour or a gross salary of \$1,870.35 in 1978; whereas, an October 18, 1982 letter from Mr. Evans stated a pay rate of \$3.50 per hour.

By letter decision dated March 16, 1983, the Office found that the employee's death was causally related to the factors of his federal employment. Appellant was informed of her entitlement to 50 percent of the amount of the employee's monthly salary or $279.07 per month, with cost of living increases added, less the cost of the health benefit plan, if applicable, and the payment of $1,000.00 for burial allowance and administrative costs. A memorandum in the case record indicates that appellant's compensation was based on the employee's rate of pay of $3.22 when he retired in 1963. She was informed that she must make an election between survivor compensation benefits under the Federal Employees' Compensation Act (FECA) and benefits of the Civil Service Commission.

The Board finds that the case is not in posture for decision.

Monthly pay for compensation purposes is defined at 5 U.S.C. 8101(4) as (1) the pay at time of injury; (2) the pay at the time disability begins; or (3) the pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.

In FECA Program Memorandum No. 268, dated December 16, 1980, the Office stated:

> "The definition does not require that the pay rate be earned in federal employment, If the individual is working in private industry at the time disability begins . . . nonfederal pay may be used in determining the pay rate for compensation purposes."

In the case of occupational disease, as in this case, the date of injury for purposes of computing compensation is the date of the last exposure to the implicated employment factors.[2] Here, the date of injury was January 18, 1963. With respect to the time when disability began, it is noted that the employee retired on civil service disability in 1963 because he was found permanently fit for limited duty, with the limitation "no work in eye hazardous areas or on unprotected elevated platforms." However, this was not the condition accepted by the Office as causally related to the employee's employment and this would not be the date when employment-related disability began. The employee returned to work in private industry in May 1969 and worked until May 1978 at a pay rate of $3.40 per hour. The Office medical adviser, who reviewed the case record, stated the employee's total disability began October 20, 1978. However, there is evidence in the case record which indicates that the employee was under medical treatment as early as June 1978 for carcinoma, the accepted employment condition.

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[2] *Charles W. Hancock*, 18 ECAB 662.

On remand, the Office should further develop the case record to determine when the employee became disabled as a result of "squamous cell carcinoma of the lung with metastases," the condition accepted by the Office as causally related to his federal employment. It should take into consideration its Program Memorandum No. 268 in determining the employee's rate of pay for purpose of computing appellant's survivor benefits.

The decision of the Office of Workers' Compensation Programs, dated March 16, 1983, is set aside and the case remanded for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

In the Matter of MARY F. DUDLEY *and* U. S. POSTAL SERVICE, POST OFFICE, St. Louis, Mo.

Docket No. 83–1065; Submitted on the Record;
Issued November 30, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T.C. THOMAS

The issue is whether the position of telephone solicitor fairly and reasonably represents appellant's capacity to earn wages.

On January 11, 1967 appellant, a 44-year-old substitute mail handler, sustained a contusion to her left knee while in the performance of duty. The Office of Workers' Compensation Programs determined that this condition resulted from the employment injury and paid her compensation benefits for appropriate periods of temporary total disability beginning January 24, 1967. Subsequently, the Office determined that appellant had developed weakness in the right knee and had aggravated her preexisting rheumatoid arthritic condition as a result of the January 11, 1967 employment injury.[1]

On June 13, 1975, Dr. Andrew Luh, a Board-certified orthopedic surgeon who was also appellant's attending physician, performed a total replacement of the right knee with hinge type prosthesis implant. She underwent the same type of procedure on her left knee on August 22, 1975. On March 26, 1979 appellant underwent a second left knee replacement.

The Office determined that appellant's total replacement of the knees resulted in a finding of permanent impairment of both knees. Accordingly, it granted appellant a schedule award for a 32 percent permanent loss of use of the right leg, and a 26 percent permanent loss of use of the left leg. The award was for 167.04 weeks for the period December 16, 1971 to February 27, 1975. On June 2, 1978 the Office amended this award and granted appellant a schedule award, an additional eight percent for partial loss of use of the right leg, and for an 11 percent for partial loss of use of the left leg. This award was for 54.72 weeks for the period January 6, 1978 to January 24, 1979.

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[1] The Office noted appellant's nonemployment-related preexisting conditions of obesity, knock knee deformity and osteoarthritis.

Prior to the expiration of appellant's schedule award, the Office began developing the record to determine whether appellant was entitled to compensation benefits after the expiration of her schedule award for an employment-related loss of wage-earning capacity.

Appellant submitted a medical report by Dr. Luh dated April 11, 1978, who reported that appellant was permanently and totally disabled for work due to "lack of endurance of the lower extremities, especially the knees."

On May 10, 1978 an Office medical adviser reported that appellant was capable of performing desk work. In setting forth appellant's work tolerance limitations, the medical adviser indicated, *inter alia*, that although appellant was capable of working an eight hour day, she was unable to do any walking, she could lift a maximum of 20 pounds.

In reports dated August 4 and December 5, 1978, Dr. Luh reported that appellant was capable of walking with a cane.

The Office medical adviser reviewed the evidence of record on February 23, 1979 and stated that he disagreed with Dr. Luh's conclusion of total disability; that in the medical adviser's opinion appellant was capable of working an eight hour day and could perform desk work. In completing a second work tolerance limitations sheet, the medical adviser indicated, *inter alia*, that appellant had partial capacity for walking.

In a report dated May 7, 1979, Dr. Luh informed the Office that on March 17, 1979 he again performed a total left knee replacement, and noted that postoperative care was uneventful.

In order to resolve a conflict in medical opinion between Dr. Luh and the Office medical adviser, the Office prepared a statement of accepted facts and referred it, together with appellant, the case record, and the duties of a telephone solicitor, to Dr. Stanley M. Leydig, a Board-certified orthopedic surgeon, for resolution of the conflict pursuant to 5 U.S.C. section 8123(a).

Dr. Leydig examined and evaluated appellant, and in a report dated May 14, 1979 reported in pertinent part:

> "At the present time [appellant] walks with a walker and I note that she was able to negotiate the hallway in my building, a distance of 100 feet on her own although rather laboriously. At the present

> time she states that she has quite a bit of pain in the left knee and she is unable to raise the left knee from the floor; the right knee she can control the bending a little more and she is able to extend the right knee to 180 degrees."
>
> * * *
>
> "Comment: The patient is unable to walk without a walker and therefore any work she would do would have to be of a sedentary nature. I discussed with the patient the duties of a telephone solicitor and she admitted that she would be able to do that type of work described . . . I think it is a reasonable medical assumption that this patient had preexisting degenerative arthritis and quite likely rheumatoid arthritis which was asymptomatic at the time of her injury and the injury aggravated these conditions producing the disability she now describes."

The Office medical adviser reviewed the evidence of record and opined:

> "[T]he claimant had marked degenerative arthritis, which was not work related, and the probability is that this claimant would have progressed to complete arthroplasty of both knees whether she was injured or not. The key word evidently is 'aggravation.' This the claimant did suffer to her preexisting degenerative arthritis by the incident of January 11, 1967."

An Office loss of wage-earning capacity specialist determined on June 6, 1979, that based on medical factors, education, and work background, appellant was best suited for the position of a telephone solicitor, Department of Labor's *Dictionary of Occupational Titles*, Code No. 293.358.

The physical requirements of this position were listed as sedentary lifting to a maximum of ten pounds, and the ability to talk and hear. The working conditions were listed as being inside 75 percent of the time. The specialist confirmed by telephone conversation with a state employment service representative that the work of a telephone solicitor was reasonably available in appellant's commuting area. The Office medical adviser stated that appellant was capable of performing the requirements of this position.

Applying the principles of the *Shadrick* case,[2] the Office by letter decision dated August 13, 1979 determined that appellant was no longer totally disabled from the effects of the January 11, 1967 employment injury, and that she had a 58 percent loss of wage-earning capacity based on her ability to perform the duties of a telephone solicitor in which she could earn $116.00 per week. The Office also informed appellant that her new compensation rate would go into effect as soon as she made an election of benefits between compensation and benefits under the Civil Service Retirement Act.

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[2] *Albert C. Shadrick*, 5 ECAB 376.

The Office referred appellant to Dr. Leydig for a current medical evaluation. Dr. Leydig examined appellant and in a report dated October 1, 1979 stated in part:

> "There has been no change in her subjective complaints and on examination: There is no change on physical examination. * * *
>
> "Comment: This patient is still unable to walk without a walker and therefore any work she could do would have to be of a sedentary nature as I described in my last report, I believe that maximum improvement has been reached and I do not believe that further medical care would be of any benefit. I still believe that this patient had preexisting degenerative arthritis and rheumatoid arthritis which may have been asymptomatic at the time of her injury according to her history, and the injury aggravated these conditions producing the disability she describes and the necessity for surgery, which has followed."

Appellant requested a hearing which was held on July 21, 1980 in St. Louis, Missouri.[3] At the hearing appellant submitted a May 11, 1979 progress note from Dr. Luh, who reported that appellant was considered to be "permanently and totally disabled for work because of lack of endurance of the lower extremities, especially the knees."

By a decision dated and finalized November 5, 1980, an Office hearing representative affirmed the Office's prior decision.

Appellant filed an application for review before the Board on December 2, 1980. In a legal memorandum to the Director of the Office, dated March 20, 1981, the Board requested that the Office submit a legal memorandum addressing the primary issue of whether the position of telephone solicitor fairly and reasonably represented appellant's capacity to earn wages. In that respect, the Office was asked to comment on whether the ability to travel should be considered in conjunction with a loss of wage-earning capacity, and if so, whether the evidence in the instant case established that appellant was capable of transporting herself to and from work.

On June 23, 1981 the Director of the Office filed a motion to remand requesting that the Board remand the case in order to enable it to further develop the medical evidence regarding appellant's ability to travel. In that regard, the Director stated that he would request that Drs. Luh and Leydig submit detailed rationalized medical reports concerning the following:

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[3] Appellant requested a hearing upon receipt of the August 13, 1979 decision, which was scheduled for January 17, 1980 in Chicago, Illinois. The hearing was postponed because of appellant's inability to travel such a distance, especially by airplane.

> "[t]he type and duration of travel that appellant is capable of performing going and coming to work, and the effect, if any, that appellant's travel to work would have on her ability to perform the duties of a telephone solicitor."

By order dated July 9, 1981, the Board granted the Director's motion and remanded the case for further proceedings as requested in the motion to remand, to be followed by a *de novo* decision. [4]

On remand the Office wrote Drs. Luh and Leydig and informed them that additional information was needed concerning appellant's medical condition. It asked the doctors to focus on the following issues:

> "We specifically need a detailed rationalized report from you concerning the type and duration of travel that Ms. Dudley is capable of performing going and coming to work. Also, we need to know what effect, if any, that her travel to work would have on her ability to perform the duties of a telephone solicitor."

On September 3, 1981 Dr. Luh stated that he recommended appellant use a walker for ambulation, and stated that her walking was limited "due to involvement of the joints in the lower extremities by rheumatoid arthritis." The doctor did not address the Office's question.

Dr. Leydig informed the Office that it would be necessary for him to examine appellant prior to rendering an opinion. Accordingly, the Office referred appellant to Dr. Leydig for a current evaluation.

Dr. Leydig examined and evaluated appellant on October 5, 1981, and in a report of the same date stated:

> "The above-captioned was reexamined by me today because of the disability in both her knees which were operated on in the past, the last one being in 1979. Since her last examination there had been some improvement inasmuch as extension of the left leg is now possible actively to almost 180 degrees from 90 degrees. The tenderness about the left knee was much less than it was on the last examination, although the patient still complains of tenderness about both knees to some extent.
>
> "The patient came to my office, driven here by her daughter who has a Ford automobile. The patient was able to get into the automobile and brought with her a collapsible walker. When the patient got out of the car she used this walker to walk from the car in the parking lot up six steps and down a hall way which was approximately one hundred feet long. Patient negotiated this distance haltingly and laboriously.
>
> "In reply to your question concerning the type and duration of travel that Ms. Dudley is capable of performing going and coming

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[4] Docket No. 81-330.

> to work; this was analyzed and she was able to travel from her home to my office, a distance of about 15 miles, and was therefore able to enter and leave an automobile and then ambulate with the use of a walker. Therefore one can assume that she could use this method to reach her place of employment. I do not believe that her travel to work would have any influence on her ability to perform the duties of a telephone solicitor after she arrived."

The Office medical adviser reviewed the evidence of record and opined that appellant was capable of performing the duties of a telephone solicitor.

By compensation order dated December 14, 1981, the Office determined that the evidence of record established that appellant was partially disabled; that she was capable of traveling to and from work; and that she was therefore capable of performing the duties of a telephone solicitor. The Office noted that appellant's compensation benefits for an employment related loss of wage-earning capacity would be reduced retroactively to January 25, 1979.

Appellant requested a hearing which was held on February 12, 1982. [5]

Prior to the issuance of the hearing representative's decision, appellant submitted a March 19, 1982 report by Dr. Luh, who stated:

> "It is my opinion that Mrs. Dudley could do sedentary type of work, such as using the telephone, for three or four hours a day if it could be done in her home.
>
> "It is my opinion that she would not be able to go to and from work without assistance. She uses a walker but it would be difficult for her to use public transportation in order to go to work."

By a decision dated and finalized May 20, 1982, the Office hearing representative remanded the case to the Office to resolve the issues of whether assistance or transportation was available to appellant on a "regular basis" in the open labor market to take her to and from her job as a telephone solicitor, and whether she had "sufficient assistance" to "safely mobilize [her] to and from the vehicle once she arrived at her place of employment." The hearing representative further directed the Office to have Drs. Luh and Leydig comment on the type and degree of assistance appellant should have "in mobilizing" to and from her position of a telephone solicitor on a regular basis, and that should a conflict arise, referral to an impartial medical specialist would be necessitated. The hearing representative also directed the Office to determine whether appellant had an additional permanent partial disability which exceeded that previously compensated for through the schedule awards; in making this determination the hearing representative suggested the Office consider appellant's "apparent" surgery in April 1980, which he also added, might be "the basis for a limited period of temporary total disability."

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[5] Appellant's daughter submitted a letter stating *inter alia*, that Dr. Leydig had slightly exaggerated his observance of appellant entering his office building for her physical examination, and that her mother could not depend on her for her as a regular source of transportation because she worked as a full-time licensed practical nurse and could only provide transportation when she was available.

In a letter dated June 23, 1982, the Office asked appellant to submit information regarding her surgery in April 1980. Appellant responded on July 12, 1982 that she did not undergo any surgery in April 1980; that her "last surgery" was performed in 1979; and that she had submitted all of the reports.

In response to an Office claims examiner's inquiry, an Office rehabilitation specialist stated the following regarding the type of setting in which telephone solicitation is performed:

> "The state employment service says telephone solicitor jobs are mostly done from a business setting. The job done at home would generally be piece rate."

The Office medical adviser reviewed the evidence of record and stated:

> "In the opinion of the District Medical Adviser from the medical evidence submitted by Drs. Luh and Leydig, it appears that this claimant could travel by car to her place of employment and perform the duties of a telephone solicitor. It appears there is some improvement in this claimant's walking ability and when she got out of the car, she was able to use her walker from the parking lot up six steps and down a hallway which was approximately 100 feet long. It appears that this shows the claimant has sufficient capacity to travel to and from work by use of a private car, and it appears that no further assistance than the above is necessary."

In a memorandum dated October 4, 1982, the Office claims examiner asked the rehabilitation specialist if there were facilities available to take appellant to and from work, such as "medi-cab" or a van for the handicapped. On October 6, 1982 the rehabilitation specialist replied:

> "Yes, transportation is available. A call to Crawford Rehabilitation Services in St. Louis confirmed at least two transportation companies Care-Cab 9889 Page and E&T Transportation 8460 Watson Road."

With respect to Care-Cab, the record reveals that the cost was "$7 one way and 90 cents a mile."

The claims examiner secured additional information regarding transportation facilities for the handicapped. One such company was entitled

County Cab, and was located in the St. Louis area. This cab company provided transportation for persons who lived in the city and worked in the county, and vice versa. The cost was $1.75 for the first mile and 90 cents for each additional mile. The claims examiner noted that the company could make arrangements for assisting appellant to her work station.

The claims examiner also inquired as to the cost of transportation for Manchester Cab, also located in the St. Louis area. This company provided services for persons traveling to and from work, and also would assist them to their workplace. The cost was 80 cents per mile and a $6.00 fee for a wheelchair lift. Payments could be made on a daily basis or as stipulated by a contract.

Dr. Luh submitted a report dated December 8, 1982, wherein he stated that he examined appellant on November 30, 1982 regarding her total knee replacement bilaterally; that she did not have many complaints relative to the knees: and that an interpretation of an x-ray revealed that the "knees still look decent."

By compensation order dated March 8, 1983 the Office determined the following:

> "The evidence of record establishes that the claimant is partially disabled and capable of performing the duties and of traveling to and from work to accomplish the position of a telephone solicitor. Compensation is payable on the basis of a loss of wage-earning capacity as previously determined in the January 25, 1979 decision."[6]

The Board finds that the case is not in posture for decision and should be remanded for further development.

Dr. Leydig, a Board-certified orthopedic surgeon, reported on October 5, 1981 that based on his observance of appellant entering and exiting from her daughter's car and walking therefrom with her walker, and the fact that he was aware that there was a distance of 15 miles between his office and appellant's home, the doctor opined that appellant could use this method of transportation to transport herself to and from work. The doctor added that the duration of appellant's travel time on a daily basis would not affect "her ability to perform the duties of a telephone solicitor after she arrived." Although Dr. Leydig did not indicate how many hours appellant was capable of working in that capacity, it appears that he was basing appellant's ability on an eight-hour day, which was also the basis for the Office's loss of wage-earning capacity determination. The Office medical adviser concurred in this opinion.

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[6] By a separate letter of the same date, the Office also informed appellant that there was no additional permanent impairment beyond that awarded previously. It therefore invited her to submit additional medical information supporting an increased permanent impairment if it was her belief that she had sustained an increase.

On the other hand, Dr. Luh, a Board-certified orthopedic surgeon who was also appellant's attending physician, reported on March 19, 1982 that appellant was capable of performing sedentary work, "such as using the telephone," for three or four hours per day, provided that it could be done in the home. Dr. Luh further stated that appellant was incapable of going to and from work without assistance and that since she used a walker to assist her in ambulating "it would be difficult for her to use public transportation in order to go to work."

Based on these diverse opinions, there is a conflict in medical opinion between Drs. Luh and Leydig, and between Dr. Luh and the Office medical adviser which necessitates referral of the case to an impartial medical specialist pursuant to 5 U.S.C. section 8123(a). In this regard, the Board notes that in his May 20, 1982 decision, the Office hearing representative directed the Office to refer the case to an impartial specialist in the event that Drs. Luh and Leydig disagreed on the type and degree of assistance appellant should have "in mobilizing" to and from work on a regular basis. The Office failed to follow this directive.

The Board further notes that since the Director of the Office conceded on previous appeal that appellant's ability to travel should be considered when making a loss of wage-earning capacity determination, which would include consideration of the "type and duration of travel that appellant is capable of performing," reasonable availability of the services on a daily basis within appellant's commuting area in 1979 and presently should have been included in the loss of wage-earning capacity determination.

On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to a Board-certified impartial specialist in the appropriate medical field, for a detailed rationalized medical opinion as to whether appellant is capable of performing the duties of telephone solicitor; if so, whether she is capable of performing the duties on a full-time or part-time basis; and whether she is capable of performing the duties outside of the home. Further, should the specialist conclude that appellant is capable of traveling from her home to perform the duties of a telephone solicitor, the Office should then assess whether transportation services are reasonably available to appellant on a daily basis within her commuting area to transport her to and from work, taking into consideration the current costs of such services. After this and such further development as the Office deems necessary, a *de novo* decision should be issued on appellant's loss of wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated May 20, 1982 and March 8, 1983, are set aside; the case is remanded for further proceedings consistent with this decision of the Board to be followed by a *de novo* decision.

In the Matter of ELISE H. DANIEL *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Oklahoma City, Okla.

Docket No. 83–876; Submitted on the Record;
Issued December 1, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant had any disability from an asthmatic condition subsequent to February 25, 1979 causally related to factors of her federal employment.

Appellant, a 50-year-old registered nurse, filed a claim on June 4, 1976 alleging that her condition of bronchial asthma was caused by exposure at work to penicillin. She became aware of her condition in August 1975 when she administered penicillin and her "symptoms would almost subside when off duty for a few days." Appellant was hospitalized from September 14 to September 26, 1975 and from November 28 to December 3, 1975 for respiratory infections.[1] She was off work from September 14 to October 25, 1975, from November 25 to December 20, 1975 and again commencing May 13, 1976.

In a report dated February 5, 1976 Dr. Norman Imes, an internist specializing in pulmonary disease, stated that he was treating appellant for chronic bronchitis and bronchospasm and "it is not exactly clear why the patient has more difficulty when she is at work, but since this seems to be the case I think that it would be advisable if she could move to some other area of the hospital to see if she has any significant improvement."

In a May 12, 1976 report Dr. John R. Bozalis, a Board-certified allergist, to whom appellant was referred by Dr. Imes, noted that appellant had a history of smoking. Dr. Bozalis stated that penicillin skin tests were positive and recommended that appellant keep away from penicillin in any form. He also noted that appellant had mold-dust sensitivity.

In attending physician's reports dated June 2, September 28 and December 30, 1976 Dr. Imes diagnosed "asthma with aggravation secondary to penicillin exposure in [appellant's] job." Dr. Imes stated that appellant should not work in any environment where she would be exposed to allergens and in particular penicillin.

Upon reviewing the record, an Office of Workers' Compensation Programs medical adviser recommended in a March 28, 1977 report that appellant be referred to a Board-certified allergist for an opinion on whether her allergic asthma was caused or materially aggravated by factors of her federal employment. However, his recommendation was not carried out.

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[1] There are no medical reports of these two hospitalizations in the case record.

In an April 27, 1977 report Dr. Bozalis stated that pulmonary function studies indicated that appellant's asthma was stable but that she should not work in an environment in which there was penicillin. In a May 6, 1977 report Dr. Imes diagnosed "stable asthma, penicillin allergy with resultant bronchospasm." He stated that appellant "cannot administer injectable penicillin."

By letter dated May 5, 1977 appellant's employing establishment offered her a position of staff nurse in the ambulatory care section in which she would not be required to administer, and would be exposed to, a minimal amount of penicillin. Appellant returned to work at that position on May 9, 1977. The Office paid appellant temporary total disability compensation for all of her absences from work through May 7, 1977 for a temporary aggravation of chronic bronchitis.

Appellant filed a notice of a recurrence of disability as of February 26, 1979. She stated that the recurrence was brought on by the stress of a heavy work load, increased smoking in her area and the administering of bicillin where she worked.

Appellant was hospitalized from February 25 to March 8, 1979 under the care of Dr. Imes who diagnosed status asthmaticus.

In an undated Civil Service disability retirement examination report, based upon a physical examination and chest x-ray taken on July 17, 1979 and pulmonary function testing performed on July 25, 1979, Dr. Elizabeth H. White, an internist specializing in pulmonary disease, diagnosed "intrinsic and extrinsic asthma with excellent functional ability between attacks." The chest x-ray revealed clear lungs and no active chest disease. The results of the pulmonary function studies were all over 85 percent of predicted levels. Dr. White concluded as follows:

> "Pulmonary measurements in a patient with episodic paroxysmal asthma attacks will be totally within normal limits; however, because of her nursing profession it is nearly impossible for her to be away from the allergens that precipitate an attack. During these attacks she is severely incapacitated and is in definite peril of death. It is suggested that if [appellant] is not able to be utilized in a nursing situation where she will have no contact with smoke or with penicillin and its derivatives and airborne particles, that she be retired on disability."

In a November 14, 1979 report Dr. Bozalis stated that "Given the situation of her sensitivity to tobacco smoke and penicillin, coupled with her inability to avoid these items in her work and there being no other treatment alternative, the only logical conclusion in our mind is to retire her with a medical disability."

In a November 26, 1979 report Dr. Imes stated that "It is my opinion that the patient's asthma may very well have been aggravated by her penicillin exposure during the time she was working in the intensive care unit." In a January 29, 1980 report Dr. Imes stated as follows:

> "It is my professional opinion that [appellant's] asthma and allergy condition are permanently and totally disabling to her. When she becomes exposed to Penicillin, tobacco smoke and/or many chronically ill patients, it is not only disabling to her, but left in continued exposure it becomes a matter of life or death. She has documented sensitivity to irritants such as tobacco smoke and especially Penicillin. Due to this physical reaction to the environment of any hospital, she is to be considered permanent and totally disabled in performing duties and assignments required of the position of a registered nurse in V.A. or any other like hospital."

By compensation order dated February 11, 1981 the Office found that "[appellant] has not met her burden of proving, through medical evidence, that her condition subsequent to the date she was separated from her work environment was proximately related to factors of her federal employment."

At the request of appellant's attorney a hearing was held before an Office hearing representative on July 14, 1981.

Appellant submitted a July 15, 1981 report from Dr. Bozalis, who stated the following:

> "My diagnosis is that [appellant] has bronchial asthma and allergic rhinitis. The treatment consists of weekly allergy injection treatments as well as asthma medicines in the form of bronchodilators; theophylline, Vanceril Spray. I might add that most of the asthma medicines that she has been taking were originally prescribed by Dr. Imes.
>
> "With respect to prognosis, I think it is favorable as long as [appellant] stays away from her former work environment. After reviewing her records, it seems obvious to me that when she was away from the VA Hospital that her asthma was under control and upon returning to work that she became worse. I have stated that to her on several occasions and it is documented in my records."

In an August 14, 1981 report Dr. Bozalis concluded as follows:

> "The way that I would construct the history of appellant's respiratory symptoms is that in 1975 because of several factors, one of which would be exposure to Penicillin, she developed asthma. . .

> However, upon developing the syndrome of asthma it is common knowledge that asthma is a capricious disease and is characterized almost universally as a condition of 'twitchy lungs.' This requires asthma medication from time to time depending upon the severity of the symptoms. Once asthmatic lungs are 'primed' i.e., sensitized, it takes very little irritants or allergens to cause them to go into bronchospasm subsequently. Hence the rationale behind the therapy of avoidance and elimination measures of any of those irritants that could lead to further bronchospasm."

By decision dated June 30, 1982, the hearing representative found that "the claimant has not met her burden of proving through medical opinion evidence that her condition subsequent to the date of her last exposure was proximately caused by factors of her federal employment."

By letter dated September 2, 1982 appellant, through her attorney, requested reconsideration of the Office's decision and in support thereof submitted reports from Drs. Bozalis and Imes.

In his August 18, 1982 report Dr. Bozalis stated as follows:

> "I want to try to clarify my thoughts regarding the asthma condition that [appellant] unquestionably has and its relationship to her former work environment at the VA Hospital in Oklahoma City. I recognize, as does anyone dealing with work-related disease, that it is virtually impossible to state in the majority of cases that a given work environment unequivocally causes a given disease entity. Such is the case with [appellant]. However, there is no doubt in my mind, after having looked after her since May 1976, that her basic asthmatic condition was work related.
>
> "It remains unknown to this date what actually causes someone to develop an asthmatic condition but we know that once it is present that the lungs become 'twitchy' and therefore it takes very little concentration of irritants to trigger wheezing. In [appellant's] case the main triggers were the Penicillin that she was exposed to, tobacco smoke and probably stress.
>
> "Even though I stated in prior letters in her behalf that the long-term effects of Penicillin allergy are minimal, nevertheless once an asthmatic condition occurs, particularly in adulthood, its likelihood of persisting for the remainder of a person's life is very great. Therefore the basic condition can continue even though one of the triggering factors has been eliminated.
>
> "There is no doubt in my mind, now that [appellant] has quit work and is at home her overall condition has improved considerably. Her recent normal pulmonary tests attest to this. However she still needs to take medication on a regular basis to keep her lungs in normal condition.
>
> "It would be impossible to go back in time and have [appellant]

> serve as her own control to see if she would not have developed asthma in the same work environment under different conditions. The simple fact is we are dealing with a condition that began while she was working at the VA Hospital. We have well-documented evidence of the factors that triggered her asthma, i.e., Penicillin and tobacco smoke and her former work environment. It would be beautiful if we could go back in time and see what would happen to [appellant's] lungs had she not been exposed to the Penicillin but that is something that no one can accomplish and, therefore, we are left with the facts as you already have them; namely, an asthmatic condition that has persisted through to date which precludes her returning to that work environment. There is no doubt in my mind that if she were to return to her work environment now it would be a matter of a few days to a few weeks before she would be in serious trouble again, including hospitalization because of a serious asthma attack."

In an August 31, 1982 report Dr. Imes concurred with Dr. Bozalis' conclusions:

> "As with Dr. Bozalis' statements, there is no doubt in my mind her asthmatic condition is work related. Removing her from the workplace after the condition becomes apparent only removes some of the triggers; i.e., penicillin and tobacco smoke, but the asthma remains. I continue to treat her for asthma and she will require treatment for the rest of her life."

Upon reviewing the record an Office medical adviser concluded that the medical evidence established that appellant had no employment-related disability subsequent to February 25, 1979, the last day of her employment. The medical adviser stated that "there is no remaining aggravation present."

By compensation order dated January 11, 1983 the Office found that "evidence submitted in support of the application [for reconsideration] is not sufficient to warrant modification of the prior decision."

The Board finds that the medical evidence of record establishes that appellant was disabled from working at her job as a nurse subsequent to February 25, 1979 due to an employment-related condition of asthma.

In the case of *Dennis L. O'Neill* the Board set forth the following principle:

> "If the medical evidence establishes that the residuals of an employment-related impairment are such that, from a medical standpoint, they prevent the employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity." [2]

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[2] See *Dennis L. O'Neill*, 29 ECAB 259.

Both Drs. Bozalis and Imes concluded that appellant's asthma was caused by her exposure at work to penicillin and smoke. In his August 14, 1981 report Dr. Bozalis, a Board-certified allergist, stated that "in 1975 because of several factors, one of which would be exposure to penicillin, [appellant] developed asthma. . ." [3]

The second Office medical adviser stated that these reports indicated that appellant sustained a temporary aggravation of her asthmatic condition and that such aggravation ceased when she stopped work on February 26, 1979. This interpretation of the evidence is based on the Board's statement in the case of *James L. Hearn* that "Where the employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where, as in the present case, the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after aggravation has ceased." [4] The application of the principle enunciated in *Hearn* to the present case is inappropriate. The first indication that appellant had asthma was in August 1975 when she realized that her severe symptoms at work subsided when she was away from her job. There is no medical evidence in the record to indicate that such condition preexisted her federal employment. As already noted, Drs. Bozalis and Imes concluded in their well-reasoned reports that this basic condition of asthma was directly caused by factors of her employment, and that the continued existence of such factors prevented her from returning to her job as a nurse.[5] The medical evidence of record therefore does not support the conclusion that appellant had an underlying condition of asthma which was temporarily aggravated by factors of her employment and that such aggravation ceased when she stopped work. The evidence is, rather, consistent with the above-mentioned principle enunciated by the Board in *O'Neill*.[6]

However, while it is clear from the record that appellant could not return to the nursing job she held when she was injured the medical evidence of record indicates that she was not totally disabled from gainful employment. The reports from Drs. Imes, Bozalis and White and the planned pulmonary function test alluded to in Dr. Bozalis' April 27, 1977 report and those performed on July 25, 1979 all reveal that when away from the precipitating factors at work, appellant was apparently able to function normally.

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[3] Dr. Bozalis stated in his August 18, 1982 report that one cannot say "that a given work environment unequivocally causes a given disease entity." The Board notes the following well-established principle concerning the interpretation of medical evidence:

> ". . . a compensation award may not be based upon speculation, surmise or conjecture; or stated differently, the award must be based upon evidence, and where an inference, deduction or conclusion is drawn, there must be evidence to support such inference, deduction or conclusion. The evidence required, however, is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical. It is not necessary that the evidence be so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist."

See *Elizabeth Maypother*, 5 ECAB 604 at 607; *Diana E. Ward*, 8 ECAB 469; *Sherwood R. McCartney*, 9 ECAB 129; *Laura Garcia*, 32 ECAB 1336.

[4] See *James L. Hearn*, 29 ECAB 278.

[5] Although appellant was reassigned on May 9, 1977 to a position where she had less exposure to penicillin than previously, she was, nonetheless, still exposed to that substance. She also claimed that in this new position she was exposed to bicillin, a form of penicillin. Dr. White, an internist specializing in pulmonary diseases, stated in her disability retirement report that "because of [appellant's] nursing profession it is nearly impossible for her to be away from the allergens that precipitate an attack."

[6] See *Janice N. Cooper*, 32 ECAB 528.

The Office should therefore determine appellant's loss of wage-earning capacity as of February 26, 1979, the date upon which she stopped work. It should request from Dr. Bozalis a work tolerance limitations form noting both the physical and environmental restrictions under which appellant could work. The Office should then select a job consistent with those restrictions and have an Office medical adviser give his opinion as to whether appellant could have performed the selected position as of February 26, 1979.[7]

The January 11, 1983 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action in accordance with this decision, to be followed by a *de novo* decision.

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[7] See *Willie R. Thompson*, 30 ECAB 1705.

In the Matter of CYRIL J. ZINNER *and* DEPARTMENT OF THE NAVY, NAVAL ORDNANCE STATION, Louisville, Ky.

Docket No. 83–1064; Submitted on the Record;
Issued December 6, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS,
MICHELE VON KELSCH

The issue is whether appellant has more than 67 percent employment-related loss of wage-earning capacity effective February 28, 1980 based on his ability to perform the duties of a cashier.

Appellent, a 49-year-old equipment mechanic, injured his back on September 22, 1976 when he tripped over a piece of conduit at work and fell backward, striking his head against a metal plate. In a report of that same date, Dr. Maynard L. Stetten, an orthopedic surgeon, diagnosed a muscle contusion of appellant's lumbar spine. Appellant received continuation of pay from September 23 through November 6, 1976. Thereafter the Office of Workers' Compensation Programs paid him temporary total disability compensation for a lumbar strain.[1]

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[1] Appellant previously injured his back at work on January 2, 1973 but missed no time from work. On May 24, 1973 appellant injured his right ankle and left hip in a fall at work as a result of which he was paid compensation by the Office for his absences from work. On June 25, 1973 Dr. Stetten performed a decompression laminectomy, L4-L5 with semihemilaminectomy and excision of osteophytic bone formation. On June 27, 1973 Dr. Stetten diagnosed "spinal stenosis, secondary to hypertrophic bone formation."

In a report dated January 3, 1977, Dr. Roy J. Meckler, a Board-certified neurologist who examined appellant upon a referral from Dr. Stetten, diagnosed an upper motor neuron deficit which he related to a nonemployment automobile accident appellant was involved in in 1948 as a result of which he sustained "a brain concussion, a skull fracture of my right tibia and fibula, drop foot on the left and spinal injury of the bottom disc." Dr. Meckler stated that appellant's September 22, 1976 employment injury exacerbated his previous back condition.

Upon reviewing the record an Office medical adviser stated the following in a December 17, 1979 report:

> "That the claimant fell backwards and struck his back. This causes a contusion in and about the lumbar area and would not be a lumbar sprain/strain syndrome. Even if it were, it would heal without residuals in 6 to 8 weeks period of time. Certainly, the medical evidence of record only indicates, from the mechanisms of injury, that he sustained a contusion, which did probably resolve by the time he was seen in Norton Hospital, Naval Ordnance Station, September 27, 1976. That the claimant has a neurological disorder, which goes back many years when he was injured in 1948, and the claimant has some type of lower motor neuron lesion throughout the central nervous system to include the brain and the spinal cord. That the claimant's muscle spasm is secondary to that and these muscle spasms were in the legs and the back and that this particular syndrome has certainly not been affected by the one time contusion of September 22, 1976, and/or the incident of May 24, 1973. That the claimant did have surgery for an injury of January 2, 1973, but this was for a spinal stenosis syndrome associated with osteoarthritis, which certainly would have been unaffected by the incident of that particular date. This is a wear and tear phenomenon over many years' duration and would be unaffected by this one time incident, and probably is related to the 1948 incident. Therefore, in my opinion, the claimant's present complaints are not causally related to the incidents in question, but are a direct result of the 1948 injury.

By compensation order dated February 4, 1980 the Office found that appellant's disabling back condition was no longer causally related to his September 22, 1976 employment injury. It terminated his compensation effective February 27, 1980.

By letter dated February 20, 1980 appellant requested reconsideration of the Office's decision. Appellant submitted a September 16, 1980 report from Dr. Stetten who stated that he did not think that appellant's back condition was related to the 1948 automobile accident since he "had no problems with his back or lower extremities until he was seen in 1973." Dr. Stetten concluded:

> "I feel that the most [recent] injury was an entity in itself since he

> did have pain in both legs and has continued to have pain in legs and had evidence of motor neuron dysfunction by EMG [electromyogram]. Indeed his other incident [occurred] in 1948 but I think this was totally resolved as indicated from the prior visits to our office for various other problems which were not mentioned at that time and were no part of his history and physical upon multiple admissions to the hospital."

The Office found that there was a conflict in the medical evidence between the reports of the Office medical adviser and Dr. Stetten. By letter dated July 27, 1981 the Office referred appellant, together with medical reports and a statement of accepted facts, to Dr. S. Pearson Auerbach, a Board-certified orthopedic surgeon, for a diagnosis of appellant's back conditions, his opinion as to whether appellant's current back condition was causally related to any of his employment injuries and, if so, his current work restrictions.

In a September 24, 1981 report, Dr. Auerbach, who examined appellant on September 21, 1981, stated as follows:

> "To respond to the specific questions that you would like an answer to, I would say first of all that the patient has a chronic disabling back condition which is due to the severe degenerative arthritis present in the lumbar spine, the restriction of back motion on examination in all directions, the probable legitimacy of his complaint of pain and the persistent clonus and hyper-reactivity of his reflexes. Certainly I would rule out this man's reasonable ability to do physical work.
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> "Question two is a little tougher to respond to because I think that his old 1948 injury is certainly a party to his present disability. However, he was doing his regular work from 1948 to 1973 until the alleged injury which occurred in January of 1973. I think that an injury such as he describes in 1973 could certainly aggravate the preexisting condition which he already had. The best way I can describe that is simply that someone with the underlying pathology resulting from a 1948 injury could certainly permit an injury to occur creating a disability problem which would not, with the same injury to a normal back, cause perhaps no important symptoms at all.
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> "What I am really saying is that if he had a normal back when the injury occurred in 1973, it would probably not [have] caused any large problem. However, with his preexisting degenerative spine secondary to the 1948 injury it was a lot easier for any sort of trauma to have caused the problems which did not resolve itself with conservative therapy for about six months and then the patient underwent the operative procedure where they found the spinal stenosis, secondary to new bone formation which in itself was secondary to his old injury.

READEX FICHE

> "Once again he survived the operative procedure and was able to return to at least light work until the 1976 injury which was still another but probably less important aggravating factor.
>
> "So far as item 3 is concerned, I do not think this patient can return to the kind of mechanical work that he said that he was doing prior to the 1973 injury."

In a work tolerance limitations form dated September 22, 1981 Dr. Auerbach stated that appellant could do sedentary work for eight hours a day with limited walking, bending, squatting, climbing, kneeling, twisting and standing, and lifting up to ten pounds.

The same Office medical adviser who previously reviewed the record was of the opinion that appellant "is capable of performing remunerative employment eight hours a day five days a week."

By compensation order dated January 8, 1982, the Office vacated its February 4, 1980 decision by which it had terminated appellant's compensation.

Upon reviewing the case record an Office claims examiner concluded that appellant was capable of performing the duties of the sedentary job of cashier which requires no climbing or kneeling and no lifting over ten pounds. The job requires the ability to hear.[2] Based upon a telephone conversation with the State Employment Service Representative the claims examiner stated that this job was reasonably available within appellant's commuting area.

A different Office medical adviser concluded that appellant could perform the duties of a cashier.

By decision dated February 23, 1982, the Office, applying the principles of the *Shadrick* case, determined that appellant had a 67 percent employment-related loss of wage-earning capacity effective February 28, 1980 based on his ability to perform the duties of a cashier.[3]

At appellant's request a hearing was held before an Office hearing representative on August 24, 1982.

Appellant's attorney submitted an undated statement from Dr. Ted N. Stetten, a Board-certified otolaryngologist, with an attached audiogram dated March 3, 1982 and two surgical reports dated March 11, 1963 and May 14, 1965. In his statement Dr. Stetten stated that due to a condition of otosclerosis appellant had stapes removed from his right ear on March 11, 1963 and from his left ear on May 14, 1965. The doctor noted that appellant had "a mixed hearing loss in both ears that is primarily sensorineural with a small conductive component. This was found to average in the frequencies in the right ear 1,000 2,000 and 3,000 cycles of 42 decibels and in the left ear 48 decibels for those respective frequencies." Dr. Stetten concluded as follows:

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[2] Code No. 211.462 - 010, Department of Labor's *Dictionary of Occupational Titles*.

[3] *Albert C. Shadrick*, 5 ECAB 376.

> "The operative reports and findings. . . and the fact that he was undergoing surgery for his hearing, indicates that [appellant] has hearing losses much prior to 1976. Also that his hearing improvement from those surgeries brought him to a barely socio-adequate level. It does indeed appear that he would be expected to have a hearing loss of some degree based on his past condition and based on the operative reports and the history obtained from [appellant]."

In an October 13, 1982 letter appellant's attorney contended that this audiological evidence demonstrated that appellant "has a total loss of wage-earning capacity stemming from disabilities which either preexisted his injury or resulted directly from his injury of September 22, 1976."

By decision dated February 28, 1983, made final on March 1, 1983, the Office hearing representative affirmed the Office's February 23, 1982 decision.

The Board finds that as of September 21, 1981, the date of Dr. Auerbach's examination, appellant had no more than a 67 percent employment-related loss of wage-earning capacity based on his ability to perform the duties of a cashier. However, the evidence does not support that appellant was capable of performing those duties as of February 28, 1980, the effective date of the Office's loss of wage-earning capacity.

The September 22, 1981 work tolerance limitations set forth by Dr. Auerbach, a Board-certified orthopedic surgeon, were consistent with the physical requirements of the position of cashier. Dr. Auerbach stated that appellant could sit for up to eight hours a day but was limited as to, among other things, climbing, kneeling, and lifting more than ten pounds. The physical requirements of the sedentary position of cashier chosen by the Office did not exceed any of these limitations. The evidence shows that the position was reasonably available in appellant's commuting area. As to appellant's attorney's contention that appellant had a hearing loss preexisting his employment injury which prevented him from performing the duties of a cashier the Board finds little merit. Although Dr. Stetten, a Board-certified otolaryngologist, noted that appellant had sustained a hearing loss prior to his employment injury, his statement does not support the fact that such loss was of sufficient severity to prevent appellant from performing the duties of a cashier.

The medical evidence therefore establishes that appellant was capable of performing the duties of a cashier as of September 21, 1981, the date on which he was examined by Dr. Auerbach.

However, in his September 24, 1981 narrative report and his September 22, 1981 work tolerance limitations report, Dr. Auerbach addressed only appellant's current back condition. The Office did not request from Dr. Auerbach and he did not address what appellant's work tolerance limitations were as of February 28, 1980. His report was therefore not sufficient to justify the Office's loss of wage-earning capacity determination.

The February 28, 1983 decision of the Office of Workers' Compensation Programs, made final on March 1, 1983, is affirmed insofar as it determined appellant's entitlement to compensation for a loss of wage-earning capacity as of September 21, 1981. The case is reversed insofar as it determined appellant's loss of wage-earning capacity as of February 28, 1980 and is remanded to the Office for payment of temporary total disability compensation for the period from February 28, 1980 to September 21, 1981.

In the Matter of GEORGE J. KEMBLE *and* DEPARTMENT OF THE NAVY, NEW YORK NAVAL SHIPYARD, Brooklyn, N.Y.

Docket No. 83-1212; Submitted on the Record;
Issued December 6, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issues are (1) whether appellant is entitled to compensation for an occupational-related lung condition; and (2) whether the refusal of the Office of Workers' Compensation Programs, in decisions dated November 2, 1982 and February 8, 1983, to reopen appellant's case for further merit review of his claim, constituted an abuse of discretion.

Appellant, 68 years of age, worked in various capacities at the employing establishment beginning December 16, 1941. The last position he occupied was that of a foreman (leading) transportation, which he assumed in approximately 1952. His last date of active duty was September 6, 1968. He was involved in a reduction-in-force and "declined [an] offer to [a] lower grade" entitled leader (automotive equipment operator), which was at the same pay rate, $4.61 per hour, as the position held at the time of the reduction-in-force. Ultimately, he chose to retire, effective November 5, 1968.

On September 11, 1979 appellant filed a claim alleging that his carcinoma of the lung was caused by his exposure to asbestos while at work. He stated that he first became aware that he had the disease on November 6, 1978, and realized that it resulted from factors of his federal employment when he was "told by U.S.A. 11/78 of relationship between my cancer (asbestos) and my work."

In a supplemental statement accompanying the claim form, appellant stated that he began working for the employing establishment on December 16, 1941 as an electric welder trainee in the shipfitter shop, and worked in various capacities from that date until November 5, 1968, the date he retired. Appellant noted that throughout his tenure with the employing establishment he primarily worked in the various ship compartments performing some type of welding until he was assigned to his supervisory post. He stated that during this time he "checked aboard these ships . . . each day amid asbestos flying from pipe covers and insulation on the overhead and bulkheads." He added that he worked in this capacity until 1966 when the facility closed; that he was transferred to the U.S. Naval Receiving Station, Brooklyn, N. Y., where he became the transportation supervisor; that he remained in that position until his retirement; that he "was not given a medical examination for retirement purposes"; and that he moved to Florida in 1968 "for retirement."

Appellant also described the various symptoms that made him aware of his lung condition. He stated that on December 16, 1973 he started sneezing and coughing up blood; that his wife took him to the hospital where he was examined and x-rayed by Dr. Daniel K. Beirne, a Board-certified family practitioner, who informed him he had "a serious lung condition"; that on December 17, 1973, Dr. Beirne referred appellant to Dr. John J. LaRosa, a Board-certified thoracic surgeon, who conducted a series of tests, and on December 20th informed him he had "a malignant tumor of the right lung"; that Dr. LaRosa rehospitalized him on January 6, 1974 and removed his right lung January 8, 1974; and that he was discharged on January 18, 1974. Appellant stated that he had "an attack of coughing blood" in September 1974, for which he underwent a bronchoscopy. The bronchoscopy revealed "an irritation of the right bronchial stump." He described "other attacks of coughing blood" he experienced on December 7 and 28, 1978.

In support of his claim, appellant submitted a clinical resume by Dr. LaRosa, who stated that he hospitalized appellant on December 16, 1973 with the following history:

> "62-year-old . . . male admitted with hemoptysis. The patient has been a heavy smoker until 3 years ago at which time he quit smoking cigarettes. In addition, the patient has some symptoms of a reflux esophagitis.
>
> "Physical examination within normal limits."

Dr. LaRosa reported that although the esophagoscopy was normal, the bronchoscopy revealed a tumor "coming from the right upper lobe," which was diagnosed as "carcinoma, bronchogenic, right upper lobe." The doctor stated that he discharged appellant on December 19, 1973 and that he would have to be rehospitalized for a thoracotomy and resection.

Dr. LaRosa stated in his January 19, 1974 clinical resume that he hospitalized appellant on January 6, 1974; that on January 8, 1974 appellant underwent a right pneumonectomy; and that appellant was discharged on January 17, 1974 with a diagnosis of carcinoma of the right lung. The doctor noted appellant's condition as "improved."

Also submitted were Dr. LaRosa's admission history, physical examination and report of operation revealing that appellant was hospitalized on September 29, 1974; that he underwent a "bronchoscopy, biopsy right bronchial stump" on September 30, 1974; and that the discharge diagnosis was "status postoperative right pneumonectomy, with hemoptysis."

Appellant submitted an undated medical report by Dr. Beirne, who reported that he first examined appellant in December 1973, and discovered a lesion in his lung which was "presumed" to be carcinogenic. The doctor further reported:

> "[Appellant] was referred to Dr. John LaRosa, who removed the tumor in January 1974. I have seen [appellant] intermittently since that period of time in conjunction with Dr. LaRosa, and he has done very well. However, he does have repeated episodes of hemoptysis (coughing up blood) from his trachea.
>
> "[Appellant] has continued to do basically well, although his anxiety component has increased secondary to the information now available in reference to asbestos. It is understandable that [appellant] should be anxious. He worked for the asbestos people in a shipyard with constant exposure. This certainly would appear to be an antecedent factor insofar as [appellant's] history of smoking is minimal."

Appellant also submitted an April 24, 1979 report by Dr. LaRosa, which was in response to specific questions posed by appellant's attorney. Dr. LaRosa reported in part:

> "Now as to your specific inquires, specifically, there is an etiologic relationship between lung cancer and a number of environmental pollutants including urban air, tobacco smoke, and exposure to asbestos. Mr. Kemble was exposed to all three of these carcinogens and all could have contributed to his malignancy.
>
> "As to availability of Mr. Kemble's right lung at this time, I would direct inquiries to the department of pathology. . . . Lastly, as to availability of tissue from his remaining lung to be examined for evidence of asbestos; this will require an operation on the patient's only remaining lung and I would recommend against such a procedure."

In response to an Office of Workers' Compensation Programs request for additional factual and medical evidence, appellant submitted a statement which essentially reiterated the contents of his previous supplemental statement. Additionally, he submitted a statement dated September 21, 1979 in which he informed the Office that he was informed in July 1979 that he had cancer of the prostate gland "which is inoperable."

The Office prepared a statement of accepted facts and referred it, together with the case record, to an Office medical adviser for his review and comment. After reviewing the evidence of record, the medical adviser concluded the following:

> "Although tissue study did not reveal mesothelioma[1] or the pulmonary fibrosis associated with inhalation of asbestos, it is reasonable to hold that the varying exposure to asbestos inhalation over the 27-year period of employment accelerated the development of bronchogenic carcinoma in the right lung. . . ."

By letter dated March 26, 1980 the Office informed appellant that it had accepted his claim for bronchogenic carcinoma of the right lung; however, the Office further informed appellant that he was under an obligation to submit medical evidence supporting his periods of disability before it could assess his entitlement to compensation. The Office also explained to appellant that it was necessary for him to make an election of benefits between workers' compensation and benefits under the Civil Service Retirement Act, and it was enclosing the election of benefits form for his convenience. Lastly, the Office informed appellant that it would pay for any medical bills due to the accepted condition.

The Office referred appellant to Dr. Don M. Spivey, a Board-certified internist specializing in pulmonary disease, for a determination as to the extent and degree of any disability remaining as a result of his employment-related condition.

On June 6, 1980 Dr. Spivey performed a battery of tests on appellant, including pulmonary function studies. The results of these series of tests were included in a June 9, 1980 report wherein Dr. Spivey reported in pertinent part:

> "[Appellant] had a chest x-ray on June 6, 1980, which showed residuals of right pneumonectomy. Left lung was essentially clear with some compensatory hyperinflation. No radiologic evidence of asbestosis was detected. Electrocardiogram was within normal limits. Pulmonary function studies revealed the following: vital capacity was 2,000 cc. or 58% of predicted, forced expiratory volume 1 sec. (FEV 1.0) was 1,400 cc. or 57%. The maximum voluntary ventilation was 42 liters per minute or 42% of predicted. The maximum midflow rate (MMFR) was 0.8 liters or 33% of predicted, time vital capacity (TVC), 1 second was 70%, 2 seconds was 88%, and 3 seconds

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[1] The Office medical adviser noted that this type of cancer was most often associated with asbestosis and was primarily located at the periphery of the lung and "often has associated pleural involvement."

> was 95%. This was interpreted as a moderate combined obstructive and restrictive breathing defect.
>
> "*IMPRESSION:* [Appellant] was post-op[erative] right pneumonectomy for carcinoma of the lung with an apparent cure from surgery. One would have to presume that this was related to his previous asbestosis exposure, since he has never smoked to any degree. We also felt that he had mild chronic bronchitis, probably related to his previous occupation. Other significant, but unrelated conditions, included metastic carcinoma of the prostate and a right carotid bruit.
>
> "His disability would be in the range of 60% related to his prior pneumonectomy and chronic bronchitis."

The Office medical adviser reviewed the evidence of record, and to the question of whether the evidence currently showed "total period of disability," he answered in the negative; he stated that appellant's total period of disability occurred prior to Dr. Spivey's June 1980 report. The medical adviser concluded that appellant was entitled to a schedule award for "lung removal."

By a letter dated December 16, 1980 the Office included a list of questions regarding appellant's pulmonary condition that it desired Dr. Spivey to address, and also enclosed a copy of its "policy in evaluating lung impairment for schedule award purposes."

In a report dated December 26, 1980 Dr. Spivey stated that based on the American Medical Association's (AMA's) *Guides to the Evaluation of Permanent Impairment*, appellant's "degree of disability" from September 30, 1974 to the present, and "degree of respiratory impairment" was 50 percent; that his period of disability commenced September 30, 1974 and continued to date; and that appellant had not reached maximum medical improvement "since he is probably showing some deterioration at present from his prostate cancer."

On February 6, 1981 the Office informed appellant that the medical evidence of record revealed that he had a nonemployment-related concurrent disability. It therefore requested that he submit a medical report discussing whether or not he was "totally disabled due to the accepted injury or to your metastatic carcinoma of the prostate and a right carotid bruit."

In response appellant submitted a medical note by Dr. Beirne, dated February 15, 1981, who stated the following:

> "Pt [patient] is totally disabled due to:
>
> (1) bronchogenic carcinoma
> (2) carcinoma of the prostate with metastasis
> (3) . . . rt [right] carotid bruit."

A second Office medical adviser reviewed the evidence of record, and to the question of whether appellant was totally disabled due to the accepted condition, answered in the negative. The medical adviser explained that appellant was entitled to a schedule award for a 50 percent impairment to the right lung, and that the remainder of the disability "appears to be due" to his metastatic carcinoma of the prostate, "a nonaccepted condition," based on the evidence of record.

The first Office medical adviser reviewed the evidence of record and stated that appellant reached maximum medical improvement on December 26, 1980. The medical adviser further reported:

> "Right lung surgically removed — R [right] 100% impairment based on anatomical loss.
>
> "Left lung high class 3 impairment on restrictive basis, as shown by pulmonary function studies June 1980 with December 1980 amendment, L [left] 40% impairment."

On May 8, 1981 the Office issued a schedule award for 100 percent loss of the right lung and a 40 percent loss of use of the left lung. The award was for 218.40 weeks for the period December 26, 1980 to March 3, 1985.

By letter addressed to appellant's attorney dated November 6, 1981, the Office informed appellant that it erred in awarding him a schedule award for loss of use of his lungs. The Office explained the error in the following manner:

> "Mr. Kemble's last date of exposure was in November of 1968. Provisions for a schedule award of compensation for the lungs were not enacted until September 7, 1974, and applied to injuries occurring on and after that date. Since Mr. Kemble's exposure was prior to this, he is not eligible to receive a schedule award of compensation for his lungs.
>
> "Mr. Kemble's compensation benefits are being suspended effective November 5, 1981. You will shortly be advised of the amount of overpayment for the period he received compensation, December 26, 1980 through November 4, 1981."

In a subsequent letter dated December 4, 1981, the Office informed appellant that it determined that there was an overpayment in the amount of $6,203.74 because he was not entitled to a schedule award for loss of use of his lungs since his last date of exposure was "in November of 1968," and the provisions for a schedule award for the lungs was not enacted until September 7, 1974. It further informed him that it had made a preliminary finding that he was without fault in the matter of the amount, and invited him to submit evidence in the event that he disagreed with the amount or fact of overpayment.

By letter dated December 17, 1981, appellant requested reconsideration of the Office's December 4, 1981 preliminary findings, stating suspension of his payment deprived him of his "rights-constitutes a serious error in my opinion."

By letter dated January 26, 1982, the Office advised appellant that the circumstances of his case did not warrant waiver of recovery of the overpayment because of the following:

> "You have not furnished the information described in our letter . . . dated 12/4/81, which is necessary for a determination as to whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience."

On January 29, 1972 the Office advised appellant that although he was not entitled to a schedule award for loss of use of his lungs, he may be entitled to compensation for loss of wage-earning capacity. It then informed him of the evidence needed to properly adjudicate his claim.

In support of his claim, appellant submitted a note by Dr. Beirne dated April 20, 1982, who briefly described when appellant first came under his care, and the condition for which he treated appellant. The doctor further stated:

> "It is impossible to state the cause of the [cancerous] tumor. Patient denied other than rare tobacco use.
>
> "Mr. Kemble has been followed in our office over the years. He is permanently and totally disabled due to bronchogenic carcinoma, carcinoma of the prostate and incidental right carotid bruit."

Appellant, through his attorney, submitted a May 6, 1982 letter describing the factors of his employment he believed contributed to his lung condition, a description which he had submitted previously. Appellant added the following:

> "March 26, 1966 I was transferred to the U.S. Naval Receiving Station. I had to go through all areas of the shipyard. I had to escort potential buyers of surplus cranes and materials due to base closing. I also had to supervise the transportation garage in the shipyard. There I was exposed to asbestos in brake lining repairs and installing new brake linings as well as asbestos installation. This exposed me to asbestos for almost eight hours a day.
>
> "I began having respiratory trouble and retired on November 7, 1968."

Appellant, through his attorney, also submitted a brief which set forth his arguments as to why he believed he was entitled to compensation.

The Office referred appellant to Dr. Spivey for a determination as to the extent and degree of any disability remaining as a result of his employment-related condition, and asked the doctor to complete the work restriction evaluation if there was any evidence "of objective physical limitations imposed" by the work-related condition.

On June 22, 1982 Dr. Spivey completed the work restriction evaluation and permitted appellant to do the following: sit eight hours a day; walk and bend one hour per day; and stand two hours per day. Dr. Spivey prohibited appellant from doing the following: lifting in excess of ten pounds; pushing and pulling; reaching or working above the shoulder; using his feet to operate foot controls or for other repetitive movement; operating a motor vehicle; and working in cold and damp places because it "would aggravate his breathing." Dr. Spivey indicated by checking the box marked "no" that appellant was incapable of working an eight-hour day; to the question "If not eight hours, how many and when?", the doctor replied "none, never." Dr. Spivey further indicated that appellant had reached maximum medical improvement, and he was totally and permanently disabled.

A third Office medical adviser reviewed the evidence of record and concurred with Dr. Spivey's assessment.

By compensation order dated September 1, 1982, which incorporated a memorandum summarizing the evidence, the Office denied appellant's claim for compensation for total disability "because he has incurred no loss of wages." The Office offered the following explanation in support of its conclusion:

> "The claimant's authorized representative has requested this office to determine whether the claimant is entitled to benefits for total disability and whether the overpayment could be liquidated through deductions from any entitlement the claimant may have. The record shows that the claimant at this time is totally disabled for work as a result of his accepted lung condition. The record also shows that the claimant voluntarily is retired and not working, therefore, has sustained no loss of wages. The claimant is, therefore, not entitled to compensation benefits for loss of wages. All medical expenses incurred as a result of his accepted condition, however, will be the responsibility of this office."

Appellant, through his attorney, requested reconsideration contending that the fact the appellant retired "on longevity in no way affects his right to permanent total disability compensation, as he has total impairment of his earning capacity."

By compensation order dated November 2, 1982, the Office denied appellant's application for review on the grounds that the submitted evidence was lacking substantial probative value and was insufficient to warrant review of the prior decision.

Appellant, through his attorney, again requested reconsideration and after reiterating a portion of the argument from the prior reconsideration request, the attorney requested that the Office award appellant compensation for "permanent total disability as a result of employment exposure from the time of the diagnosis of the cancer and operation therefor." In addition, appellant submitted a statement of earnings which read as follows:

> "1. Date of retirement November 1, 1968.
>
> "2. Claimant did not work for the period from November 1968 as 1969 was consumed in moving to Florida to reestablish himself before seeking employment.
>
> "3. 1970 — The claimant worked in 1970 at:
>
> (a) Bethesda Memorial Hospital, Boynton Beach, Florida earning
> $277.92
>
> (b) Board of Public Instruction, Palm Beach County, West Palm Beach, Florida, earning
> $1,138.40
>
> "4. 1971 — The claimant worked in 1971 at:
>
> (a) Palm Beach BPI, West Palm Beach, earning
> $1,398.33
>
> (b) BPI, Brevard County, Titusville, Florida, earning
> $499.07
>
> "5. 1972 — Claimant worked at BPI, Titusville, Brevard County, Florida, earning
> $1,026.57
>
> "6. Claimant was self-employed showing model houses for Joseph DiPrima, Builder, in Satellite Beach, earning in 1973
> $3,900.00

By compensation order dated February 8, 1983 the Office denied appellant's application for review on the same ground as its November 2, 1982 denial.

Appellant filed an application for review before the Board on April 13, 1983. By letter decision dated April 29, 1983 the Office informed appellant that this decision represented a "corrected version" of its January 26, 1982 letter denying waiver of recovery of the overpayment on the ground that he failed to submit any information demonstrating that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. In that regard, the Office informed appellant that since he had returned his check for the period June 18, 1981 to July 15, 1981, the amount of the overpayment had been reduced by $553.20, making that total amount owed $5,650.54.

The Board finds that appellant is currently temporarily totally disabled and is entitled to compensation for an occupational-related lung condition. However, it is unclear from the evidence of record when the period of temporary total disability began.

Section 8102(a) of the Federal Employees' Compensation Act[2] sets forth the bases upon which an employee is eligible for compensation benefits. The section provides:

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[2] 5 U.S.C. section 8102(a).

> "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty * * *."

The word "disability" is used in several sections of the Act. With the exception of certain sections, where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." [3] This meaning, for brevity, is expressed as "disability for work." [4]

Turning to the instant case, the evidence of record reveals that appellant's last date of exposure was September 6, 1968, and that he retired on November 5, 1968 after declining an offer of employment to a lower grade. Except for a few odd jobs appellant performed during the period 1970-1973, he remained unemployed.[5] It was not until appellant's examinations of December 1973, over five years from his date of last exposure, that he was first informed by Drs. Beirne and LaRosa that he had "carcinoma, bronchogenic, right upper lobe," which, they opined, was related to appellant's federal employment. Subsequently, a pneumonectomy was performed on January 8, 1974. However, the Office did not accept that his bronchogenic carcinoma of the right lung was employment related until March 26, 1980.

The Office then referred appellant to Dr. Spivey, a Board-certified internist specializing in pulmonary disease, who reported on June 9, 1980 that appellant's right pneumonectomy and mild chronic bronchitis were employment related, and that his metastic carcinoma of the prostate and right carotid bruit were "other significant conditions" unrelated to his employment. On December 26, 1980 Dr. Spivey reported that because of appellant's prostate cancer, he had not reached maximum medical improvement; that his period of disability began on September 30, 1974 and continued through that date; and that his degree of disability and degree of respiratory impairment were 50 percent. Based on this report and the computations of the first Office medical adviser, appellant was awarded a schedule award for a 100 percent impairment of the right lung and a 40 percent loss of use of the left lung for the period December 26, 1980 to March 3, 1985. The Office rescinded this award because appellant's last date of exposure to asbestos was prior to September 7, 1974, the effective date of the schedule award provisions of the Act pertaining to the lungs[6] and that prior to that date the lungs were not specifically enumerated[7] for payment of a schedule award.

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[3] *Eldon H. Tietze*, 2 ECAB 38 at 40; *Franklin L. Armfield*, 29 ECAB 500 at 504; and *Clarence D. Glenn*, 29 ECAB 779 at 781.

[4] *Clarence D. Glenn*, note 3, *supra*.

[5] The length of time appellant occupied these positions and the reasons for his separation from employment are unknown.

Nevertheless, on June 22, 1982 after completing appellant's work restriction evaluation, Dr. Spivey concluded that as a result of appellant's employment-related lung condition, appellant was totally and permanently disabled and therefore unable to work at all. As was noted previously, the third Office medical adviser concurred with his assessment.

The Board finds that because of appellant's lung condition, which the Office accepted as employment related, he is currently "disabled for work" or incapable, because of this condition, "to earn the wages which [he] was receiving at the time of such injury." Based on the Board's interpretation of the term "disability" therefore, appellant is entitled under 5 U.S.C. section 8102 (a) to compensation. This is true despite the Office's finding that appellant had no loss of wages because he had retired voluntarily and therefore was not entitled to compensation. In view of the Office's acceptance of an employment-related occupational lung condition, which its Office medical adviser agreed resulted in total disability, the provisions of eligibility for compensation, and the definition of the term "disability," the Office's finding of ineligibility for compensation is inconsistent.

It is unclear from the record when appellant's period of temporary total disability began. Dr. Spivey stated that it began September 30, 1974, but the pneumonectomy occurred eight months prior to that date, January 8, 1974. Moreover, the date of commencement of the erroneous schedule award was December 26, 1980. The case will therefore be remanded for a determination as to the date of onset of temporary total disability. Once this date is determined, following any further action as the Office deems necessary, payment of compensation for appropriate periods of disability should be made.[8]

With respect to the Office's April 29, 1983 decision, the Board notes that under its applicable rules and procedures the Board and the Office may not simultaneously have jurisdiction over the same case.[9] When the Board docketed the appeal on April 13, 1983 and informed the Office that an appeal had been filed with respect to appellant's claim the Office no longer had jurisdiction over that claim. Thereafter, it did not have authority to issue its decision of April 29, 1983. Such decision is therefore null and void.[10]

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[6] Act of September 7, 1974, 88 Stat. 1151.

[7] *George L. Gonzales*, 33 ECAB 1001.

[8] With respect to the second issue, the Board notes that since the case is being remanded to the Office for specified further development, it is not necessary to address the issue of whether the Office abused its discretion, in its decision dated November 2, 1982, and February 8, 1983, in denying further merit review of appellant's case.

[9] 20 C.F.R. 501.2(c).

The decisions of the Office of Workers' Compensation Programs, dated September 1 and November 2, 1982 and February 8, 1983, are set aside; the case is remanded for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision. In view of the Board's findings of temporary total disability in this case, on remand, the Office should reconsider its December 4, 1981 preliminary decision which declared an overpayment in the amount of $6,203.74 and its January 26, 1982 letter decision determining that his case did not warrant waiver of recovery of overpayment because of his failure to submit necessary information.

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[10] See *Bennie Minor*, Docket No. 80-1374 (issued December 15, 1979).

In the Matter of THOMAS MEYERS *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Pittsburgh, Pa.

Docket No. 83-1719; Submitted on the Record;
Issued December 8, 1983

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 21, 1983 on the basis that his partial disability beginning December 15, 1982 was not causally related to the June 3, 1976 employment injury.

On June 3, 1976 appellant, a 41-year-old laborer, sustained an injury to his right leg and right foot when a "walk board" fell on these areas. He continued to work until June 28, 1976, when he was treated by an employing establishment physician who specialized in orthopedic surgery. This physician reported that appellant sustained "sciatic contusion improving," and indicated that this resulted from the June 3, 1976 employment incident. The doctor concluded that appellant would be capable of returning to work on August 2, 1976. In a consultation report dated July 21, 1976, the doctor stated that appellant had bruised his right buttocks and complained of some radicular symptoms on the right side.

In a duty status report dated July 21, 1976, the same employing establishment physician stated that appellant was unable to return to his regular duties or perform light duty due to a "bruised right hip with pain." Appellant returned to work on August 2, 1976.

The Office of Workers' Compensation Programs determined that appellant's contusion of the right leg, foot and hip resulted from the June 3, 1976 employment injury, and authorized continuation of pay for the period June 28, 1976 through August 1, 1976.

On June 11, 1977 appellant sustained a recurrence of disability. He stopped work that day and has not returned.

Appellant was treated on January 11, 1977 by an employing establishment specialist in orthopedic surgery. In a report dated January 26, 1977 this doctor stated that appellant complained of intermittent right hip and leg pain, which grew worse over a three week period, and that appellant's condition to date consisted of mechanical back pain, which he indicated resulted from the June 3, 1976 employment injury. He restricted appellant from performing heavy lifting and bending. A subsequent report dated February 23, 1977 contained essentially the same information.

An Office medical adviser reviewed the evidence of record and recommended that the case be referred to a Board-certified orthopedic surgeon for a diagnosis and a reasoned medical opinion as to whether appellant's condition was causally related to the June 3, 1976 employment injury.

The Office prepared a statement of accepted facts and referred it, together with appellant, the case record, and a list of specific questions, to Dr. George H. Gilmore, a Board-certified orthopedic surgeon, for an evaluation.

Dr. Gilmore evaluated appellant on August 15, 1977. In a report of the same date, the doctor noted *inter alia*, that appellant had undergone back surgery ten years prior to this examination; that appellant's chief complaint consisted of chronic back and right leg pain, which became more severe when his activities increased; that appellant had a bending limitation; and that radiographic examination revealed a degenerative process vertebral body spur at L-5, L-4, and L-3, and loss of lordosis. Dr. Gilmore concluded that appellant had a herniated nucleus pulposus L-5, S-1 on the right, and stated that he advised appellant to undergo a myelogram.

In a September 23, 1977 addendum to his first report, Dr. Gilmore reported as follows:

> "(1) MEDICAL OPINION: The accident of June 3, 1976 caused a herniated nucleus pulposus L/4, L/5, right.
> "(2) CURRENTLY DISABLED: Yes, *TOTALLY*.
> "RECOMMENDATIONS:
> "(1) This patient was admitted to St. Francis Hospital; had a myelogram done, which showed a defect to be present at the L/4, L/5 interspace. We recommended to the patient at that time that he

> have a laminectomy and excision of herniated nucleus pulposus. The patient, however, refused."

The Office medical adviser reviewed the evidence of record and stated:

> "According to this history with subsequent medical evidence by orth[opedist] VAH [Veterans Administration Hospital], as well as impartial opinion by Dr. Gilmore, is *acceptable* that original work injury on 6/3/76 (which not involved only leg and foot it also involved rit [right] hip). *Probably* precipitated acute symptoms of preexistent back condition, resulting in herniated nucleus pulposus — L5-S1 — right. On final diagnosis, according myelogram performed at St. Francis Hospital, as referred by Dr. Gilmore 9/5/77." (Emphasis in the original).

Based on the Office medical adviser's assessment of the medical evidence of record, the Office determined the injury resulted in contusion of the right leg, foot, and hip, and precipitation of "acute symptoms of preexistent back condition," resulting in a herniated nucleus pulposus of the L5 S1 disc on the right. It paid compensation benefits for temporary total disability for the period beginning January 12, 1977.

The Office referred appellant to Dr. Gilmore for a current examination, which was conducted on January 30, 1980.[1] After completion of the examination and evaluation, Dr. Gilmore concluded that appellant had a herniated nucleus pulposus L-4-5, right.

By letter dated February 25, 1980, the Office asked Dr. Gilmore to complete a work restriction evaluation for appellant. Dr. Gilmore submitted an undated evaluation on March 11, 1980, which set forth appellant's restrictions to date. The doctor concluded that appellant had not reached maximum medical improvement; that he was incapable of working; and that he did not anticipate appellant's participation in any type of vocational rehabilitation.

Dr. Gilmore submitted a report dated June 24, 1982, wherein he again stated that appellant's chief complaint was low back pain which "occasionally radiates" to both hips, and that this pain occurred after standing for an extended period. He again diagnosed a herniated nucleus pulposus.

The Office prepared a statement of accepted facts and submitted it, together with appellant, the case record, and a list of specific questions, to Dr. Robert O. Sarver, a Board-certified orthopedic surgeon, for an opinion as to the extent and degree of any residual impairment resulting from the June 3, 1976 employment injury.

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[1] On April 17, 1978, Dr. Gilmore completed a work tolerance limitations sheet for appellant. He did not indicate whether or not appellant was capable of returning to work on a full or part-time basis.

Dr. Sarver examined and evaluated appellant on December 15, 1982, and in a report of the same date stated the following:

> "This 47-year-old comes in for independent evaluation for the U.S. Department of Labor. The patient apparently had disc surgery some ten years prior to the incident of injury in question, June 3, 1976. This was done by Dr. Baker at a Pittsburgh Hospital for back and right leg pain. The patient is not aware specifically at which level the disc surgery took place. He does not describe ongoing disability subsequent to this surgery. Apparently on the June 3 date, a board hit him in the buttock-thigh area of the leg on the right side and initial evaluation at the Veteran's Hospital defines only leg complaints suggestive of a right sided radicular discomfort, tenderness over the sciatic nerve of the buttock-thigh and describes no back symptoms and describes no abnormalities of back exam.
>
> "Patient was treated supportively at this time with a diagnosis contusion of the right sciatic nerve and advised eventually to return to regular work activities as of 8/27/76. The patient states to me that he does not recall returning to any work activities at this time. He is lost to documented follow until January of 1977 when he reappeared in the clinic with complaints of intermittent right hip and leg pain worse the last three weeks. The diagnosis at this time was mechanical back pain and he was treated supportively. The report of accepted facts indicates a Veteran's Hospital admission on 8/22/77 but the patient denies this and there is no record of it in the forwarded material. He was admitted to St. Francis Hospital in September of 1977 under the service of Dr. Gilmore at which time the diagnosis was herniated nucleus pulposus, L4-5 right and surgery was recommended and refused. The myelogram report from St. Francis Hospital was obtained by me and reports minimal asymmetry of the L4-5 root level. Dr. Gilmore's evaluation reflects an absent ankle jerk on the right side with positive straight leg raising right and referred straight leg raising left. The patient apparently is continued on occasional follow up by Dr. Gilmore, but has not seen him in over a year. At the present time he continues to complain of chronic soreness of varying degree, aching in the back region, aggravated by prolonged standing and walking. He states he avoids any lifting or bending activities. He had varying aching with radiation into the right lower extremity and calf area."
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> * * *
>
> "Today's diagnosis is spondylosis of the lumbar spine with evidence of degenerative disease, L4-5 interspace. No evidence of active or current nerve root pain, although the patient has significant residual nerve root signs which could be related either to residual

of his original lumbar surgery and discectomy or to a recurrent herniated nucleus pulposus at the 4-5 level on the right side.

"Certainly the patient's condition as of June 3 of 1976 was that of status of post lumbar laminectomy. His injury and evaluation at this time and immediately thereafter was diagnosed as contusion of the sciatic nerve in the buttock area but certainly symptoms could have been an aggravation or exacerbation of the nerve root pathology which either lead to or was followed by his original disc surgery. In any event, the initial evaluation did not identify back pain nor did they document any evidence of back pathology which would go along with an acute recurrent rupture of a disc. The first documentation of back pain was in January of 1977 at which time the patient related it to the injury of June, 1976, although again we have no documentation of significant ongoing problems from his advised return to work date of 8/27/76 to his January evaluation in the clinic.

"It would seem reasonable that the patient was having some significant nerve root irritation from January through his hospitalization by Dr. Gilmore in 1977. My opinion is that this would be a natural progression of his disease of degenerative disc disease at L4-5, exclusively on the basis of lack of identification of specific back pain or back findings in his June and July evaluations of 1976 at the clinic and lack of documentation of continued pain and disability from August of 1976 until January of 1977. Certainly the absence of current evidence which would suggest nerve root irritation additionally suggests that the active nerve root irritation persisting through 1977 was most likely an exacerbation of the pathology which initially required a discectomy many years prior. At the present the patient has significant degenerative changes in his spine which would preclude him from doing any work activities other than quite moderate to light work activities but exclude any repetitive bending, even light lifting of a frequent manner but would not exclude sitting, standing, walking, particularly with varying and frequent changes in position. It would not restrict moderate leg use activities for pedal controls and he has no restrictions in the upper extremities.

"In my opinion, current disability is related to the degenerative disease of the spine, rather than specifically related to the June 3, 1976 injury. Again, this judgment is based quite heavily on the lack of documentation of significant back pain disability from June 3, 1976 to January of 1977."

The Office medical adviser reviewed the evidence of record and opined:

"*Conclusion:* (a) Times elapsed and lack of documentation *between* June 76 to January 1977, make very difficult for conclusive opinion, *but presumptively*, on basis of evidence in the file, condition of the

> claimant *beyond* January 1977 would be considered rather due to the natural progression of preexisting spine condition, *but* it is presumptive opinion.
>
> "(b) In matter of *present* disability of the claimant, Dr. Sarver is conclusive, as that it *is due* to the preexisting nonwork-related 'spondylosis of the lumbar spine with evidence of degenerative disease L4-5 interspace.'
>
> "(c) Report by Dr. Gilmore, in matter of extension and degree of *present* disability of the claimant, is noncontributory, due to that dating back six months, to orthopedic evaluation by Dr. Sarver performed on December 15, 1982. Also Dr. Gilmore in matter of disability may *preclude*, standing for long periods of time." (Emphasis in the original)

The medical adviser also submitted a work restriction evaluation which enumerated appellant's limitations based on recommendations by Dr. Sarver and on the natural progression of the preexisting condition.

By compensation order dated May 24, 1983, which incorporated a memorandum summarizing the evidence, the Office terminated appellant's compensation effective April 21, 1983 on the ground that "a causal relationship does not exist between his current partial disability and the work injury of 6/3/76." The recommendation for termination in the memorandum was stated as follows: "the medical evidence of record does not support a causal relationship between [appellant's] disability beginning 12/15/82 and the work injury of 6/3/76."

It is well established that once the Office has accepted a claim and paid compensation for disability, it has the burden of justifying termination or modification of benefits. Under such circumstances, it must establish either that: (a) its original determination was erroneous; or (b) that the employment-related disability had ceased.[2]

Under the latter theory the Board finds that the Office did not meet its burden. In that regard, the Board notes that in its memorandum summarizing the evidence, the Office recommended termination on the ground that the medical evidence of record failed to support a causal relationship between appellant's disability beginning December 15, 1982 and the work injury of June 3, 1976. The implication here is that appellant's employment-related aggravation ceased by December 15, 1982, the date of Dr. Sarver's report, the Board-certified orthopedic surgeon to whom the Office referred appellant.

Dr. Sarver reported on December 15, 1982 that appellant's diagnosis consisted of spondylosis of the lumbar spine with evidence of degenerative disc disease L4-5, and that there were residual nerve root signs which could either be related to his original lumbar surgery and discectomy or to a recurrent herniated nucleus pulposus L4-5, right. Dr. Sarver further reported that the significant nerve root irritation for which appellant was hospitalized in January 1977, was a "natural progression" of his degenerative disc disease at L4-5. The doctor pointed out that this conclusion was based on the lack of identifiable "back pain or back findings" in appellant's June and July 1976 evaluations at the employing establishment's medical unit and lack of documentation of continued pain and disability from August 1976 to January 1977. The Board notes at this point that contrary to Dr. Sarver's conclusion, the Office medical adviser recommended that, based on Dr. Gilmore's report, the Office accept appellant's claim for compensation on the ground that the June 3, 1976 employment injury "probably precipitated acute symptoms of preexistent back condition, resulting in herniated nucleus pulposus L5-S1." Dr. Sarver further pointed out that the active nerve root irritation persisting through 1977, was "most likely" an exacerbation of the condition which required appellant to have a discectomy ten years prior to the June 3, 1976 employment injury. Moreover, he stated that appellant's current disability was due to "significant degenerative changes" in his spine, which were precluding him from returning to his regular work and also set forth appellant's limitations.

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[2] See *John C. F. Heath*, 29 ECAB 42 and cases cited therein.

In essence, Dr. Sarver did not report that the employment-related aggravation of appellant's disability ceased by December 15, 1982. The doctor did report that appellant had residuals which precluded him from engaging in his regular work activities. The Board notes however that Dr. Sarver concluded that these residuals resulted from an exacerbation of a condition which preexisted the June 3, 1976 employment injury and had resulted in a discectomy ten years prior to the injury. Thus, the Office may not, based on Dr. Sarver's report, terminate compensation on the theory of cessation of an employment-related aggravation.

Nevertheless, it does appear that the Office is terminating appellant's compensation on the ground that his condition was not employment related, which constitutes a determination of erroneous acceptance of the claim.

As noted above, Dr. Sarver concluded that appellant's current disability was causally related to his preexisting degenerative disease of the spine, and not to the June 3, 1976 employment injury. The doctor noted that "this judgment is based quite heavily on the lack of documentation of significant back pain disability from June 3, 1976 to January of 1977." In that regard, he pointed out that there was no medical documentation of appellant's condition between August 27, 1976, when appellant worked following the employment injury, and January 1977, five months prior to the June 11, 1977 recurrence of disability. He further pointed out that the statement of accepted facts the Office forwarded to him indicated appellant was admitted to the Veterans Administration Hospital on August 22, 1977; however, he stated, appellant denied this and added that there was no record of the hospitalization in the case record.

The Office medical adviser concurred with Dr. Sarver's assessment. He pointed out the lack of documentation between June 1976 and January 1977, which made it very "difficult for conclusive opinion but presumptively . . . condition of claimant beyond January 1977 would be considered . . . due to natural progression of preexisting spine condition." He added that appellant's current condition was due to "the preexisting nonwork-related spondylosis of the lumbar spine with evidence of degenerative disease L4-5 interspace." The Board notes that the Office accepted appellant's claim on this medical adviser's assessment that appellant's contusion of the right leg, foot and hip, precipitation of "acute symptoms of preexistent back condition," resulting in a herniated nucleus pulposus of the L5-S1 right were causally related to the June 3, 1976 employment injury. Now, based on the "same" evidence of record, the medical adviser has changed his opinion to be in accord with that of Dr. Sarver, thereby implying that the Office erroneously accepted the claim. However, the Office did not state this as the reason for termination in its compensation order. It merely stated that appellant's current partial disability was unrelated to the June 3, 1976 employment injury.

The Board finds that Dr. Sarver's report contains no "new" evidence of record which establishes that the reported conditions are no longer employment-related. Dr. Sarver's conclusion was based "heavily" on a lack of documentation.

On remand, the Office should secure any available medical evidence between appellant's return to work in August 1976 and January 1977, and the missing hospital admissions and discharge summary from appellant's August 22, 1977 hospitalization. Once this information is secured, the Office should prepare a statement of accepted facts and submit it, together with appellant and the case record to a Board-certified specialist for a rationalized medical opinion as to the extent and degree of appellant's current disability and its relationship, if any, to the June 3, 1976 employment injury. Following receipt of this opinion, and any further development as the Office deems necessary, it should issue a *de novo* decision fully explaining the basis for its decision, i.e., whether it is terminating because of cessation of an employment-related disability or because it erroneously accepted the claim.

The decision of the Office of Workers' Compensation Programs dated May 24, 1983 is set aside and the case is remanded for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

In the Matter of LAYMON C. CHRISTIE *and* DEPARTMENT OF THE ARMY, ARMY EDUCATION CENTER, Germany

Docket No. 83–1095; Hearing November 18, 1983;
Issued December 12, 1983

Appearances: *Marty D. Price, Esq.*, for appellant; *Brenda J. Stovall, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant sustained any disability after August 13, 1981 causally related to his February, 1974 employment-related myocardial infarction.

Appellant, then a 42-year-old teacher supervisor, filed a claim on October 15, 1974 alleging that his "progressive heart disease" was causally related to his federal employment.

Appellant retired on disability effective February 24, 1977.

By compensation order dated August 24, 1977 rejecting appellant's claim for an employment-related myocardial infarction, the Office found "[t]hat the claimant has not discharged his burden of proof in furnishing reasoned medical opinion evidence to support the disability for which [the] claim is filed."

In a report dated September 28, 1977, Dr. George D. Cowen, a cardiologist, stated:

> "Mr. Christie underwent coronary artery bypass surgery in 1974 at St. Luke's Hospital in Houston. He returned to his job approximately $1\frac{1}{2}$ months following the surgery. This was significantly early as the usual recommended time is at least 3 months following surgery. Mr. Christie began to have problems very soon post-operatively with recurrent angina pectoris. He had a treadmill stress test which was positive and was treated with various medications with some relief but without complete obliteration of his symptoms. He was initially followed by Dr. Dawson at this hospital and subsequently by me. He remained stable but symptomatic during 1975 and the first part of 1976. Subsequently he began to have increasing symptoms including chest pain in spite of medical management. In December of 1976 while evaluating Mr. Christie it became apparent to me that his work situation was causing a significant amount of anxiety which was detrimental to his medical condition. He was being required to do an increased amount of heavy labor in the

> course of his job including handling heavy boxes and equipment. I felt this was definitely to his detriment. He further stated that because of a relocation, the continuation on his job would require a significant amount of driving from his home to the new work location. I felt that this amount of driving under the road conditions faced in this area was also detrimental to his well being and his medical condition. At this point I recommended that he consider retirement from his job because of conditions which I felt were improper for one of his medical condition.
>
> "It should be further stated that in addition to frequent outpatient visits, the patient was hospitalized in December of 1976 for a severe episode of chest pain. Subsequent test did not show evidence of any acute myocardial infarction."

In a statement dated August 30, 1977, appellant requested a hearing before an Office hearing representative.

In a memorandum dated January 18, 1978, an Office hearing representative reviewed the evidence of record and concluded that based on Dr. Cowen's September 28, 1978 report appellant's "disability was causally related to the conditions of the [federal] employment."

By compensation order dated January 27, 1978, the Office vacated its previous compensation order of August 24, 1977.

By letter dated January 27, 1978, the Office made the following comments to appellant:

> "The Branch of Hearings and Review has completed study of your compensation case and found that the evidence of record supports a finding that your disability, the infarction of October, 1974, was causally related to the conditions of your employment. Therefore, the decision rejecting your claim for compensation has been set aside as indicated in the enclosed compensation order."

The Office began paying appellant compensation for temporary total disability on February 26, 1977 and placed him on the automatic roll to receive compensation for temporary total disability effective June 22, 1978.

In a report dated June 4, 1979, Dr. A. A. Rasheed, a Board-certified internist, stated in part:

> "Briefly, he has coronary artery disease. On October 24, 1974, he underwent double vessel bypass surgery and has done reasonably well excepting for episodes of angina on exertion.
>
> "Presently he is doing well and is quite well-controlled with medications. I have instructed him to lose weight and increase activities. He will be followed up every three months and you will be advised about his progress accordingly."

In a second report dated August 25, 1980, Dr. Rasheed stated:

"This is to inform you that Mr. Laymon Christie continues to be under my care and has regular follow-ups.

"He was hospitalized in April, 1980, with unstable angina and did well with no sequela.

"He is permanently disabled from his medical condition."

On January 5, 1981, the Office referred appellant to Dr. Brian J. Baldwin, a Board-certified cardiologist, for examination and evaluation. In a report dated February 24, 1981, Dr. Baldwin stated in part:

> "Chest x-rays show a normal sized heart with previous evidence of coronary bypass procedure.
>
> "EKG: regular sinus rhythm with normal AV conduction with initial forces compatible with an old inferior myocardial infarction. There were no other changes.
>
> "DIAGNOSIS:
>
> "(1.) Atherosclerotic coronary heart disease with history of inferior myocardial infarction, February 1974.
>
> "(2.) Status post-cardiac catheterization, October, 1974 revealing 100% obstruction of right coronary artery, 95% obstruction of circumflex coronary artery.
>
> "(3.) Status post double aorto coronary bypass, October, 1974 vessels bypassed, not clear. Records not available.
>
> "(4.) Angina pectoris post open heart surgery (bypass procedure).
>
> "(5.) History of hypercholesterolemia, hypertriglyceridemia.
>
> "(6.) Exogenous obesity.
>
> "(7.) Hyperventilation syndrome with neurocirculatory asthenia.
>
> "(8.) Cardiac anxiety.
>
> "To answer the specific questions in your letter of 1/5/81; I can say because of the patient's symptoms, in order to fully assess him, he would need to undergo re-cardiac catheterization, in order to see what his negative coronary circulation was doing; whether the disease has progressed since 1974, and to see if the bypass grafts are patent.
>
> "I do not feel that a treadmill Thallium test would be useful, because the patient could only exercise a minute or so, making the reliability of that test questionable. His prognosis would be dependent on the findings at the time of the re-catheterization. The catheterization would also demonstrate what form of future management would be available to the patient; either, surgery or medical.
>
> "It is my opinion that the patient's coronary disease is not proximally related to his employment with the Federal Government. The patient has a number of well-known risk factors including hypertension (by history), heavy smoking, hypertriglyceridemia, hypercholesterolemia and a positive family history. I do not feel that

> his employment by the Federal Government materially aggravated the coronary disease.
>
> "The patient, in my opinion, is clinically a New York Heart Association Class 2. I see no reason why this type of individual would be prevented from performing a sedentary job."

In a follow-up report dated March 5, 1981, Dr. Baldwin stated in part:

> "The patient suffers with obvious anxiety, which was present throughout the interview and examination. During the interview, he seemed more concerned about the status of his disability than the status of his illness.
>
> "It is our recommendation at the present time that the patient should undergo a repeat cardiac catheterization and coronary angiographic studies in order to delineate the extent and nature of his coronary disease in his native coronary circulation to see whether or not the disease has progressed since the study of 1974 and to study the status of his saphenous vein bypass grafts to ascertain their patency. This test would clarify the clinical situation and would predict the patient's prognosis.
>
> "The amount of symptoms the patient is having seem out of proportion to the coronary disease described in the initial arteriogram unless the patient has developed new disease to the anterior descending coronary system."

In a statement dated May 6, 1981, an Office medical advisor stated that he concurred with Dr. Baldwin's opinion that appellant's "basic underlying arteriosclerotic coronary artery disease" was not related to factors of his federal employment.

On June 1, 1981, the Office requested Dr. Baldwin to further comment with respect to the following:

> "Specifically, what we need to know is whether there are current residuals of the October, 1974 infarction and whether his current condition can be attributed to the October, 1974 infarction or to the underlying arteriosclerotic heart disease. If the accepted myocardial infarction aggravated the underlying disease, how long would such aggravation persist? Did work stress continue to impinge upon the underlying disease after the employee stopped work and returned to the United States?"

In response to the Office's request for further information, Dr. Baldwin on June 2, 1981 stated the following:

> "Specifically to answer your questions raised in paragraph #3, I can state the following: (1) patient's myocardial infarction in October of 1974 was caused by underlying atherosclerotic coronary heart disease with a total obstruction of his right coronary artery. It is

> obvious from the report that this was not the only artery involved with the coronary arteriosclerotic process; he underwent a double aorto-coronary bypass after his myocardial infarction. The fact that he has so called angina pectoris at this time, is related to a number of possibilities. He may have developed coronary occlusive disease in a coronary artery which was previously not involved and not bypassed. Or, the bypass graft or grafts which the patient received may have developed disease in them, and they could be closed or he could have developed disease distal to the bypass grafts. The myocardial infarction the patient sustained in 1974 did not aggravate his underlying disease but rather was caused by his underlying coronary disease. The disease is an aging diseasc and tends to be progressive. His other coronary risk factors -- other than his job — are more important as causes of his disease. It is my personal feeling that work-stress bore no relationship to the patient's disease."

By compensation order dated August 31, 1981 terminating his compensation, the Office found that "[t]he claimant's current condition is not related to factors of federal employment."

In a report dated August 31, 1981, Dr. Rasheed stated:

> "He [appellant] has been under my care since April, 1979. He remains fatigued and quite symptomatic with angina on exertion and mental strain, hence limiting his physical ability to a great extent. Part of the fatigue is attributed to a medicine called Inderal which is specifically to control angina, but since it causes a decrease in cardiac output it can cause fatigue.
>
> "I assume that during the post-infarct period in February, 1974, the gradual deterioration in his cardiac status that eventually led to coronary artery bypass surgery in October, 1974, was probably accentuated by the physical and mental strain at work. Also he is one among the many whose grafts unfortunately occluded post-surgery and hence do relatively poorly."

Appellant subsequently filed an application for review with the Board. In an order dated November 6, 1981,[1] the Board remanded the case to the Office for further development noting that Dr. Baldwin in his June 2, 1981 clarification report "did not respond to the Office's query of whether appellant currently has any residuals attributable to his employment related February 1974 myocardial infarction which would cause his present disability."

On March 19, 1982, the Office requested Dr. Baldwin to reply to the following issues:

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[1] Docket No. 81-1911

> "1. We need to ascertain when the claimant had a myocardial infarction. The record appears to confirm only one (1) MI in February of 1974. Please provide your expert medical opinion with rationale.
>
> "2. Please clarify if his employment from 1974 to 1977 aggravated his preexisting heart condition. If so, was it temporary or permanent? If temporary, when would the aggravation have ceased?
>
> "3. If indicated and necessary what would his work tolerance limitations have been?

In response to the Office's request for further information, Dr. Baldwin on March 25, 1982 stated:

> "In answer to your first question, Mr. Christie in February of 1974 had chest pain and was hospitalized in Europe and had an EKG consistent with inferior myocardial infarction. The hospitalization was basically uncomplicated and he was discharged after 2½ weeks.
>
> "In October of 1974 because of atypical angina pain he underwent cardiac catheterization which revealed him to have significant 2-vessel disease (100% obstruction of the right coronary artery which caused the infarction and 95% obstruction of the circumflex coronary artery).
>
> "Shortly after catheterization he underwent a double aorto-coronary bypass. One graft was placed into the distal right coronary artery following an endarterectomy and a 2nd bypass was placed in the obtuse marginal coronary artery.
>
> "His postop course in the hospital was uncomplicated with no evidence of perioperative myocardial infarction. To my knowledge the patient has not sustained any further infarction other than the initial one of February of 1974.
>
> "It is my opinion that his preexisting heart condition was not aggravated by his employment from 1974 until his retirement in 1977.
>
> "To answer question #3, if his clinical situation at that time was one of a patient with angina pectoris, one would normally temper the patient's work to avoid circumstances which would cause angina pectoris; that is, heavy lifting or curtailment of manual type labor. Sedentary work such as office work, driving a car or some travel would not necessarily be restricted.
>
> "In looking at what kind of recommendations one would make for Mr. Christie as an individual patient, there are a number of things to be considered.
>
> "(1) It has been approximately 7½ years since the initial bypass procedure. The patient, according to himself and his personal physician in Longview, Texas, states he is not doing well, although there is little objective evidence such as positive stress testing, etc. No doubt, during the past 7 years one could surmise that his cor-

onary disease could have progressed in the arteries already involved by the arteriosclerotic process or in artery previously involved. In this type of situation, because of the symptoms that the patient complains of, one would certainly recommend re-catheterization to be performed in order to look at the native coronary circulation and to know the status of the bypass grafts. Any information short of this would be performing a disservice to this patient.

"At the time of his surgery, it was actually only necessary to bypass the circumflex coronary artery (obtuse marginal coronary artery) and not the right coronary artery. This artery had been previously totally obstructed and was involved in the already documented myocardial infarction. Revascularization of that artery would be of little benefit to the patient.

"In summary, the patient has well-documented coronary disease. He has sustained an inferior myocardial infarction and subsequently undergone a double aorto-coronary bypass procedure 7$^1/_2$ years ago and has continued to be bothered by chest pain syndrome. He is overweight and continues to smoke and has a history of hypertension and hyperlipidemia and has a significant amount of coronary anxiety. It is our feeling that the patient should undergo re-catheterization to clarify the clinical situation and allow him to be treated properly. It is our feeling that his employment did not cause or contribute or aggravate his underlying atherosclerotic coronary heart disease."

By compensation order dated May 7, 1982, the Office again determined that termination of appellant's compensation was proper, finding that "[t]he claimant's current heart condition was neither caused nor aggravated by the factors of his employment."

Appellant again filed an application for review with the Board. In an order dated July 1, 1982,[2] the Board remanded the case to the Office for further development, including referral of appellant to an impartial medical specialist, in view of the fact the "the Office failed to ask Dr. Baldwin to opine with respect to the central issue in the case: Whether appellant currently has any residuals attributable to his employment-related February 1974 myocardial infarction which would cause his present disability."

On December 8, 1982, the Office referred appellant, along with a statement of accepted facts and his medical records, to Dr. James M. Atkins, a Board-certified cardiologist, for examination and evaluation regarding the following questions:

"1. Nature and extent of current cardiovascular conditions.

"2. Fully reasoned expert medical opinion as to whether such impairments should be considered proximately related (caused, ma-

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[2] Docket No. 82-1431.

> terially aggravated, precipitated, accelerated), to the reported circumstances of the claimant's Federal employment. If material aggravation is assessed, please advise if temporary or permanent. If temporary, advise when such aggravation should reasonably be considered as having ceased.
>
> "3. Prognosis, recommendations for future management.
>
> "4. Assessment of employability, suggested schedule of work tolerance limitations. Please complete and return the Work Tolerance Limitations checklist attached bearing in mind you should consider only the accepted employment-related condition(s) and any condition(s) existing prior to date of accepted injury."

The Office also requested Dr. Atkins to respond to the following additional questions:

> "1. From your review of the medical record and your diagnostic studies, was the 1974 myocardial infarction the only infarction sustained by the claimant?
>
> "2. Did employment factors encountered from 1974 through 1977 aggravate the residuals of the myocardial infarction, or preexisting condition?
>
> "3. If an aggravation is assessed, was such aggravation permanent or temporary in nature? If temporary in nature, when did such aggravation cease?
>
> "4. Please advise as to whether or not there are any disabling residuals of the 1974 infarction. If so, please describe.
>
> "5. Is the condition currently diagnosed due to the 1974 infarction, or to the natural progression of an underlying condition?
>
> "6. If there are disabling residuals of the infarction, to what extent are they disabling?"

In a comprehensive report dated January 24, 1983, Dr. Atkins stated in part:

> "1. . . . our conclusion is that Mr. Laymon Christie has significant coronary artery disease, having suffered a myocardial infarction in the inferior and posterior wall. Historically, this infarction was in February, 1974. The patient developed unstable angina and had coronary angiography in October, 1974, revealing lesions in his right coronary artery, his circumflex artery, and a non-significant lesion in his anterior descending coronary artery. Our exercise test reveals that there has been a progression of the lesion in the anterior descending coronary artery, where it is now causing him ischemia or angina. We would give his function class as a Class II on the New York Heart Association when he is stressed with exercise.
>
> "2. It is my expert medical opinion he suffered a myocardial infarction in February, 1974. This myocardial infarction was second-

ary to coronary artery disease, due to several preexisting conditions. These preexisting conditions include a positive family history, a history of smoking, and a history of elevated cholesterol and triglycerides. The patient does not state that he was in any unusual or undue stress at the time of his myocardial infarction. Hence, I do not believe that his myocardial infarction was proximately related to his employment. After his myocardial infarction he had some episodes of angina and an episode of unstable angina. He related that these episodes were triggered both by exertion and by stress on the job. Very typically angina can be evoked by either exercise or emotion. Where we can get objective evidence of exercise-induced angina, it is difficult to assess emotionally-induced angina. It is more than conceivable that his angina was aggravated by anxieties and stresses that were job related.

"Then, it is reasonable that stress materially aggravated his angina during 1974, after his myocardial infarction, and could be considered proximately related to his employment. He underwent cardiac catheterization and coronary artery bypass grafting with relief of his symptoms. He states in May, 1975 that he had return of his symptoms, again related to both exercise and emotion. He says that the anxiety of his employment precipitated episodes of angina. It is clear that this patient does have angina that can be precipitated by exercise. Whether emotional stress is also precipitating any of his symptoms cannot be proven with definity either way. Historically he states that job-related stress did evoke some angina. Hence, this stress pain could have been materially aggravated by his employment. These episodes of stress-induced angina are one factor which led to his initial disability and release from service in 1977.

"Emotional stress can aggravate coronary artery disease. Emotional stress normally would precipitate angina pectoris, which is a temporary condition which can be relieved by rest and relaxation. Occasionally, arrhythmias (irregularities of the heart beat) can occur and myocardial infarction can occur, if the stress is extreme. Hence, for an individual episode, the aggravation is temporary any time a patient gets back to that degree of stress, and he will again develop angina. If a patient with this degree of coronary artery disease exercises and gets angina at 450 KPM of work, every time he does 450 KPM work, he will develop angina. If a patient develops angina with emotional stress, then every time he gets under a similar emotional stress he will develop angina. Clearly the patient does have angina pectoris due to his coronary artery disease, which is aggravated by exercise. How much limitation he has from anxiety or stress is difficult to determine. Historically, this limited him in his work.

"3. This patient has coronary artery disease and is a New York

Heart Association functional Class II, equivalent with angina pectoris. Since his coronary artery bypass surgery in 1974, he has probably had evidence of extension of his coronary artery disease, with the previously insignificant lesion in his left anterior descending coronary artery now being significant. We have strong evidence that this is the case from our exercise gated blood pool scans. Hence, his prognosis is that he has coronary artery disease, and we will see a slow progression of this disease. He potentially can have recurrent myocardial infarctions and/or sudden death. As he is functionally a Class II at this time, my recommendations would be to improve his medical management by increasing his Inderal or propranolol to 40 mg four times daily. I would also switch his nitrates to 20 mg total of Transderm-nitro daily. This would improve the current medical management of this patient. In the long term, there is a high probability that this patient will have to have recurrent coronary artery bypass surgery, as his disease is progressing.

"4. This patient could be employed again under certain circumstances. As he develops evidence of ischemia or angina at 450 KPM of work, then he could do activities which are less than this. For example, he could do clerical-types of jobs, which did not require him to either lift repeatedly or to lift weights greater than 20 lbs. He could do work in which he is not called upon to do recurrent physical labor. However, he must be kept from situations in which stress might occur. Since it appears that this angina can be provoked by emotional stress, placing him in a stressful environment could materially aggravate his condition. Hence, I would say his employability is marginal. With this previous history, and knowing what his coronary artery disease is, and knowing that stress or anxiety frequently would precipitate angina, as an employer, I would not wish to employ him for the risk that his job could materially aggravate his symptoms. Hence, we have a gentleman that could do light-to-moderate work, but in whom the emotional stresses may put an employer at risk for materially aggravating a preexisting condition.

Additional Questions:

"1. In 1974 the patient definitely had a myocardial infarction. There is no electrocardiographic evidence of an additional myocardial infarction. He [claimed] that he had unstable angina in late 1974 (October), for which he underwent coronary artery bypass grafting. Because of this, it is impossible to determine whether he had a second small infarction or an episode of unstable angina. In most likelihood, he had a myocardial infarction in February, 1974 and unstable angina in October, 1974 requiring coronary artery bypass grafting. There is no historical or electrocardiographic evidence of any infarctions subsequent to 1974.

"2. As this patient claims to have angina with emotional events or stress, then clearly stressful situations could evoke episodes of angina pectoris and could limit his employability. Hence, I would say that employment factors could have aggravated his symptomotology after his myocardial infarction. Myocardial infarction is caused by coronary artery disease. This coronary artery disease does not go away. Hence, any subsequent stresses can aggravate and cause angina pectoris. In some patients emotional stress causes little or no aggravation of a condition. In other patients this causes extreme aggravation of symptoms. We can prove that this patient definitely has angina pectoris on exertion; we are unable to prove how much this is aggravated by emotional stress. We can only go on historical evidence.

"3. The aggravation is temporary in nature. In a given episode of stress, it temporarily causes angina pectoris. So, an individual episode of angina is relieved as soon as the patient gets out of the stressful situation. However, the condition which is being aggravated is permanent. His coronary artery disease will not go away. Hence, any time he gets back into that stressful situation, he will again have chest pain. If a person's employment is such that he is frequently stressed in a way that he gets angina, then he is going to be limited and unable to perform that job. So, from that standpoint, his disease is permanent; and any time an emotional, physical or exercise stress aggravates this, he will be limited by chest pain. Hence, if aggravation ceases, then the pain will subside with inminutes after the initial episode. However, it will reoccur as soon as the patient returns to exercise or to psychological stress. And that would be a permanent problem.

"4. There are minor residuals from his 1974 myocardial infarction. His ventricular function, i.e. how well his ventricular muscle works, has been reduced by the damage caused by the myocardial infarction. This will never go away. The coronary artery disease which he had in 1974 still exists and still causes angina pectoris if he is given the right physical or emotional stress. Hence, there is minimal residuals from the infarction, but there is marked residuals from the disease which caused the infarction.

"5. The infarction in 1974 was a complication of his underlying coronary artery disease. His present symptoms are mostly due to his underlying coronary disease and not to the myocardial infarction in 1974. Angina pectoris, like the 1974 infarction, is merely a complication of the underlying coronary artery disease.

"6. There are no disabling residuals of the myocardial infarction. The only residual is the reduced ability of the myocardium to meet future stress and his significant coronary artery disease.

"Therefore, in summary, I feel that Mr. Christie suffered a myo-

> cardial infarction in February, 1974. He developed angina and unstable angina requiring coronary artery bypass grafting in October, 1974. From May, 1975 through January, 1977 he had episodes of angina precipitated both by exercise and by emotion. Since his retirement in 1977, he continues to have episodes of angina brought on by exertion and by emotional stress. His employability would be marginal, because his angina will not go away; and emotional stress historically can cause angina in this patient."

An Office medical consultant, Dr. Michael S. Vaughn, a Board-certified cardiologist, reviewed the medical evidence and on February 23, 1983 stated in part:

> "1. It appears that the 1974 myocardial infarction was the only infarction sustained by Mr. Christie.
>
> "2. Employment between 1974 and 1977 did not aggravate residuals of the myocardial infarction. Mr. Christie continued to have angina pectoris while employed from 1974 to 1977 and it appears that the physical and emotional stress of employment did precipitate angina pectoris. The angina pectoris is a symptom due to coronary atherosclerosis and myocardial ischemia (insufficient blood flow to the heart muscle). Angina pectoris is a symptom of the underlying condition of coronary atherosclerosis. Coronary atherosclerosis is a multi-factorial disease process which takes many years to become symptomatic. The only aggravation that employment could have produced would be to precipitate symptoms of the preexisting disease process. The symptoms would be present only so long as the physical or emotional stress was present. Use of nitroglycerin, rest or removal of the stress would result in relief of the angina. Angina pectoris by itself would not cause a worsening of the underlying coronary atherosclerosis.
>
> "Aggravation of angina pectoris, a symptom of the underlying disease process, coronary atherosclerosis, would be temporary and would cease on termination of the physical or emotional stress. Any aggravation related to his employment would terminate on termination of his employment.
>
> "There do not appear to be any disabling residuals of the 1974 infarction. There is an area of the left ventricle which does not contract, which represents a dead, scarred area of the left ventricle, a consequence of the infarction. This does not appear to be a disabling factor, although theoretically it could be. It appears that the disabling factor at this time is angina pectoris and that Mr. Christie does not exercise to the point of developing symptoms which could be explained on the basis of damage of his left ventricle from the 1974 infarction.
>
> "His present condition is due to his underlying coronary arth-

> erosclerosis with its resultant myocardial ishcemia and angina pectoris.
>
> "3. The question concerning disabling residuals of the infarction has been addressed above.
>
> "The detailed report by Dr. Atkins, dated January 24, 1983, answers a number of specific questions. I have reviewed that report carefully and do not disagree with it in any significant way."

By compensation order dated March 15, 1983, the Office found that "[t]he weight of medical opinion negates continuing disabling residuals of the February 1974 [myocardial] infarction, and negates any residuals of an aggravation of coronary artery disease."

On March 16, 1983, the Office requested Dr. Vaughn to provide a response to the following inquiry:

> "In reviewing that report, we have noted that one area of concern has not been addressed, nor your opinion requested previously. Although Mr. Christie does have residuals of the myocardial infarction which occurred in 1974, we need your reasoned medical opinion as to whether or not any of the medication and/or treatment presently administered to Mr. Christie should be considered related to the infarction residuals, as opposed to the underlying coronary artery disease. Are any of the current treatment modalities likely to cure, give relief, reduce the degree or the period of disability due to the infarction residuals?"

In response to the Office's inquiry, Dr. Vaughn on March 29, 1983 stated the following:

> "The present medications including Nitro-bid, Inderal, Ascriptin, Isordil and nitroglycerin are usually prescribed for treatment of angina pectoris due to underlying coronary atherosclerosis. These agents would not ordinarily be used to treat any residual of myocardial infarction.
>
> "Mr. Christie's only residual of myocardial infarction is an area of nonmoving left ventricle which can be demonstrated by catheterization and other testing modalities. His residual of myocardial infarction is not functionally significant at this time in that Mr. Christie is limited primarily by angina and not by diminished cardiac pumping capacity. While various testing modalities can demonstrate some defect in the pumping capacity as a consequence of his myocardial infarction, this does not appear to be a limiting factor with respect to Mr. Christie's exercise tolerance. He develops angina and is limited by angina before he reaches the limits of his cardiac reserve.
>
> "His present treatment is aimed at control of his angina. None of the present treatment will change the nonfunctioning area of left

> ventricle which is a consequence of his previous myocardial infarction. There are no treatment modalities which can restore dead cardiac muscle to life.
>
> "In summary, Mr. Christie is limited by angina which is a manifestation of his underlying coronary atherosclerosis and not by his previous myocardial infarction which has left an area of nonfunctioning heart muscle which, although it can be demonstrated by testing, does not appear to be significant in terms of reducing Mr. Christie's exercise tolerance or functional capacity. Mr. Christie is limited by angina before he reaches the limit of his cardiac pumping capacity. His present treatment is aimed at control of his angina which is a manifestation of his underlying coronary disease."

The Board finds that the case is not in posture for decision.

The January 24, 1983 report of Dr. Atkins establishes that as a result of the October 1974 employment-related myocardial infarction appellant sustained a permanent impairment of his ventricular function, i.e. ventricular muscle. Dr. Atkins stated that as a result of the permanent damage to the ventricular muscle, appellant would have "the reduced ability of the myocardium to meet future stress and his significant coronary artery disease." An Office medical consultant, Dr. Vaughn, described the permanent residual, loss of ventricular function, as follows:

> "There is an area of the left ventricle which does not contract which represents a dead, scarred area of the left ventricle, a consequence of the infarction. This does not appear to be a disabling factor although theoretically it could be. It appears that the disabling factor at this time is angina pectoris and that Mr. Christie does not exercise to the point of developing symptoms which could be explained on the basis of damage to his left ventricle from the 1974 infarction."

The Board in *James L. Hearn*,[3] stated the following:

> "Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, where . . . the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment.
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> "The circumstances involved in the present case [i.e., the *Hearn* case] are to be distinguished from those in the recent case of *Dennis*

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[3] 29 ECAB 278.

> *L. O'Neill.*[4] There the employment factors caused a permanent loss of hearing. The hearing loss was not of a type that entitled the employee to a schedule award under the Office's standardized procedures. However, there was medical evidence that the hearing loss was of such nature that further exposure to the employment factors would constitute grave dangers to appellant physically, and that therefore he no longer could continue in such employment. The Board found that if development of the medical evidence established that the employee's employment-related hearing condition prevented him from returning to this employment, he would be entitled to compensation for any resulting loss of wage-earning capacity.
>
> "The important distinction between the *O'Neill* case and the present one is that employment factors there, unlike here, caused a permanent impairment; that case was remanded to determine whether the impairment resulted in a loss of wage-earning capacity. In contrast, the Board finds that the employment factors in the present case did not cause permanent residuals that adversely affected appellant's wage-earning capacity. The adverse effect here is due solely to the employee's underlying physical condition."

In light of the principles enunciated in the *Hearn* and *O'Neill* cases, the Office should have determined whether as a result of the employment-related, permanent loss of ventricular function together with the preexisting coronary artery disease, appellant could perform the duties of a teacher supervisor, the position he held when he sustained the employment injury. On remand, the Office should take note of appellant's work restrictions as described by Dr. Atkins in his January 24, 1983 report and then determine whether appellant's employment-related, permanent loss of ventricular function and his preexisting coronary artery disease prevented him from performing the duties of a teacher supervisor. If appellant is prevented from returning to his former employment, the Office should make a determination with respect to appellant's wage-earning capacity.

The compensation order of the Office of Workers' Compensation Programs, dated March 15, 1983, is hereby set aside and the case remanded for further proceedings as outlined above, to be followed by a *de novo* decision.

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[4] 29 ECAB 151.

In the Matter of RITA L. POWER *and* U.S. POSTAL SERVICE, POST OFFICE, Boston, Mass.

Docket No. 83–1759; Submitted on the Record;
Issued December 12, 1983

Before MARGARET PALLANSCH, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant's disability due to an emotional condition is causally related to factors of her federal employment.

Appellant, a 42-year-old clerk, filed a traumatic injury claim on April 27, 1981 alleging that she had an emotional condition caused by "ongoing adverse working conditions which culminated in an arbitrary notice of transfer on 4/3/81," upon which date she stopped work. In a duty status report dated April 17, 1981 Dr. Sheldon D. Zigelbaum, a psychiatrist, diagnosed "severe chronic anxiety disorder with depressive reactions." He concluded that the disability "is directly related to the harassment and discrimination which she endured in her work setting."

By letter decision dated May 6, 1981 the Office of Workers' Compensation Programs denied appellant continuation of pay on the ground that her "condition was not caused by a traumatic incident or injury."

In a June 10, 1981 attending physician's report, Dr. Zigelbaum diagnosed a totally disabling, employment-related condition of "part traumatic stress disorder acute."

At appellant's request a hearing was held before an Office hearing representative on August 4, 1981. At the hearing Dr. Zigelbaum testified that appellant was romantically involved with one of her superiors at work and that the superior informed appellant that if she ended the relationship she would have difficulty in her current job and trouble moving in to any other position at work. Dr. Zigelbaum testified that when appellant did end the relationship she was the recipient of "vague threats, harassments at work" and she had "difficulties with transfers, inability to get job positions that she wanted, and clearly, an enormous difficulty in getting anyone to understand what was going on." Dr. Zigelbaum went on to give the following testimony:

> "This began the experience of post-traumatic stress disorder. She began to feel alienated from everybody. Joy went out of her life; her capacity to enjoy herself socially with other people began to disappear. She had psychic numbing. Things didn't mean very much to her anymore. She began to have bad dreams and obtrusive thoughts about [being] exploited and deceived by this man and by the other men around her. Most of all, a pervasive sense of sadness and sense of loss; loss of her dignity, loss of her own personal stature within herself, loss of her identity as a successful worker. And always trying to get help for this from some people but never able to get help and when I saw her she was seriously disabled by this experience and since that time she has gotten increasingly disabled and

> it is my feeling now that without question she is totally disabled. She cannot work. She does not have the psychic energy and the emotional resources and the stamina necessary for her to work."

Dr. Zigelbaum also stated at the hearing that co-workers of appellant would allude to her relationship and that both her employees' union and the employing establishment's management were unresponsive to her allegations of harassment and discrimination. Dr. Zigelbaum argued that this case involved a traumatic injury because the "triggering experience" of appellant's emotional condition was a transfer she received from her employing establishment on April 3, 1981.

Appellant's attorney submitted an affidavit from appellant dated August 10, 1981, in which she stated that in December 1976 she began a romantic relationship with a superior at her employing establishment; that in January 1980 she ended the relationship; and that as a result of her ending the relationship she suffered harassment. Appellant stated that her immediate supervisor continually made allusions to the relationship and refused to recommend her for another job. She also stated that restrictions were placed upon her movement within the employing establishment and that she was required to punch in on a time clock. Appellant contended that while she was in the process of attempting to have the Postmaster end this harassment, she received a notice of reassignment to another position on April 3, 1981.

By decision dated September 9, 1981 the hearing representative found that appellant did not sustain a traumatic injury and was therefore not entitled to continuation of pay. He remanded the case for development on the merits of an occupational emotional injury claim.

The employing establishment submitted to the Office a February 27, 1980 memorandum in which it was stated that four craft employees, including appellant, should be using punch-in clocks instead of signing in as they had been doing.

By letter dated October 8, 1981 the employing establishment responded to the allegations made by appellant in her affidavit and submitted evidence in support of its contentions. The employing establishment noted that appellant had brought an Equal Employment Opportunity complaint, a grievance regarding her October 9, 1981 removal from the Postal Service, and a civil action against the superior in U.S. District Court. The employing establishment contended that the evidence indicated that there was no conspiracy against appellant and that the April 3, 1981 transfer resulted from her rude behavior over the telephone and not from the ending of her relationship with her superior.

Part of the evidence submitted by the employing establishment was a February 8, 1980 statement by the superior addressed to the Postmaster. The superior stated that due to an error appellant initially did not get the position she now holds and that she accused him of being responsible for preventing her from attaining the position. The superior admitted to once visiting appellant in the hospital when she was ill, and to twice assisting her in her home (at her insistence) with the completion of her PASS book. He also charged that appellant threatened that she would tell the Postmaster of their romantic involvement if he did not recommend her for higher level duties.

The employing establishment submitted four customer complaints covering the period from September 23, 1980 to March 12, 1981 which indicated that there was discourteous behavior over the telephone by the employees at the express mail unit, where appellant worked. Only one of these complaints specifically mentioned appellant by name.

In an October 10, 1980 memorandum to the Postmaster, the superior stated that on three occasions members of his family saw appellant just sitting in her car parked outside of his home.

The employing establishment also submitted a copy of the April 3, 1981 reassignment notice of appellant to a unit of the general mail facility effective April 6, 1981 and a September 1, 1981 notice of removal of appellant effective October 9, 1981. The reason given for the removal was appellant's failure to submit to a fitness-for-duty examination for which she was initially referred on February 23, 1981.

In a September 22, 1981 letter to the Justice Department requesting legal representation the superior stated that in July 1979, when he was promoted to the position of director of the customer services division, appellant pressured him to assist her in getting other positions at work. When she failed to get these desired positions, the superior stated, appellant attempted to discredit him with a false story of an extramarital affair he had had with her.

In a September 23, 1981 letter the Postmaster stated that an investigation by the employing establishment revealed no support for appellant's allegations and that her removal from the postal service was not related to any of those allegations.

In an October 6, 1981 memorandum, appellant's immediate supervisor denied that he harassed appellant at any time or that he ever restricted her movement. He stated that on December 19, 1979 he had recommended appellant for the position of customer service representative trainee.

Appellant submitted a May 4, 1982 report from Dr. Zigelbaum who stated that "the ending of the affair [with her superior] coupled with [his] threats of harassment and the subsequent harassing experiences, constitute the stress for her present illness." Her reassignment on April 3, 1981 according to Dr. Zigelbaum "rendered her totally disabled and produced a severe exacerbation of her symptoms so that she became relatively sleepless, had a significant weight loss, coupled with a loss of appetite and was no longer able to function." Dr. Zigelbaum concluded that "the decline in her functional capacities and coping skills would not have occurred were it not for harassment she experienced subsequent to her withdrawing from the relationship with [her superior]."

In an April 27, 1983 memorandum a claims examiner stated that the evidence of record did not support appellant's allegations of harassment. The claims examiner also stated that "problems deriving from [appellant's] personal life, even if she did have a romantic relationship with [her supervior], are not considered to arise from factors of the employment for purposes of the Act, likewise, [appellant's] failure to obtain promotions or a new job is also not considered to arise from factors of the employment for the purposes of the Act (Cutler 28 ECAB 126)."

By compensation order dated May 13, 1983 the Office found that "the claimant has failed to sustain her burden of proof in establishing by reliable, substantial and probative evidence that the condition for which compensation is claimed is causally related to factors of the employment."

The Board finds that the case is not in posture for decision.

The April 27, 1983 memorandum from the claims examiner indicates that the bases for the Office's decision were that appellant's allegations were untrue and that even were they true any disability resulting therefrom would not come within the coverage of the Federal Employees' Compensation Act. In making this second point the claims examiner alluded to the Board's decision in *Lillian Cutler.*[1]

In *Cutler* the Board stated as follows:

> "Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment."
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> * * *
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> "In contrast, the Board has held that a disabling condition resulting from an employee's feeling of job insecurity *per se* is not sufficient to constitute 'a personal injury sustained while in the performance of duty' within the meaning of . . . the Federal Employees' Compensation Act. Likewise, assuming that appellant was unhappy doing inside work, desired a different job, brooded over the failure to give him the kind of work he desired for which the establishment considered him unsuitable, and as a result of such brooding appellant became emotionally disturbed, causing an outbreak of dermatitis; this does not establish 'a personal injury sustained while in the performance of duty' within the meaning of . . . the Federal Employees' Compensation Act.
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> "The above cases demonstrate the distinctions that govern situ-

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[1] 28 ECAB 125.

> ations where an employee has a disabling emotional condition having some kind of causal relationship to the employment. Where the disability results from his emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position."

Appellant alleged that her emotional condition was caused by harassment and discrimination directed at her at work as a result of her ending a personal relationship with her superior at work. As instances of this harassment and discrimination appellant alleged that her immediate supervisor continually alluded to the relationship, that she was reassigned to another position, that her immediate supervisor and superior at the employing establishment blocked her promotion and that she was sent for a fitness for duty examination.

The Board has previously held that the requirement to undergo a fitness for duty examination comes within the assigned duties covered by the Act.[2] If the evidence establishes that the reassignment and the alleged verbal abuse contributed to the development of appellant's emotional condition, they too would come under the coverage of the Act.[3]

Appellant's allegations and the only medical evidence of record, represented by the report of Dr. Zigelbaum, indicate that her emotional condition did not result from her frustration at not being permitted to attain a particular position at work but resulted from what she perceived as harassment and discrimination against her, of which her not getting a promotion constituted only a part.

Where the employee has alleged that the employment situation which caused her emotional reaction included actions taken by her supervisor which the employee described as constituting harassment or discrimination, the issue, generally speaking, is not whether in fact there was harassment or discrimination, but whether the disabling emotional reaction was precipitated or aggravated by condition of employment.[4]

In the present case the Office did not sufficiently develop the record for the purpose of determining the truth of appellant's allegations.[5] The Office did not provide any reasoning for its conclusion that appellant did not suffer any harassment or discrimination at work. It apparently relied upon the refutations from appellant's superior, immediate supervisor and the postmaster, as well as the employing establishment's own investigation. However, there is no copy in the record of the results of this investigation and the Office made no effort to independently verify the truth of appellant's allegations of harassment and discrimination. It did not, for instance, request statements from any of appellant's co-workers.[6]

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[2] See *Ronald S. Dick*, 30 ECAB 714.

[3] See *George Derderian*, 33 ECAB 1910.

[4] See *Dorothy J. Williams*, 32 ECAB 665.

[5] See *John A. Snowberger*, 34 ECAB 1262.

On remand the Office should make detailed findings of fact with respect to appellant's allegations regarding her working conditions. In making such findings the Office should attempt to obtain statements from appellant's co-workers. If available, it should also take into account the findings of any decision arising out of appellant's Equal Employment Opportunity complaint and her civil action in Federal District Court. Any reliance on the employing establishment's investigation of the case should be supported by a copy of those findings. Should appellant's allegations be found to contain merit, the Office should refer a statement of accepted facts together with the case record to a Board-certified psychiatrist for his opinion on whether appellant's emotional condition was causally related to any factors of her employment and, if so, the duration of any such relation.[7]

The May 13, 1983 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action in accordance with this decision, to be followed by a *de novo* decision.

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[6] The Board notes that Dr Zigelbaum, a psychiatrist, concluded that appellant's emotional condition was causally related to factors of her employment. However, since the Board here finds that the Office made inadequate findings of fact regarding appellant's employment conditions, medical evidence based on the newly established facts is now required.

[7] See *Anna J. Backman*, 30 ECAB 118.

In the Matter of Lillie M. Schooler, claiming as widow of Richard M. Schooler *and* Department of the Air Force, Air Force Reserve, Langley Air Force Base, Va.

Docket No. 83-1588; Submitted on the Record;
Issued December 13, 1983

Before E. Gerald Lamboley, Margaret Pallansch,
Michele von Kelsch

The issue is whether appellant was not without fault in the creation of a $4,401.24 overpayment in her case caused by her receipt of dual benefits from the Office of Workers' Compensation Programs and the Veterans Administration for the death of her husband, the deceased employee.

On July 28, 1955 the employee, an air force reservist, was killed in an automobile accident while in the performance of duty. Appellant filed a timely claim for compensation for death benefits with the Office of Workers' Compensation Programs, and the Office on March 29, 1956 determined that she was entitled to monthly compensation benefits as a result of the death of the employee.

Appellant received compensation from the Office on her own behalf and on behalf of her children. Appellant was adjudged legally incapable of handling her own affairs for the period August 18, 1960 through December 18, 1961 and for the period November 19, 1965 through April 21, 1967. During these two periods appellant's affairs were handled by a legally appointed guardian. Since April 21, 1967, appellant has managed her own affairs.

In a June 15, 1974 letter, the Office informed appellant that "it has recently been determined that survivors of military reservists are now permitted to elect benefits from the Veterans Administration (VA) although a previous election may have been made to receive benefits provided by the Office of Workers' Compensation Programs under the Federal Employees' Compensation Act (FECA)." The Office noted that "if VA benefits are elected in preference to FECA benefits, the Office would terminate the FECA benefits for those persons who have elected VA benefits," and stated that "if we hear nothing further from you, we shall assume you wish to continue receiving FECA benefits."

In an April 24, 1979 letter to appellant, her representative informed her that the "VA officials in Houston indicate that you are entitled to receive Dependency and Indemnity Compensation (DIC) benefits and the amount you may be able to receive is greater than what you are now receiving from the Department of Labor." The representative also indicated that appellant should request that the Office "terminate your compensation benefits to coincide with the start of your DIC benefits. In this way you will not have to go a month or two without benefits and eliminate the possibility of an overpayment occurring if you should receive a monthly check from both programs."

In an April 27, 1979 letter to the Office, appellant enclosed the April 24, 1979 letter from her representative and stated:

> "Please advise if I can have the [Office] terminate my compensation benefits *to coincide* with the start of my DIC benefits." (Emphasis in original)

In a May 4, 1979 letter, the Office advised the Veterans Administration that appellant had elected VA benefits, and that "benefits under the Federal Employees' Compensation Act will cease effective May 31, 1979; thus VA benefits should commence June 1, 1979." A copy of this letter was sent to appellant.

In a May 29, 1979 letter, appellant stated that she did not want her compensation benefits from the Office to stop because she was told by the Veterans Administration that it would take 60 to 90 days for her to start receiving her DIC benefits.

In a June 4, 1979 letter, the Office informed appellant that she would continue to receive her compensation benefits.

In an October 13, 1979 report on an Office form CA-12, appellant stated that she was receiving "death benefits" from the Veterans Administration.

In an April 29, 1980 letter to appellant, the Office stated:

> "On April 27, 1979 you indicated that you wished to elect VA benefits in lieu of Office of Workers' Compensation Programs benefits. On May 4, 1979 this Office advised that your Office of Workers' Compensation Programs benefits would terminate May 31, 1979. However, due to a telephone call on May 24, 1979 and your letter of May 29, 1979 which stated that you did not wish Office of Workers' Compensation Programs benefits to terminate, we did not, in fact, terminate compensation payments to you as previously indicated.
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> "Your reply to our form CA-12 indicates that as of October 13, 1979 you were receiving dual benefits from Office of Workers' Compensation Programs and the VA. As you are not legally entitled to receive dual benefits we will suspend Office of Workers' Compensation Programs payments to prevent further overpayment pending your election on the enclosed forms. The election is irrevocable."

In a July 14, 1980 letter decision, the Office found that appellant had received a $4,401.24 overpayment because she "received illegal dual benefits from April 30, 1979 through March 31, 1980."

In an August 7, 1980 letter, appellant stated that she was unaware that she had been receiving benefits to which she was not entitled and that she was unable to repay the overpayment, and requested a "hardship waiver of the amount which you have alleged is an overpayment."

On August 20, 1980 the Office advised appellant that there is no provision for waiver of an overpayment when a claimant is not without fault in the creation of the overpayment, and stated that appellant "was made aware that a receipt of dual benefits was not authorized." The Office also stated that "if you do not make provision for repayment of the $4,401.24 overpayment we will have the Veterans Administration deduct $50.00 per month until it is satisfied."

In an August 25, 1980 letter, appellant requested that the Office wait until January 1, 1981 to start deducting $50.00 per month from her Veterans Administration benefits.

On June 5, 1982 appellant requested reconsideration of the Office's determination of a $4,401.24 overpayment in her case. In a June 30, 1982 letter, an Office claims examiner stated that a final decision on the issue of overpayment had not yet been issued, and requested that appellant advise the Office whether she wanted a final decision and, if so, that appellant provide financial information relevant to the question of waiver of the overpayment. In a July 4, 1982 letter, appellant requested a final decision on the overpayment issue and provided the requested financial information.

In a July 23, 1982 letter decision, the Office determined that a $4,401.24 overpayment had occurred because appellant "received benefits from both this agency and the Veterans Administration for the period April 30, 1979 through March 31, 1980." The Office also determined that appellant was at fault in the creation of the overpayment for the following reason:

> "You were aware that you were not allowed to receive benefits from both agencies and on April 27, 1979 you advised this Office that you wished to elect VA benefits instead of the benefits of this agency."

The Board finds that appellant was not without fault in the creation of the $4,401.24 overpayment.

Section 8129(b) of the Federal Employees' Compensation Act provides:

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [the Act] or would be against equity and good conscience."

It will be noted that, in order to qualify for this waiver, the recipient of an overpayment of compensation must be without fault.

In determining whether an individual is "without fault" what constitutes "fault" depends on whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[1]

In the present case it is apparent that the Office applied the third standard to appellant in determining that she was not without fault in the creation of the overpayment. In its June 15, 1974 letter to appellant, the Office notified appellant that she could elect VA benefits instead of FECA benefits and stated that "if VA benefits are elected, no further

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[1] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682; 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2-claims.

FECA benefits will be paid." In her April 27, 1979 letter to the Office, appellant requested that her FECA benefits be terminated at the same time her VA benefits would begin. Accordingly, by her own statements and actions, appellant has shown that she either knew or should have known that she was not entitled to receive dual payments; she was therefore not without fault in the creation of the overpayment.

The July 23, 1982 decision of the Office of Workers' Compensation Programs is hereby affirmed.[2]

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[2] On appeal to the Board and in a November 13, 1982 letter to the Office, appellant contended that she "became mentally ill in the spring of 1979" and "just got it into my head that I was entitled to receive both benefits." Accompanying her November 13, 1982 letter to the Office was a February 10, 1982 letter from Dr. Robert S. Demski, a psychiatrist. Since this evidence was not before the Office at the time of its July 23, 1982 decision, it cannot be considered by the Board on this appeal. See 20 C.F.R. section 501.2(c), which provides that the "review of the case shall be limited to the evidence in the case record which was before the Office at the time of its final decision."

In the Matter of WILEY L. WALL *and* DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, Cherry Point, N.C.

Docket No. 83-1386; Submitted on the Record;
Issued December 14, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issues are (1) whether appellant's aggravation of hypertension as a result of employment factors ceased on March 7, 1982, and (2) whether appellant is entitled to a schedule award for loss of use of the left eye as a result of factors of his federal employment.

On October 16, 1981 appellant, a 54-year-old wage and classification division head, filed a claim alleging that emotionally stressful situations in his federal employment induced dangerously high blood pressure. He stopped work on October 15, 1981 and returned to light duty on March 8, 1982.

Appellant stated, and the employing establishment did not refute, that there were only two nonsupervisory classification specialists serving nearly 4,000 positions in several activities, including one in South Carolina. Significant pressures were brought daily by organized labor groups for increases in pay for specific ratings or change in pay category for ratings when pay attraction rather than the true nature of work requirements was the overriding concern of the employees and management. It was not uncommon to receive several to a hundred or more position descriptions for processing to accommodate personnel being processed. Appellant also cited that there was a lack of proper and effective communication externally and within the personnel department, which added to the problem. In essence, appellant alleged that pressure was put upon him by both civilian and military department heads to get desired grades and get organizational structures approved that were not sound fiscally or structurally.

On an Office of Workers' Compensation Programs form report, dated October 22, 1981, Dr. Walter M. Brady, a family practitioner, reported appellant's blood pressure as 208/94. He diagnosed, "(1) stress reaction, (2) arteriosclerotic cardiovascular disease, and (3) diabetes mellitus," and recommended that appellant be restricted to "less stressful work."

On November 17, 1981 appellant was examined by Dr. John J. Bennett, an occupational health physician at the employing establishment, for disability retirement. The doctor diagnosed: "(1) diabetes mellitus—insulin dependent, (2) arteriosclerotic cerebrovascular disease, (3) status post-carotid endarterectomy, bilateral, (4) essential hypertension, and (5) chronic anxiety secondary to above and work environment," and concluded that appellant was disabled for his usual position of supervisory position specialist.

In a February 12, 1982 report, Dr. Brady stated as follows:

> "I have received and carefully reviewed all the comments and facts made by Mr. Wiley Wall relevant to his disability situation. I agree with his presentation and that his present physical condition has resulted from the stress exposure as previously documented.
>
> "I firmly believe that his cumulative job stresses have in the past and will in the future exacerbate his diabetes mellitus, hypertension, arteriosclerotic vascular disease and stroke potential.
>
> "Mr. Wall's work limitations must be, in my considered opinion, restricted to those areas that do not lend themselves to stress."

An Office medical adviser reviewed the case record on March 5, 1982 and stated hypertension as the established diagnosis. He opined that appellant's condition was temporarily aggravated by factors of his federal employment.

Appellant returned to work on light duty on March 8, 1982. Dr. Bennett permanently restricted appellant's activities and advised him to avoid stressful emotional and physical situations.

The Office accepted appellant's claim for temporary aggravation of hypertension; however, in a letter dated March 18, 1982 it informed him that he was not entitled to continuation of pay during his absence from work because the disability claimed resulted from an occupational disease.[1] In a letter dated July 23, 1982 the Office informed appellant that he was entitled to compensation during his absence from work from October 15, 1981 to March 5, 1982, and that he could "buy back" leave that he used during that period. He was further informed that it was determined that the employment-related aggravation ceased on March 7, 1982 when he was released to return to work on March 8, 1982.

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[1] 5 U.S.C. section 8118 provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury . . . "

On March 18, 1982 appellant reported to the employing establishment health unit for a blood pressure check stating "I feel hyper." His blood pressure was elevated 180/90. He was instructed to see his private physician.

On March 19, 1982 appellant was hospitalized with the chief complaint of upper anterior chest pain. He gave a history of riding a bicycle prior to the onset of this pain. He was discharged on March 23, 1982 with the following diagnoses: (1) unstable angina versus prinz-metal angina, (2) diabetes mellitus, and (3) hypertension.

Appellant filed an Office form CA-2a alleging that he sustained a recurrence of disability due to factors of his federal employment. He retired on disability effective April 30, 1982.

In an April 6, 1982 report, Dr. Brady reported the following:

> "On 03-08-82 Mr. Wall returned to his job with the admonition from me that he must avoid all stressful situations since such might easily trigger further physical catastrophic occurrences.
>
> "Unfortunately, he was involved on 03-18-82 in such a work-related stressful situation that his blood pressure was reported as 180/90 and a residual of the experience persisted. The next day he suffered chest pains and EKG [electrocardiogram] changes which were compatible with an acute anterior myocardial infarction. Fortunately there proved to be no myocardial damage but acute coronary insufficiency and he was referred immediately to a cardiologist in Raleigh and is undergoing appropriate studies.
>
> "This episode coupled with the previously documented episodes clearly indicate job stress that has nearly taken this man's life."

On April 7, 1982, Dr. Richard H. Wray, III, a Board-certified surgeon, reported the following:

> "Mr. Wiley Wall underwent left carotid endarterectomy on May 24, 1978 for extracranial occlusive cerebrovascular disease with stenosis and an ulcerated plaque in the left internal carotid artery. Postoperatively he did well but suffered in the perioperative period apparent embolization of atheromatous debris to the left retinal artery. He was left with a partial permanent visual loss in the left eye.
>
> "Factors which contribute to the development of extracranial cerebrovascular disease which were present in Mr. Wall are cigarette smoking, diabetes mellitus, and hypertensive cardiovascular disease. If I may be of further assistance, please let me know."

Appellant submitted a November 20, 1978 report from Dr. Joseph Majstoravich, Jr., a Board-certified ophthalmologist, who had examined appellent on November 17, 1978. His impression was: (1) retinal infarct right eye (? embolic or diabetic), (2) old arterial occlusion left eye following carotid endarterectomy, and (3) diabetes mellitus. He referred appellant for further evaluation to Dr. Maurice Landers, a Board-certified ophthalmologist, who examined appellant on November 29, 1978.

The same Office medical adviser reviewed the case record on June 10, 1982 and concurred with Dr. Wray's opinion that appellant's arteriosclerosis was related to his cigarette smoking, diabetes mellitus, and hypertensive cardiovascular disease; he saw no relationship between appellant's condition and the factors of his employment. The medical adviser further opined that appellant's loss of vision in his left eye was not causally related to his federal employment but rather was due to an embolism from an arteriosclerotic plaque in one of his carotid arteries, which dislodged from the artery and came to rest in the retinal artery.

By compensation order dated September 13, 1982, the Office found that appellant had not furnished substantial and probative evidence to establish that he was entitled to a schedule award for loss of vision in his left eye as a result of his employment factors, and that his aggravation of hypertension, as a result of his employment factors, ceased on March 7, 1982.

In a letter dated October 2, 1982 appellant requested reconsideration arguing that the Office did not address the issue of a heart attack that he sustained in March 1982 and that his hypertension was not temporary but of a continuing indefinite nature. Appellant also argued that the long exposure to chronic tension and anxiety produced in his work environment either directly contributed to or exacerbated the condition which ruptured the blood vessels of his eye causing loss of sight. In support of his request for reconsideration appellant submitted a September 30, 1982 report signed by a physician's assistant.

By letter decision dated October 20, 1982 the Office found that the medical evidence submitted was insufficient for review because it was only signed by a physician's assistant, who is not a "physician" as defined by the Federal Employees' Compensation Act (FECA), and an evaluation opinion rendered by such does not constitute competent medical evidence in a FECA case, unless the report was countersigned by a physician.

Appellant subsequently submitted a November 16, 1982 report from Dr. Landers which stated in pertinent part:

> "It is a nonmedical fact that hypertension can directly cause occular problems similar to what you have. It is not uncommon to find a picture such as yours in someone who has had significant episodes of elevated blood pressure to the same degree as yours had been

elevated in the past. You additionally, have a situation of significant vascular disease as evidenced by the necessity of your carotid and endarterectomies. These operations were, as you know, to remove a buildup of deposits in the large blood vessels in your neck. Small portions of these buildups can break off, either before surgery, at the time of surgery, or later, and cause blockage of very small blood vessels in your eye which can show different types of problems. Additionally, your diabetes itself can cause vessel problems in your eyes. You are very fortunate in the fact that your examination in 1978, in spite of all your medical problems, showed only some mild changes which were probably secondary to the previous hypertensive problems. You showed no real evidence of vessel blockage from your vascular problems or changes from your diabetes. This is not to say that in the year since or in the years to come this could not develop."

* * *

> "In summary, it is possible to say that the high blood pressure has significantly contributed to your overall vascular problems and may well have been a precipitating factor in the problems of vein occlusions which you experience."

On December 8, 1982, Dr. J. Tift Mann, an internist who specializes in cardiovascular disease, stated as follows:

> "The above patient has recently been under my care for coronary artery disease and has undergone successful percutaneous transluminal coronary angioplasty.
>
> "It is my strong feeling that job stress has played a role in the development of the above coronary artery problem and may in the future precipitate a recurrence of the same difficulty. He further has other problems which have been exacerbated by job stress.
>
> "It is therefore my recommendation that his work be restricted to areas with minimal stress."

The same Office medical adviser reviewed the case record in January 6, 1983 and opined that there was no relationship between the temporary aggravation of appellant's hypertension and the left eye vision loss due to central retinal artery occlusion due to embolism. He opined there was no probative rationale in the reports of Dr. Brady and Dr. Lander.

By compensation order dated March 7, 1983 the Office rejected appellant's claim on the basis that he has not furnished substantial and probative medical evidence to establish that he is entitled to a schedule award for loss of use of the left eye as a result of his federal employment.

The Board finds that the case is not in posture for decision.

With respect to the issue of appellant's aggravation of hypertension as a result of employment factors, the Office accepted that his hypertension was temporarily aggravated by his employment. Appellant returned to work on March 8, 1982, therefore, the Office properly concluded that the aggravation had ceased by that date. However, Dr. Brady indicated that appellant was involved in a work-related stressful situation on March 18, 1982 that elevated his blood pressure and that a residual of the experience persisted. The next day appellant had chest pains and EKG changes which were interpreted as compatible with an acute anterior myocardial infarction but with no myocardial damage. The hospital admission report of March 19, 1982, however, did not state a history of any employment-related stressful situation, but rather stated a history of appellant riding a bicycle prior to the onset of his chest pains. On remand, the Office should further develop the case record to determine whether appellant was involved in any employment-related stressful situations which aggravated his hypertension and/or precipitated, accelerated, aggravated, or proximately caused an acute anterior myocardial infarction on March 19, 1982. If the Office finds there was a temporary aggravation, it should determine when the aggravation ceased.

The Board further finds that there appears to be a conflict in the medical evidence regarding appellant's loss of vision in the left eye. An Office medical adviser reviewed the case record and opined that appellant's loss of vision in the left eye was not causally related to his federal employment but rather was due to an embolism from an arteriosclerotic plaque in one of his carotid arteries. On the other hand, Dr. Lander, a Board-certified ophthalmologist, stated that hypertension can directly cause occular problems similar to those experienced by appellant. The doctor further concluded that "it is possible to say that the high blood pressure has significantly contributed to appellant's overall vascular problems and may well have been a precipitating factor in the problems of vein occlusions which he experienced." Although this opinion is speculative, and insufficient to discharge appellant's burden of proving by the weight of the reliable, substantial, and probative evidence that his loss of vision was related to his employment, it constitutes sufficient evidence in support of appellant's claim to require further development of the record by the Office.[2] Since the Office accepted that appellant's hypertension was aggravated by factors of his employment, the Office should refer appellant, together with a statement of accepted facts and the entire case record, to a Board-certified impartial specialist to express an opinion, supported by medical rationale, on the issue whether appellant's loss of vision in the left eye was precipitated, accelerated, aggravated, or otherwise causally related to factors of his federal employment. After further action as it may find necessary, the Office should then issue a *de novo* decision.

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[2] *Rebecca S. Panitz*, 30 ECAB 199.

The decisions of the Office of Workers' Compensation Programs, dated September 13, 1982, October 20, 1982 and March 7, 1983 are set aside and the case remanded to the Office for further development in accordance with this decision.

In the Matter of BILLY G. SINOR *and* U. S. POSTAL SERVICE, POST OFFICE, Leesville, La.

Docket No. 83-1682; Submitted on the Records;
Issued December 15, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant is entitled to compensation for the period beginning July 27, 1981.

Appellant, a part-time flexible clerk, filed claims for left shoulder and neck injuries sustained on May 16, 1978, December 5, 1978, and May 18, 1979. He attributed each injury to carrying heavy parcels or satchels.

The employing establishment's job description for the position of clerk and carrier showed that it required lifting up to 70 pounds. After his employment injuries, however, appellant returned to restricted work with no repetitive motion, no lifting of heavy parcels, and no exposure to cold.

In a March 6, 1980 report Dr. Larry S. Fields, a Board-certified family practitioner, stated that appellant was being treated for degenerative joint disease of his cervical spine and that he could not handle heavy parcels but could sort and distribute mail or work as a window clerk.

Appellant stopped work on April 17, 1980 and claimed a recurrence of disability.

On August 14, 1980 the Office of Workers' Compensation Programs referred appellant, with the case record and a statement of accepted facts, to Dr. John T. Weiss, a Board-certified orthopedic surgeon. In reports dated September 22, 1980 Dr. Weiss diagnosed degenerative cervical disc disease of C5–6 and possibly of C4–5, and stated that, if appellant's history of no problems with his neck prior to his employment injuries was correct, appellant had a permanent aggravation of a preexisting condition. Dr. Weiss indicated that appellant could lift 10 to 20 pounds and work an eight hour day, and stated that he could not perform his regular job involving lifting up to 70 pounds but could do clerical work or mail sorting.

The Office determined that appellant was disabled for his regular duties due to the employment-related aggravation of his cervical condition, and paid him compensation for temporary total disability beginning April 18, 1980. The Office of Personnel Management determined that appellant was totally disabled for useful and efficient service, and approved his request for disability retirement effective March 20, 1981.

Appellant performed light duty at the employing establishment from November 26, 1980 to March 20, 1981, during which period the Office paid him compensation for loss of wage-earning capacity based on his actual earnings. On May 14, 1981, upon the Office's request to elect between benefits under the Civil Service Retirement Act or the Federal Employees' Compensation Act, appellant elected to receive benefits under the Federal Employees' Compensation Act.

On June 25, 1981 the employing establishment offered appellant reemployment under its rehabilitation program; the requirements of the offered position were described as follows:

> "To sort letter mail, one letter at a time manually. This is to be done at a modified case that is low enough to work without raising above your shoulders. The separations are small enough to require frequent opportunities to stand and move about to empty them; however, this could be accomplished seated, if desired. To empty the separation (no more than a handful of mail), the employee will remove the mail from the front of the case and place in a container provided."

This offer indicated that appellant would be returned to part-time work for approximately 34.8 hours per week, which the employing establishment stated was the number of hours per week he had been working. Appellant accepted this offer, and the employing establishment scheduled him for a medical evaluation on July 13, 1981 by Dr. L. Donovan Ferdue, a Board-certified orthopedic surgeon, for an evaluation of his ability to perform the offered light duty position.

In a report dated July 13, 1981 Dr. Perdue stated that appellant had common chronic lower back syndrome and cervical syndrome with minimal objective findings, and degenerative changes at C5–6 by x-ray. Dr. Perdue stated that appellant could perform the position described but would have problems with jobs requiring significant amounts of lifting or frequent bending, and that he should be able to manage satisfactorily with light forms of activity which would also allow him to move and not stay in one position continually for inordinately long periods of time.

Appellant began working the offered limited duty position on July 27,

1981. The Office paid him compensation for temporary total disability from March 20, 1981 to July 26, 1981.

Appellant submitted a February 8, 1982 report from Dr. Frederick Hackley, stating that appellant had degenerative disc disease at C5–6 demonstrated by x-ray and that, on examination, he had decreased left grasp, decreased sensation of the left ulnar hand, and increased kyphosis of his neck with some muscle spasm. Dr. Hackley stated that the movement of appellant's neck required in sorting mail, had "considerably aggravated his condition so that he is almost incapacitated by this movement, despite maximum doses of anti-inflammatory agents." Dr. Hackley concluded that appellant was "not going to be able to continue his present work and should be permanently retired. . . ."

On April 1, 1982 the Office referred appellant, with a statement of accepted facts and the case record, to Dr. Heinz K. Faludi, a Board-certified neurosurgeon, for a diagnosis of his employment-related condition and an opinion on his ability to work. In an April 23, 1982 report Dr. Faludi noted appellant's complaint of being unable to sort mail because head movements caused neck pain radiating to the left arm; the doctor stated that examination revealed somewhat diminished cervical motion, tenderness from the mid-cervical region to C7, no muscle spasm, no radiation on head compression, no weakness or atrophy, and an alleged sensory diminution of his left shoulder, neck and entire left arm except his little finger which the doctor considered a functional response as it did not localize to any dermatome or peripheral nerve distribution. Dr. Faludi stated that x-rays showed mild narrowing of the C5–6 intervertebral space and some osteophytic spurs of C5 and C6. Dr. Faludi concluded that appellant had degenerative disc disease at C5–6 which could give him neck discomfort, and that he most likely had this condition before his employment injuries which likely aggravated it. The doctor stated:

> "Actually at the present time, the patient does not show significant neurological involvement except perhaps for a slightly diminished triceps reflex and for the local areas of tenderness and limitation of motion. It seems to the undersigned that the patient's present medical problems are relatively minor. The patient was assigned to very light work consisting primarily of sorting mail, and I feel that he definitely is in a position to continue with this type of work. I would agree with former examiners that the patient should not be required to carry heavy mail pouches and I would limit the patient's weight lifting to about 25 lbs."

By a compensation order dated December 2, 1982 the Office found "that the weight of medical evidence fails to support permanent total disability and [appellant] is able to continue in his usual and customary duties of a part-time flexible clerk."

Appellant requested reconsideration, contending that he was unable to perform the duties of a part-time flexible clerk, which entailed lifting up to 70 pounds. By an April 5, 1983 compensation order the Office vacated its December 2, 1982 compensation order.

In a May 10, 1983 letter the employing establishment indicated that appellant was still performing the same duties.

By a June 17, 1983 compensation order the Office denied appellant's claim for compensation after July 27, 1981 on the grounds "that the weight of the medical evidence does not support total disability and [appellant] is able to continue in the limited duty assignment which was assigned to him on 7/27/81."

The Board finds that appellant is not entitled to compensation for the period beginning July 27, 1981.

In general the term "disability" under the Act means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury."[1] Applying this definition to the present case, appellant was not disabled during the period beginning July 27, 1981 as he returned to work for the employing establishment on that date and thereafter earned no less than he had before his employment injuries.[2]

The medical evidence establishes that appellant is capable of performing the limited duty assignment which he has actually performed for the employing establishment since July 27, 1981. Dr. Perdue, a Board-certified orthopedic surgeon, considered appellant capable of performing the limited duty position offered by the employing establishment, based on a July 13, 1981 examination. Appellant's submission of Dr. Hackley's February 8, 1982 report indicating incapacity to perform the duties of the limited duty position created a conflict of medical opinions, which was resolved by the report of Dr. Faludi, a Board-certified neurosurgeon.

Appellant's contention on appeal that he is entitled to compensation because the limited duty position at the employing establishment offers no opportunity for transfer or advancement is unavailing. The Board has stated that ". . . a contention, or even a showing, that the employee was precluded by reason of his physical impairment from applying for or obtaining a specific position or that he might have obtained other positions which would have paid more wages than he was able to earn in the work performed when injured or in the work he performed after the injury, is not proof of a loss of wage-earning capacity."[3]

With regard to appellant's contention that he is considered totally disabled under Civil Service retirement provisions, it is pointed out that the Civil Service Retirement Act defines "disabled" as "totally disabled . . . for useful and efficient service in the grade or class of position last occupied by the employee . . ." and has no application under the Federal Employees' Compensation Act. Under the latter statute, even though an employee is unable to perform the duties of the position he held when injured, he is not totally disabled if he has the capacity to perform the duties of another position for which he is qualified. A determination made for disability retirement is not determinative of the extent of physical impairment or loss of wage-earning capacity for compensation purposes under the Federal Employees' Compensation Act.[4]

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[1] *Dave L. Lucero*, Docket No. 83-1088; *Thomas Olivarez, Jr.*, 32 ECAB 1019 at 1021.

[2] See *Rafael Rodriguez*, 16 ECAB 630.

[3] *Francis X. Milesky*, 13 ECAB 128 at 131.

The decision of the Office Workers' Compensation Programs dated June 17, 1983 is hereby affirmed.

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[4] *James L. Sutton*, 32 ECAB 1886.

In the Matter of TED and HAZEL CARSON, claiming as dependent parents of LEONARD D. CARSON, deceased employee, *and* U.S. POSTAL SERVICE, POST OFFICE, Bloomington, Ill.

Docket No. 83-1766; Submitted on the Record;
Issued December 15, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellants were partial dependents of the employee at the time of his death.

On February 3, 1981, appellants filed a claim for partial dependency benefits as the result of the January 7, 1981 death of their 23-year-old son, Leonard D. Carson, who sustained a gunshot wound while in the performance of his federal duties.

In a letter to appellant's attorney dated November 4, 1981, the Office of Workers' Compensation Programs stated in part:

> "We have accepted the incident of January 7, 1981, and the subsequent death of employee Leonard D. Carson as being related to factors of his federal employment. We will need copies of all funeral expenses for reimbursement consideration.
>
> "We will need a breakdown of all sources of income regarding his parents if they are claiming partial or total dependency on the employee. We also need to know the breakdown of the amount the employee contributed toward support."

In response to the Office's above-mentioned letter, appellants' attorney on February 25, 1982 stated in part:

> "Mr. Ted Carson is age 49 and is employed at Nussbaum Trucking, making $511.20 a week. Mrs. Carson is not employed. During his life, Leonard Carson contributed in many ways to the financial well being of his father, and although they were not totally dependent upon him financially, there was financial dependence as well as emotional and moral dependence. Mr. Carson would perform domestic duties around the house during summer and winter, such as lawn mowing, snow removal, transportation for Mrs. Carson, and helped Mr. Carson with the general maintenance of said family home. He made numerous purchases of household appliances for his parents. Within two years prior to his death, he purchased not only many small appliances, but a new snowblower and a new lawnmower for his parents. He was continually purchasing items for his parents that they could not afford.
>
> "Although Mr. Carson has not retired at this time, he is reaching eminent retirement age and would have had the benefit of his son's employment support in his retirement years. This, of course, has now been lost by Leonard's death. I could continue with a multitude of dependency arguments, such as those which would be presented in a wrongful death action before a jury, but I'm sure that you're well aware of those benefits and detriments caused by the loss of an adult son to parents who are getting older and reaching their retirement.
>
> "It was my understanding from the tenor of your letter, that you were looking for only out of pocket payments made by Mr. Carson to his parents. Based on the fact that Ted Carson is still employed, we cannot of course, claim total dependency, but we are claiming partial dependency in this matter."

On June 1, 1982, the Office requested appellants' attorney to provide information reflecting the following interpretation of section 8133(a)(4) of the Act:

> "The Federal Employees' Compensation Act provides for payment of compensation to a wholly or partially dependent parent of a deceased Federal employee whose death was work related. 'Need', as such, is not essential in determining whether a parent is considered to be dependent. It is necessary to show, however, that the claimants looked to or relied upon contributions from the decedent as a means of maintaining, or helping to maintain, a customary standard of living. The acceptance of gifts and maintenance services from Leonard Carson does not establish that his parents were dependent upon him for support, nor has the notion of possible future depend-

> ency been accepted as a basis for compensation in cases before the Employees' Compensation Appeals Board. Generally, regular contributions in the form of money, groceries and other essentials of life have been considered as proof of support."

In response to the Office's request for additional information, appellants' attorney stated on June 29, 1982:

> "I would have to say I believe we have established dependency of the Carsons on their son, Leonard. The services he performed around the house were done on a regular basis and if he had not performed them, the Carsons would have had to pay to have them done. Also they came to regularly expect the financial assistance of Leonard for the purchase of appliances and items needed for maintenance of their home.
>
> "I believe that within the meaning of the Federal Employees' Compensation Act they were dependent upon him and are entitled to a finding of dependency."

The Office rejected the claim in a compensation order, dated August 6, 1980, which found that "[t]he evidence of record fails to establish dependency within the meaning of the Federal Employees' Compensation Act."[1]

At a hearing before an Office representative on December 16, 1982, appellant, Hazel Carson, testified that the deceased employee provided funds to her and her husband for utility payments on a year-round basis; that he provided maintenance duties to their house at no cost; that he purchased a snow blower and lawn mower for their house; that he purchased household items for their house; and that she and her husband began to rely on the deceased employee's contributions to their household. Appellant also testified that the deceased employee would regularly give $50 to $100 per month to her and her husband and that on occasion he would purchase groceries for their home.

In a decision dated July 5, 1983, the Office hearing representative in affirming the Office's August 6, 1982 decision found that there was no documentation relating to the alleged monetary regular contributions for maintaining a customary standard of living made to appellants by the deceased employee. The hearing representative further added; "since the claimants have not sustained their burden of proof in establishing dependency and have not submitted supporting documentation of regular contributions for maintaining a customary standard of living, the [prior] decision is affirmed."

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[1] 5 U.S.C. 8133 states in pertinent part:

> "(a) If death results from an injury sustained in the performance of duty, the United States shall pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule:
>
> (4) To the parents, if there is no widow, widower, or child, as follows-
>
> (A) 25 percent if one parent was wholly dependent on the employee at the time of death and the other was not dependent to any extent;
>
> (B) 20 percent to each if both were wholly dependent; or
>
> (C) a proportionate amount in the discretion of the Secretary of Labor if one or both were partly dependent."

In *Agnes M. Chekel*,[2] the Board stated: "In order to meet the test of dependency, it is necessary to show that the parent claiming as a dependent looked to and relied upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living. It is not necessary to show dependency to a substantial extent."

The Office hearing representative correctly found that appellants provided no documentation to support their allegation that the deceased employee made regular monetary contributions to them for the payment of utility bills. Appellant did not introduce any documentary evidence, such as cancelled check receipts of the deceased employee, bank deposit receipts of appellants, or witness statements of local merchants, friends or family members attesting to the fact that the deceased employee made regular contributions to appellants. However, there is the December 16, 1982 testimony of appellant, Hazel Carson, who stated that the deceased employee did in fact make the alleged monetary contributions to appellants.

In light of the above, the case will be remanded to the Office to afford appellants the opportunity to submit documentary evidence to support their claim.

The compensation order of the Office of Workers' Compensation Programs, dated August 6, 1982, and the decision of the Office hearing representative, dated July 5, 1982, are hereby set aside and the case remanded to the Office for further development as outlined above, to be followed by a *de novo* decision.

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[2] 13 ECAB 269.

In the Matter of LAWRENCE A. GOFF *and* DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Marsing, Ida.

Docket No. 83-1121; Submitted on the Record;
Issued December 20, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant's disabling cardiopulmonary condition is causally related to factors of his federal employment.

The case has been before the Board on appeal on two previous occasions.[1] Those decisions set forth the facts and history of the case. In its most recent decision issued on December 15, 1981 the Board found that there was a conflict in the medical evidence. It remanded the case, and instructed the Office of Workers' Compensation Programs to ask an impartial medical specialist for a reasoned opinion on whether appellant's disability due to his cardiopulmonary condition subsequent to January 29, 1979 was causally related to factors of his employment.

By letter dated April 20, 1982 the Office referred appellant together with the case record and a statement of accepted facts to Dr. James J. McCabe, an internist specializing in pulmonary disease, for his opinion regarding causal relationship. It specifically asked whether appellant's condition "was caused, aggravated, accelerated, precipitated or hastened by the factors of his employment" and if it was determined that there was a temporary aggravation, the Office requested Dr. McCabe to conclude when such aggravation ceased.

In a report dated May 20, 1982 Dr. McCabe concluded as follows:

> "My impression then is that [appellant] does have chronic obstructive pulmonary disease with predominant bronchitis and cor pulmonale. I feel that this is the result of cigarette smoking in a susceptible individual and is aggravated by chronic obesity. It is very reasonable to assume that while he was committed to fairly vigorous activity in 1978, 1979, his symptomatic deterioration was accelerated. I do not think there is any medical evidence in this case or in the general literature to suggest that such a deterioration is permanent and irreversible. I would assume that if [appellant] had never been employed by the Job Corps that his present condition would be indistinguishable from what it really is at this moment."

Upon reviewing this report an Office medical adviser concluded that appellant's federal employment did not cause any acceleration or aggravation of his underlying cardiopulmonary condition.

By compensation order dated June 21, 1982 the Office found that the medical evidence established that appellant's disabling cardiopulmonary condition was not causally related to his employment.

By letter dated July 23, 1982 appellant, through his attorney, requested reconsideration of the Office's decision and in support thereof submitted a transcript of a June 24, 1982 telephone conversation the attorney had with Dr. McCabe. Dr. McCabe was reported to have stated that "I assume that the conditions in the job did accelerate or aggravate [appellant's] symptoms." Dr. McCabe did not verify the accuracy of the transcript.

By letter dated August 6, 1982 the Office requested that Dr. McCabe sign a copy of the above-mentioned transcript if he found that it accurately transcribed what he had said and that he clarify his position regarding whether appellant's employment "speeded up the worsening of his pulmonary disease."

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[1] Docket No. 80-452 and Docket No. 82-38.

In an August 10, 1982 report Dr. McCabe stated that he was unaware that his June 24, 1982 conversation with appellant was recorded. He did not sign a copy of the transcript. Dr. McCabe concluded as follows:

> ". . . I can say appellant's work speeded up the early symptoms formation associated with this disease; that is, he probably would not have been found to have chronic obstructive pulmonary disease as early if he had been in a more sedentary occupation.
>
> "What this means, practically speaking, is that everyone has a certain margin of safety for various organs. They only use a certain percentage of their total capacity and only develop symptoms when they go beyond that capacity.
>
> "Appellant's capacity was reduced and this reduction was uncovered by his more strenuous physical activity. If he had not had strenuous activity the disease was there but the symptoms were masked. This is true of the lung disease.
>
> "So far as the associated heart disease is concerned, it appears patients develop a 'decompensation' or inability of the heart to cope with the physical stress imposed on it. In this case, the stress represents a severe pulmonary disease and its attendant low oxygen levels in the pulmonary artery.
>
> "During exercise, the pulmonary artery oxygen level drops even further, the resistance is greater and the heart is subjected to more stress. This can make it fail.
>
> "If he was not physically stressed, he would not have gone into heart failure and we would have had to wait until a later date to know that his heart was adversely affected by his pulmonary disease.
>
> " If a person develops one episode of heart failure due to a severe stress and then refrains from that stress for the next five years and has no further episodes of heart illness, it is impossible for us to know whether or not his heart, after five years, is different than it would have been had it not been for that one episode five years previously. I think most of us would assume, in the absence of any evidence of damage, that the heart, indeed, is unaffected by that single episode of severe stress."

By compensation order dated March 7, 1983 the Office denied appellant's request for reconsideration on the ground that "the evidence submitted in support of the application for review is found to be lacking substantial probative value and is not sufficient to warrant review of the prior decision."

The Board finds that the case is not in posture for decision.

Dr. McCabe, the impartial medical specialist selected by the Office to address the conflict in the medical evidence, failed to resolve the issue of whether appellant's disability due to his cardiopulmonary condition was causally related to factors of his employment.

In his May 20, 1982 report Dr. McCabe stated that factors of appellant's employment might have accelerated his cardiopulmonary condition but that such deterioration was not permanent and that if appellant had not been exposed to these factors his current condition would not have been any different. Since this latter conclusion referred only to appellant's current condition Dr. McCabe seemed to imply that appellant's cardiopulmonary condition was temporarily aggravated or accelerated by factors of his employment. However, Dr. McCabe did not address the length of time of any such causal relationship.

Dr. McCabe did not adequately clarify his opinion in his August 10, 1982 report submitted at the request of the Office. In that report he stated that "if [appellant] had not had strenuous activity the [pulmonary] disease was there but the symptoms were masked" and "if he was not physically stressed, he would not have gone into heart failure and we would have had to wait until a later date to know that his heart was adversely affected by his pulmonary disease." Once again, Dr. McCabe apparently concluded that the factors of appellant's employment caused either a temporary aggravation or an acceleration of his cardiopulmonary condition, but failed to specify when such aggravation or acceleration ceased to exist.

The Board has held that "when the impartial specialist's statement of clarification or elaboration is not forthcoming to the Office or if the doctor is unable to clarify or elaborate on his original report or if the doctor's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question." [2]

In light of Dr. McCabe's failure to resolve the issue at hand the Office should refer appellant together with the case record and a statement of accepted facts to an appropriate Board-certified specialist for a reasoned opinion on whether appellant's disabling cardiopulmonary condition was causally related to factors of his federal employment subsequent to January 29, 1979. The referral physician should address whether such condition was either accelerated or aggravated by factors of appellant's employment and note the length of time any such acceleration or aggravation existed.[3]

The March 7, 1983 and June 21, 1982 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action in accordance with this decision to be followed by a *de novo* decision.

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[2] See *Harold Travis*, 30 ECAB 1071 and *Roy C. Price*, 32 ECAB 166.

[3] See *James L. Hearn*, 29 ECAB 278.

In the Matter of JOHN W. MACDONALD *and* DEPARTMENT OF STATE, AGENCY FOR INTERNATIONAL DEVELOPMENT, Washington, D. C.

Docket No. 83-1745; Submitted on the Record;
Issued December 21, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant's asthmatic condition was caused or permanently aggravated by his federal employment.

On February 20, 1980 appellant, then a 50-year-old former program assistant, filed a claim alleging that his "intrinsic and extrinsic acute asthma" and his acute bronchitis were causally related to his federal employment. On his claim form, appellant stated that he first became aware of his conditions on July 1, 1976 and indicated that he had never had asthma prior to that date. He continued:

> "I returned from overseas assignment (four years) in Tunisia on 25 June 1976 and became asthmatic on July 1, 1976. I was assigned to Washington, D. C."

The employing establishment submitted copies of its medical records on appellant. These included a December 9, 1977 report from Dr. Dennis G. Kleban, a Board-certified allergist, submitted in support of appellant's 1977 request for disability retirement. In his report, Dr. Kleban stated:

> "[Appellant] has been under my care since his return from Tunisia in June of 1976. He was having severe asthmatic difficulty at that time with constant coughing and wheezing. Allergy tests were strongly reactive for local pollens, dust and molds, and I initiated treatment with allergy injections and Slophyllin. He did very well during last winter but again developed severe difficulty requiring constant medication in April of 1977. Since then he has been experiencing persistent difficulty requiring constant medication (Slophyllin, Metaprel, Vanceril) with only fair control. I feel that Mr. MacDonald is exhibiting increasing intrinsic and extrinsic asthma and his current symptoms (severe coughing, shortness of breath, dizziness, severe fatigue) severely inhibit his capacity to function in a work situation."

Appellant was hospitalized at Georgetown University Hospital from December 26, 1977 through December 29, 1977. In a discharge summary dated February 13, 1978, Dr. Oscar Mann, a Board-certified internist, stated:

> "HISTORY OF PRESENT ILLNESS: This is the first Georgetown University Hospital admission for this 48-year-old . . . male, admitted with a chief complaint of fever. The patient noted the onset of asthma in July 1976, four days after returning from a Foreign Service assignment in North Africa. A medical checkup on return revealed no evidence of tropical disease. He has been treated with Metaprel and Slo-Phyllin. However, the asthma symptomatology has progressively increased. Presently, the patient is considering medical retirement for this reason. The symptoms of shortness of breath and wheezing are increased by exercise, excitement, cold weather and pollen. Previously he smoked approximately ten cigarettes a day. He denied chronic cough or sputum production. There is no history of congestive heart failure or angina. On December 12, 1977, the patient had an asthma attack, treated with Epinephrine, Metaprel, Slo-Phyllin and Prednisone. The Prednisone was started at 30 mg. a day and tapered off, finally being discontinued on the day of admission. On December 15, the patient complained of fever, vomiting, diarrhea and cough. He was started on Erythromycin. Over the next week he complained of cough productive of thick, brown sputum for three days. The sputum is now clear and easy to cough up. The patient denies hemoptysis. The asthma symptoms are well controlled. On December 23, he complained of increased fever, to 103 degrees, associated with sweats and chills; no shaking chills. The fever abated. On the evening of admission the temperature rose again to 103 degrees. The patient felt weak. His cough was productive of clear sputum. He denied chest pain. His asthma symptoms were stable. He drinks fluids well. The patient was seen in the Emergency Room by Dr. Mann and admitted. The patient denied headache, neck pain, back pain, abdominal pain, diarrhea or vomiting. He had a slight sore throat and a left earache, runny nose and myalgias.
>
> "PAST MEDICAL HISTORY: Past history is significant for hay fever.
>
> "ALLERGIES: No allergies to medicines.
>
> "PHYSICAL EXAMINATION: Physical examination on admission revealed a temperature of 39.5 degrees, a pulse of 88, respirations 22 and a blood pressure of 140/70. In general he was a well-developed, well-nourished, . . . male in no acute distress, although mild to moderate shortness of breath and expiratory wheezing following a cough were noted. Examination of the head, eyes, ears,

> nose and throat: Conjunctiva injected; left ear, external canal injected; nasal mucosa injected; pharynx unremarkable. The neck was supple without lymphadenopathy or thyromegaly. Chest: Inspiratory rales one-half way up bilaterally; expiratory wheezes following cough; no signs of consolidation. Cardiac examination: Regular rhythm; normal heart sounds; no murmur, gallop or rub. * * * Extremities: Unremarkable. Neurologic examination was unremarkable.
>
> "HOSPITAL COURSE: Sputum gram stain revealed moderate polys with a mixed flora of gram-positive cocci and gram-negative rods. The chest x-ray did not reveal an infiltrate. After consultation with the patient's private physician and the Infectious Disease Service, the following were done: The Erythromycin was continued at 500 mg. p.o. q.6h [by mouth every six hours]. The Prednisone was increased to 40 mg. a day. Slo-Phyllin was given at 200 mg. p.o. q.6h. also. The Infectious Disease consultant felt that the most likely diagnosis was Mycoplasma pneumoniae infection. The cold agglutinin was negative. However, at this time the PPLO [pleuropneumonia-like organism] complement fixation titer was not available. The patient did well in the hospital. He defervesced. His cough, shortness of breath and wheezing decreased. Physical examination of the chest at the time of discharge revealed diffuse rales and wheezes, but he was moving air well."

Dr. Mann stated that his discharge diagnoses were: upper respiratory infection, possibly secondary to PPLO; asthma; mild dehydration; and hypokalemia.

In a March 30, 1978 letter from his employing establishment, appellant was informed that his request for disability retirement was denied on the ground that he was not "totally disabled for useful and efficient service within the meaning of section 831 of the Foreign Service Act of 1946, as amended."

Appellant continued working at the employing establishment. In October of 1978, while stationed in Kinshasa, Zaire, he had a severe attack of bronchial asthma and was returned to Washington, D. C. for evaluation and treatment. In an October 6, 1978 report, Dr. Alfred R. Henderson of the employing establishment stated:

> "[Appellant] recently made a 60-day TDY [tour of duty] trip to Kinshasa . . . and before very long developed severe bronchial asthma. He was treated by Doctor Washington there with adrenalin in oil, Prednisone, antibiotis and bronchodilators. He was able to function with this medication but returned to the U.S. still with active asthma. Between Kinshasa and the United States he had to receive injections of adrenalin and oil several times, given to him by a fellow passenger on the plane. He arrived in the U.S. last night

> and immediately came to this Department. We have rechecked his chest with a chest x-ray and have done a blood count and have given him these materials to take to his private doctor in town.
>
> "He does not have bronchopneumonia and continues on the medications as outlined above. I told him that, before he goes out on a TDY again, he should consult with the Department so that he may be protected against an unusual and hazardous place."

Appellant continued to attempt to work in spite of his increasing problem with his asthma condition. In a June 20, 1979 memorandum to an employing establishment physician, Dr. Jerome M. Korcak, appellant stated that he had experienced an asthma attack immediately on arrival in Syria for his tour of duty there. Appellant indicated in the memorandum that "since July of 1976 the asthma has become progressively worse so that I am constantly taking quadrinal, vanceril, inhalers and prednisone."

In a November 14, 1979 report, Dr. Kleban stated:

> "I have been attending Mr. MacDonald since July 8, 1976 when I was originally consulted concerning his progressive asthmatic difficulty. Since then, I have been following him on a weekly basis and have developed an excellent picture of his problem. It is apparent that Mr. MacDonald has a severe extrinsic and intrinsic asthma. When he first came under my care his problem was primarily extrinsic in nature with severe exacerbations of asthma during the spring and fall pollen seasons. Over the years, however, he has insidiously developed more and more nonseasonal wheezing so that his problem is now perennial in nature. Repeated pulmonary function tests by the State Department and through my office confirm the reversible airways disease. From 1976 through 1977 Mr. MacDonald could be controlled with use of hyposensitization plus intermittent bronchodilators. Since then, however, he has required progressviely more bronchodilators, including a variety of theophyllin preparations and metaproteranel. In addition, he was requiring increasing usage of cortisone preparations to control his problem. On a recent assignment to Africa, his wheezing was so severe that he required emergency treatment and evacuation to an appropriate medical facility. Of late, I have instituted alternate day prednisone therapy and vanceril in the hope of bringing his asthma under control. Fortunately, these measures still provide excellent symptomatic relief, but his disease is invariably progressive. In addition, I do not feel that he can tolerate the climatic extremes and the poor medical facilities that some of his assignments might bring. Overall, I feel that Mr. MacDonald should definitely alter his work pattern and retire in a dry, warm climate that might be more beneficial to his health."

Appellant retired voluntarily on February 11, 1980. In a March 21, 1980 letter, the employing establishment informed him of its determination that at the time of his retirement he "qualified for disability retirement, pursuant to section 831 of the Foreign Service Act of 1946, as amended," retroactive to January 11, 1980. He had been on sick leave from December 7, 1979 to January 11, 1980.

In a May 28, 1980 letter, the Office of Workers' Compensation Programs requested that appellant describe the factors of his employment which he believed had contributed to his asthma condition. In an undated reply received by the Office on June 11, 1980, appellant indicated that he worked overseas in American Embassies in Lagos, Nigeria (1966), Saigon, Vietnam (1969), Tunis, Tunisia (1972), Kinshasa, Zaire (1977), and Damascus, Syria (1979). He continued:

> "Aside from my most recent duty in Washington, D. C., duty overseas in those countries involved working in extremely severe climates with heat extremes, high humidity, dust, molds, fungus, poor sanitation and less than complete medical facilities. This was particularly true in west Africa and in north Africa where very hot, dry and dusty conditions were normal. In addition to this was the stress of wartime conditions in Saigon and Nigeria during the Biafran war."

On September 29, 1980 an Office medical consultant reviewed the case file. He concluded that factors of appellant's employment "contributed to his asthmatic condition," and stated that he could not determine when total disability from asthma ceased, stating that "I feel that total permanent disability should never have begun."

In an October 30, 1980 letter, an Office claims examiner advised appellant that his claim had been approved "for temporary aggravation of preexisting asthma only." The claims examiner continued:

> "This means that the temporary aggravation would only last as long as you were exposed to the particular environment. Once you are removed from this exposure, the job-related aggravation would cease. However, during this particular time, you would be entitled to all applicable benefits under the Federal Employees' Compensation Act."

On November 13, 1980 an Office medical adviser reviewed the case record. In a report of the same date he stated:

> "The termination of the temporary aggravation ended upon the patient's retirement on 10/7/79. This is the date the patient retired and when any work-related aggravation would have ceased.

> "Since condition is preexisting and the temporary aggravations self limited, the date 10/7/79 means end of our responsibility. If the patient has recurrences, they are not secondary to job-related factors—*i.e.*, no longer job-related stress or pulmonary infection to trigger asthma."

In an undated letter received by the Office on December 11, 1980, appellant indicated that his retirement date was January 11, 1980, not October 7, 1979, and stated that he did not believe that his asthma was preexisting condition because he never had asthma prior to 1976.

By compensation order dated January 29, 1982, the Office determined that "factors of claimant's employment caused a temporary aggravation of his asthmatic condition which ceased no later than October 7, [1979], the date he stopped work," and rejected appellant's claim for compensation subsequent to October 7, 1979 on the ground that "the medical evidence of record fails to establish that the claimant's continuing respiratory problems are due to factors of his federal employment."

Appellant appealed his case to this Board. In an April 26, 1982 order, the Board remanded the case to the Office for further development. The Board noted that "it is not clear whether employment factors caused a permanent condition—an increased and heightened sensitivity to a wider field of allergens—thus adversely affecting appellant's wage-earning capacity." The Board remanded the case for referral of appellant, the case record and a detailed statement of accepted facts to an appropriate medical specialist for a rationalized opinion "whether appellant's asthma originated with his employment or, if not, whether his preexisting condition was so aggravated as to cause a permanent condition."[1]

The Office on remand referred appellant, along with a statement of accepted facts and the entire case record, to Dr. Robert W. Langevin, a Board-certified internist. In a September 14, 1982 report, after noting the history of appellant's asthmatic condition and detailing his findings on physical examination, he concluded:

> "Your second question related to my opinion whether Mr. MacDonald's asthma originated with his employment or whether a preexisting condition was aggravated by his employment so as to cause a permanent condition. With regard to this last query, there is little question that Mr. MacDonald has asthma of moderate severity. He has required continuing care from several physicians and even at the present time has significant symptoms. It appears to me that there is nothing in the voluminous Department of Labor record as I have reviewed it which documents that his problem originated with his overseas service. In point of fact his symptoms

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[1] Docket No. 82-900

> did not occur until four days after he had returned to the Washington, D. C. area after having spent a great deal of time overseas without symptoms for many years. It thus appears that his asthma was a natural outgrowth of his allergic state (he has had documented hay fever back to childhood) and the fact that he comes from an allergic family (he has a brother with asthma). The fact that he had passed many military and State Department physicals in previous years simply documents the fact that he had no evidence of asthma at that time. His own statements clearly indicate that, in a similar fashion, he had no asthma when he returned from his overseas assignments on June 26, 1976.
>
> "In summary, it is my opinion that Mr. MacDonald suffers from asthma which is moderately severe and requires continuing medical therapy but that there is insufficient evidence to come to the conclusion that his work environment was responsible for the development of his asthma."

On the recommendation of Dr. Langevin, the Office requested that appellant's treating physician provide a rationalized medical report on appellant's condition. In a December 30, 1982 report, Dr. Allan M. Weinstein, a Board-certified internist specializing in allergy/asthma, after noting that objective lung function studies demonstrated that appellant has asthma, stated:

> "In answer to the central issue, Mr. MacDonald recalls that his first asthma episode appeared when moving into his new home on return from a foreign assignment. In association with his asthma symptoms he had nasal stuffiness that was year around. His asthma flares and he is worse with exercise. There is no doubt that there is an allergic contribution to his problem on the basis of his skin tests. He reports that he had no history of asthma prior to July 1976 when he did move into his new home on return from foreign service. As he never did lung functions prior to this time, truly objective evidence that he did not have asthma as a preexisting condition is unavailable. However, he did have military exams while in foreign service — State Department and military that by the patient's report never revealed any asthma difficulty. Therefore, a clearcut answer one way or the other is impossible.
>
> "It is certainly unlikely based on his story that his asthma was a preexisting condition and thereby aggravated by his employment. It appears as if his asthma did originate during his time of employment. Whether his employment conditions—including possible parasitic exposures, travel around the world including the Middle East — played a role is difficult to say definitely. The end result, however, is that he does at times have difficult to manage asthma necessitating

> at times frequent doctor's visits. In addition, he is on daily multiple medications regardless of symptomatology, just to keep his airways open.
>
> "He does give a history of allergic nasal symptoms that are long-standing and does have a family history of allergy. The nose, chest and skin are all target organs for allergy and it is possible that one can have allergic nasal symptoms without ever developing asthma (allergy chest symptoms). This also makes the decision somewhat difficult.
>
> "In summary it is doubtful that his employment brought on his asthma but he did, in all probability, develop asthma while he was employed. In addition, it is incorrect to say that [appellant's] asthma is just a natural extreme of an allergic individual, as one can have allergic nasal symptoms and never develop asthma (and vice versa). The bottom line is that [he] now has difficult to manage asthma that requires multiple medications on a daily basis. His ability to work is limited by the number of days his asthma flares and the fact that he does require frequent medical observations—both factors could limit his consistent attendance on the job and his career opportunities."

The same Office medical adviser reviewed the case record. In a March 25, 1983 report, he stated:

> "The patient's asthma did not originate with the overseas service. His asthma was the natural outgrowth of his allergic state starting four days after return to D. C. The patient comes from an allergic family.
>
> "Dr. Weinstein [in his] 12/30/82 [report] agrees. The asthma is not secondary to job factors—it is just a natural extreme of an allergic individual."

By compensation order dated June 3, 1983, the Office rejected appellant's claim for compensation subsequent to October 7, 1979 on the ground that the medical evidence of record failed to establish that appellant's "respiratory problems are due to factors of his employment."

The Board finds that the weight of the medical evidence fails to establish that appellant's asthmatic condition was caused or permanently aggravated by his federal employment.

The Board has stated previously:

> "Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, where, as in the present case, the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after

> the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment." [2]

Of all the physicians who examined appellant and submitted reports on his asthma to the Office, only Dr. Langevin, a Board-certified internist, and Dr. Weinstein, a Board-certified internist who specializes in the treatment of allergies and asthma, addressed the question whether appellant's asthma was caused or permanently aggravated by his federal employment. In his September 14, 1982 report Dr. Langevin concluded that "there is insufficient evidence to come to the conclusion that [appellant's] work environment was responsible for the development of his asthma." Dr. Langevin's opinion was based on his examination of appellant and his review of the entire case record. In his December 30, 1982 report, Dr. Weinstein concluded that "it is doubtful that his employment brought on his asthma but he did, in all probability, develop asthma while he was employed." To the extent that he offers an opinion one way or the other, Dr. Weinstein appears to be saying only that appellant's asthma originated during his federal employment, without indicating that factors of his federal employment contributed to the initial appearance of the condition. Accordingly, neither Dr. Langevin nor Dr. Weinstein supported appellant's contention that his asthma was caused or permanently aggravated by his federal employment. The Office medical adviser and medical consultant also negated any permanent aggravation in their reports.

The Board notes that the Office, based apparently on the unrationalized November 13, 1980 report from an Office medical adviser, found that the temporary aggravation of appellant's condition ceased on October 7, 1979, the date the medical adviser thought appellant had retired. The evidence of record indicates that appellant retired on February 11, 1980. However, it is not clear when appellant's employment had actually ceased. Accordingly, the case will be remanded for a determination whether appellant is entitled to compensation for temporary total disability (or repurchase of sick leave) for the period October 7, 1979 through February 10, 1980.

The June 3, 1983 decision of the Office of Workers' Compensation Programs is affirmed with respect to the period commencing February 11, 1980; with respect to the period October 7, 1979 through February 10, 1980, the case is remanded to the Office for further development and a *de novo* decision.

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[2] *James L. Hearn*, 29 ECAB 278.

In the Matter of NONA J. NOEL *and* DEPARTMENT OF THE AIR FORCE, WHITEMAN AIR FORCE BASE, MO.

Docket No. 83-1710; Submitted on the Record;
Issued December 22, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further merit review pursuant to 5 U.S.C. section 8128(a) constituted an abuse of discretion.

On March 1, 1971 appellant, then a 55-year-old keypunch operator, slipped and fell on a sidewalk on the employing establishment base outside a building in which she regularly ate breakfast. She sustained a callus fracture and aggravation of preexisting arthritis to her right wrist.

The Office of Workers' Compensation Programs accepted appellant's claim and she received compensation for temporary total disability for the period commencing March 1, 1971. By letter decision dated August 27, 1979 the Office terminated appellant's compensation effective October 11, 1979 finding that she did not sustain her injury while in the performance of duty.

In a letter dated November 8, 1979 appellant stated:

> "I was injured March 1, 1971, working for the Air Force at Whiteman Air Force Base, Missouri. On Monday at 6:35 a.m., I fell on my way into the N.C.O. Club (I was an associate member) to eat breakfast, something I had been doing every morning for over 5 years before reporting for work at Base Supply at 8:00 a.m. When I fell, I broke my right wrist (I am enclosing affidavits from employer, doctors, etc., to substantiate my claim). When my employer and Personnel Officer heard of my falling, they immediately reported the accident to the Department of Labor and I was put on Workmens' Compensation which I drew until October 17, 1971, at which time I reported back to work as key puncher on a trial basis, to see if I could perform my job as a keypunch operator, which was doubtful since I had contracted arthritis in my right wrist, and much stiffness in fingers and wrist. I tried but on May 5, 1972, I was again put back on workmen's compensation. I, as well as my employer and Personnel Office, was with the understanding that, since I was on my way to work when I fell and I was on Government property, I was covered under Workmen's Compensation until I received my

> notice (copy enclosed) August 27, 1979, that I was being terminated."

By letters dated November 27, 1979 the Office requested appellant and the employing establishment to submit new evidence with regard to her presence on the base one and one-half hours prior to her 8:00 a.m. duties. The Office also requested information on appellant's normal mode of transportation and the distance between the NCO club and Base Supply building where she worked.

On December 5, 1979 appellant responded indicating that the employing establishment had made membership in the N.C.O. club available to her for over 5 years for which she paid monthly dues. She stated that she regularly arrived at the base by car at approximately 6:30 a.m. and proceeded directly to the N.C.O. club where she would eat breakfast. Thereafter, she would leave the club at approximately 7:30 a.m. and proceed by car to her work station at the Base Supply Building which she indicated was approximately 5 miles from the N.C.O. club. Appellant stated that dining at the base club was a personal convenience and not a requirement of her employment.

By letter dated December 5, 1979 the employing establishment civilian personnel officer stated that appellant "was in the habit of eating breakfast daily" at the base club prior to reporting for duty. He indicated that this was a personal convenience for appellant and not a requirement of her job. He also stated that the distance between the club and supply buildings was approximately one-half mile.

By compensation order dated December 26, 1979 the Office rejected appellant's claim finding that at the time of injury on March 1, 1971 she was on a personal errand and not in the performance of duty.

In a letter dated January 14, 1980 appellant requested a hearing before an Office representative. At the hearing held on November 18, 1980, appellant, in response to a question posed by the Office representative, stated that there was no benefit to the employer by her early arrival for breakfast on the base, rather "it was just a benefit to me because I, you know, I would have still been at work at half past 7:00 if I had ate at home." She did not submit any exhibits at the hearing.

In a decision dated and finalized July 30, 1981 the Office hearing representative affirmed the December 26, 1979 Office compensation order finding that on the date of injury appellant had arrived on the employing establishment premises an hour and one half before her official starting time for the convenience of eating breadfast and not for circumstances related to the requirements of her job and therefore, she was not in the performance of duty when injured.

On July 18, 1982 appellant filed an application for review before the Board. Her appeal was docketed as No. 82 – 1795. On September 9, 1982 the Board requested that the Office submit a legal memorandum on the issue of whether appellant was in the performance of duty when injured on March 1, 1971. Specifically, the Board requested that the Office consider section 21.60 in Larson on Workmen's Compensation Law, which states:

> "The course of employment, for employees having a fixed time and place of work, embraces a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts. The rule is not confined to activities that are necessary; it is sufficient if they can be said to be reasonably incidental to the work. What constitutes a reasonable interval depends not only on the length of time involved but also on the interval and the nature of the employees' activity." (Footnotes omitted)

The Office responded by filing a motion to affirm in which it requested that the July 30, 1981 hearing representative's decision be affirmed for the reason that the Federal Employees' Compensation Act "was not intended to protect an employee in a case such as this."

On January 4, 1983 the Board entered an order dismissing the appeal on the January 3, 1983 request of appellant's attorney so he could request the Office to reconsider its decision of July 30, 1981.

By compensation order dated March 2, 1983 the Office denied appellant's application seeking modification of the July 30, 1981 decision finding that it was insufficient to warrant review.

On March 15, 1983 appellant, through her attorney, requested reconsideration and in support thereof submitted an affidavit in which she stated that she arrived early at the employing establishment base each morning to "be sure that I would have sufficient time to eat breakfast and be at my assignment station on time."

By compensation order dated April 22, 1983 the Office denied appellant's application seeking modification of the March 2, 1983 decision finding that the evidence submitted in support thereof was not sufficient to warrant review.

The Board finds that under the circumstances the Office acted improperly by refusing to reopen the case for further consideration on the merits.

The Board notes that the case presents legal contentions not previously considered by the Office and appellant has submitted relevant new evidence pertaining to her activities on the date of injury. On the prior appeal, the Board requested that the Office submit a legal memorandum on the issue as it presented a case of first impression. The Office responded by filing a memorandum with the Board on November 24, 1982. Thereafter, appellant's attorney requested that the appeal be dismissed so he could submit new evidence and request reconsideration by the Office. The evidence submitted was relevant to the present case and the Office should have reviewed it on the merits.

The compensation orders dated March 15 and April 22, 1983 of the Office of Workers' Compensation Programs are set aside, and the case remanded to the Office to reconsider the evidence and appellant's legal contention on the merits.

In the Matter of ISIDORE J. GENNINO *and* U. S. POSTAL SERVICE, CANAL STREET STATION, New York, N. Y.

Docket No. 83-1471; Submitted on the Record;
Issued December 27, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant's disability commencing April 17, 1981 due to chondrosarcoma was causally related, by way of aggravation, to factors of his federal employment.

On September 11, 1958 appellant, then a 32-year-old postal clerk, sustained a contusion to his left ankle when he was struck by a falling tray of slugs at work. Appellant filed a claim for this injury on September 12, 1958 and received medical benefits. No time was lost from work due to this injury.

On November 22, 1974 appellant filed a claim for compensation, claiming that he injured his left ankle when he walked into his stamp cage on that date and struck his left ankle on the steel sliding door. In a November 27, 1974 report Dr. Bradford, an employing establishment physician, diagnosed an "osteo bone tumor."

On December 6, 1974 appellant sustained a recurrence of his left ankle condition and began to receive continuation of pay from that day. On the same day, he was hospitalized by Dr. Arthur S. Liggett, a Board-certified orthopedic surgeon. In a December 9, 1974 report Dr. Alex Norman, a Board-certified radiologist, stated:

> "Examination shows a lesion in the distal end of tibia, destroying the medial malleolus and extending to the articular cortex. It is eccentric in position, purely osteolytic and produces a bubble-like expansion of the bone, contained by a thin shell of periosteal new-bone. There is a pseudotrabeculated appearance to the lesion and the periosteal response produces a spiderweb-like appearance. There is no mass seen out in the soft tissues."
>
> * * *
>
> "This is most likely a benign tumor. The unusual appearance

> creates difficulty in interpretation. However, in spite of the age, a chondromyxoid fibroma or an aneurysmal bone cyst is a possibility. Other possibilities are an atypical giant cell or chondroblastoma in an older age patient."

On December 12, 1974 Dr. Liggett performed a biopsy and subsequent curettage of appellant's left ankle lesion and diagnosed chondrosarcoma of the distal end of the left tibia. Appellant was discharged on December 24, 1974.

On January 13, 1975 Dr. Liggett referred appellant to Dr. Kenneth C. Francis, an orthopedic surgeon. In a January 16, 1975 report on Office of Workers' Compensation Programs form CA-20, Dr. Francis related the history of appellant's November 22, 1974 ankle injury and noted that x-rays disclosed a purely lytic lesion involving the entire medial malleolus. Dr. Francis diagnosed a "tumor medial malleolus distal tibia left" and checked the box marked "yes" in response to the question "Do you believe this disability is in any way related to the history of the injury as given above?"

On January 23, 1975 appellant claimed compensation for temporary total disability commencing that date. On January 30, 1975 the Office, on the basis of Dr. Francis' January 16, 1975 report, determined that appellant had sustained a "tumor medial malleolus distal tibia left" as a result of the injury of November 22, 1974, and paid compensation for temporary total disability retroactive to January 20, 1975.

On February 10, 1975 Dr. Liggett submitted a report on Office form CA-20 in which he repeated his diagnosis of "chondrosarcoma of distal end of left tibia." He also submitted a February 28, 1975 report on Office form CA-20a in which he repeated his earlier diagnosis and checked the box marked "yes" in response to the question "Is employee's present condition due to the injury for which compensation is claimed?"

In a March 11, 1975 report Dr. Francis noted that he had examined appellant on that date. He diagnosed "low-grade chondrosarcoma of the distal tibia left" and recommended that no surgery be performed at that time. In a March 14, 1975 report he concluded that the claimed injury could have aggravated appellant's condition.

On April 15, 1975 an Office medical adviser reviewed the evidence and concluded that appellant's underlying condition of "chondrosarcoma distal end of left tibia" had been aggravated by the trauma of the November 22, 1974 injury.

In an October 8, 1975 response to an Office request for a current evaluation of appellant's condition, Dr. Liggett submitted a report on Office form CA-20. Dr. Liggett diagnosed "tumor medial malleolus distal tibia left; chondrosarcoma of distal end of left tibia," and causally related appellant's condition to factors of his federal employment.

On October 20, 1975 Dr. Francis submitted a report on Office form

CA-20 in which he related the results of his October 14, 1975 examination of appellant. Dr. Francis repeated his earlier diagnosis and causally related appellant's current condition, by way of aggravation, to the November 22, 1974 injury.

In a January 14, 1976 letter to the employing establishment, Dr. Liggett released appellant to light duty for four hours daily. Appellant returned to work in this status on January 22, 1976. Subsequently, on March 12, 1976 Dr. Liggett increased appellant's workday to eight hours, and appellant returned to full-time status on March 15, 1976.

In July of 1980, appellant contacted Dr. Emanuel M. Viscusi, who referred him to Dr. Joseph N. Savino, a Board-certified radiologist, for an x-ray examination. In a July 31, 1980 report Dr. Savino stated:

> "An area of soft tissue prominence is present at the anterior aspect of the ankle.
>
> "The underlying osseous structures show a lucent area involving the anterior aspect of the most distal portion of the tibia.
>
> "Periosteal reactions with spiculation is seen anteriorly. Thick periosteal reaction is present proximally and is most pronounced anteriorly and medially.
>
> "A postoperative status is noted (1974 by history). The remaining osseous, articular and soft tissue structures are intact.
>
> "Impression: malignant giant cell tumor."

On August 2, 1980 appellant was examined by Dr. Viscusi. In an August 5, 1980 report to the Office, Dr. Viscusi remarked:

> "Consultation with the patient on August 2 disclosed a history of chondrosarcoma of the left ankle joint for which surgery was performed in December of 1974. There can be no doubt that the present inflammatory aggravation was precipitated in the course of his duties as a post office clerk, walking about and standing on his feet."

Appellant stopped work on August 11, 1980. He filed a notice of recurrence on the same day, alleging that he had sustained a recurrence on August 2, 1980.

On September 1, 1980 Dr. Savino submitted an x-ray report to Dr. Viscusi, in which he noted:

> "Significant progression in the previously described changes in the distal portion of the tibia from malignant giant cell tumor are visualized. A lucent area at the anterior aspect of the distal tibia has undergone significant enlargement as has the periosteal reaction. A marked soft tissue prominence is present at this level.
>
> "Demineralization distal to the lesion is attributed to the absence of normal stress.
>
> "Impression: malignant giant cell tumor bone."

In a September 2, 1980 report on Office form CA–20, Dr. Viscusi stated that he found "massive edema and inflammation" of appellant's left ankle in his examination of that day. He diagnosed "acute inflammatory periostitis," and causally related appellant's condition to factors of his federal employment.

Dr. Viscusi subsequently referred appellant to Dr. Joseph P. Demeri, a Board-certified orthopedic surgeon. In a September 22, 1980 report Dr. Demeri related appellant's history and the results of his September 16, 1980 examination. The doctor diagnosed a "recurrent chondrosarcoma distal tibia left" and noted that amputation of appellant's left lower extremity might be necessary. Dr. Demeri did not comment on the relation of appellant's condition to factors of his federal employment.

On September 24, 1980 Dr. Demeri referred appellant to Dr. Ralph C. Marcove, a Board-certified orthopedic surgeon of professorial rank. In a report of that date on Office form CA–20, Dr. Marcove diagnosed chondrosarcoma of the left ankle and negated any causal relationship between appellant's current condition and his employment. On October 21, 1980 appellant returned to work.

On February 9, 1981 an Office medical adviser reviewed the evidence and concluded that appellant had sustained an aggravation of an underlying condition causally related to his employment. The medical adviser diagnosed malignant giant cell tumor of appellant's distal left tibia, and noted that appellant had aggravated this condition "by prolonged standing at work."

On February 11, 1981 the Office determined that appellant had sustained a recurrence on August 2, 1980 due to aggravation of an underlying condition. The Office authorized payment of compensation for temporary total disability for the period from August 11, 1980 through October 20, 1980.

On April 20, 1981 appellant filed a notice of an April 17, 1981 recurrence of his left ankle condition. He submitted April 17, 1981 and May 7, 1981 reports on Office form CA–20 by Dr. Viscusi, who noted massive edema, inflammation and tumor enlargement at the site of the original injury. In each report, Dr. Viscusi diagnosed acute periostitis and giant cell tumor of the left ankle, and causally related appellant's condition to factors of his federal employment.

In an August 5, 1981 report a second Office medical adviser reviewed the evidence of record. He diagnosed a giant cell tumor and concluded that appellant's condition was not causally related to factors of his federal employment, and was instead due to the natural progression of the inherent pathology.

On August 27, 1981 the Office referred appellant, the case record and a statement of accepted facts to Dr. Julius Schneiderman, a Board-certified orthopedic surgeon, for examination and evaluation. In a September 29, 1981 report Dr. Schneiderman stated:

> "The pathological report revealed that the cyst was a low grade chondrosarcoma. Curetting a cyst of this type does not remove it entirely, and it is bound to recur. The recurrences were due to the chondrosarcoma and not the [November 22, 1974] accident. I must emphasize this. The recurrences of the cyst were not due to the accident but due to the original pathology."
>
> * * *
>
> "I am certain that the pathology is the same, a chondrosarcoma, which has become very aggressive and probably has now metastasized. The leg will have to be amputated, hopefully below the knee, and should have been amputated when the original diagnosis was made.
>
> " *** The recurrence of his disability on April 17, 1981 is in no way related to the accident of November 22, 1974."

In an October 23, 1981 report Dr. Joseph M. Lane, a Board-certified orthopedic surgeon of professorial rank, noted that he had examined appellant on October 14, 1981. He diagnosed chondrosarcoma of the distal end of the left tibia, and causally related appellant's condition to the November 22, 1974 employment injury. Dr. Lane stated that appellant would be hospitalized on October 25, 1981.

In an October 28, 1981 report an Office medical consultant reviewed Dr. Schneiderman's report and concluded that "the recurrent disability starting April 17, 1981 is in no way related to the accident of November 22, 1974. It is due to a preexisting condition."

On November 16, 1981 Dr. Lane submitted a report on Office form CA–20 in which he stated that appellant had been hospitalized from October 25, 1981 to November 7, 1981. Dr. Lane reported that "x-rays revealed a large destructive lesion with anterior cortical destruction [eroding] into the cortex, marked periosteal reaction with proximal extension." He diagnosed recurrent chondrosarcoma of the left ankle and noted that appellant's left lower extremity had been amputated below the knee on October 28, 1981. Dr. Lane concluded that appellant's condition was causally related to factors of his federal employment.

In a February 12, 1982 compensation order, the Office rejected appellant's claim on the ground that "claimant's disability beyond October 20, 1980 was not attributable to the work incident of November 22, 1974."

On February 23, 1982 Dr. Schneiderman submitted a report in response to an Office request for clarification. He stated:

> "This is in reference to your letter of February 1, 1982 wherein you

> request a clarification as to whether [appellant's] standing at work aggravated a preexisting chondrosarcoma of his distal left tibia.
>
> "It is my opinion that his standing at work did not in any way influence the progress of the chondrosarcoma. There is no precedence in the literature that weight-bearing in any way antagonizes progress of this lesion. In other words, there is no relationship between weight-bearing and the advancement of the chondrosarcoma as seen in this instance.
>
> "The only way to have eliminated this lesion was to remove the limb when the condition was first diagnosed. Nonweight-bearing would not have influenced this condition."

At appellant's request, a hearing was held before an Office hearing representative on December 14, 1982. At the hearing, appellant submitted Dr. Liggett's progress notes and an April 22, 1975 report not previously in the record.

Subsequent to the hearing, appellant's representative submitted two reports — a December 27, 1982 report from Dr. Viscusi and a December 28, 1982 report from Dr. Lane. Dr. Viscusi stated:

> "When I first saw [appellant on August 2, 1980] he was advised to discontinue all occupational duties to allow for some degree of clinical recovery in the face of massive swelling. He was given decongestive therapy. An August 11, 1980 examination revealed appreciable reduction of swelling. Again, he was admonished to forego accustomed work and to return in September. But, under the pressure of financial difficulties, [appellant] elected to resume gainful occupational duties despite the unresolved inflammation.
>
> "During the interval of rest and avoidance of prolonged weight-bearing and walking, there was obvious detumescence and improvement. Recurrence was therefore work related."

Dr. Lane reported:

> "[Appellant] had a chondrosarcoma of his distal tibia. The job at which he was working caused stress on the tumor. The tumor became extremely active due to the stresses of his job. He necessitated an amputation. It is difficult to determine the exact relationship of his job to the tumor. I can only say that the standing caused edema. Edema fed the tumor and the tumor then proceeded to grow. I would say that there is a contribution of the job to aggravation of the preexisting tumor, but not to its etiology."

In a May 18, 1983 decision finalized on May 20, 1983, the Office hearing representative affirmed the February 12, 1982 Office decision, on the ground that Dr. Schneiderman's report negating causal relation represented the weight of the medical evidence.

The Board finds that the case is not in posture for decision.

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[1]

Once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner. The reports of Drs. Liggett and Viscusi prior to the August 27, 1981 referral to Dr. Schneiderman all indicated a causal relationship between appellant's disability commencing April 17, 1981 and factors of his federal employment. However, the Office determined that their reports were insufficient to support a finding of causal relationship and concluded that further medical evidence was necessary. At this point, the Office should have referred appellant to a Board-certified oncologist, the type of specialist best able to evaluate appellant's chondrosarcoma and its possible relationship to factors of his federal employment.

In this case, the Office referred appellant, a statement of accepted facts and the case record to Dr. Schneiderman, a Board-certified orthopedic surgeon. He was requested to evaluate appellant's current condition and state whether it was causally related, by way of aggravation, to factors of his federal employment. The Board notes, however, that while Dr. Schneiderman is a Board-certified orthopedic surgeon, he is not a Board-certified oncologist, the type of specialist best able to evaluate appellant's oncological condition. Therefore, the Board finds that the Office did not fulfill its responsibility in the development of the medical evidence because it did not refer appellant to the proper specialist—a Board-certified oncologist.

On remand, the Office should refer appellant, a statement of accepted facts and the entire case record to a Board-certified oncologist for a well-rationalized opinion whether appellant's disability commencing April 17, 1981 was causally related, by way of aggravation of the underlying chondrosarcoma, to the employment injuries to the left ankle or to other factors of his federal employment. The specialist should be requested to discuss the opinions of Drs. Lane and Schneiderman in his review of the medical evidence of record. After such further development as it may deem necessary, the Office should issue a *de novo* decision.

The decision of the Office Workers' Compensation Programs dated

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[1] *Russell F. Polhemus*, 32 ECAB 1066.

May 18, 1983 is hereby set aside; the case is remanded to the Office for further proceedings consistent with this decision.

In the Matter of Charles Delbert Ray *and* U. S. Postal Service, Post Office, Woodward, Okla.

Docket No. 83–1141; Hearing November 7, 1983;
Issued December 28, 1983

Appearances: *Charles Delbert Ray*, appellant, and *D. D. Collins, D.C.*, for appellant; *Daniel T. Franklin, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. Gerald Lamboley, George E. Rivers, Willie T. C. Thomas

The issue is whether the appellant is entitled to payment for chiropractic services after May 16, 1980.

On February 13, 1976 appellant, then a 45-year-old rural mail carrier, filed a claim alleging that he sustained low back pain beginning on August 19, 1975.[1] He stated that the pain was caused "by reaching across vehicle to place mail in mailbox located at curbside and on the right hand side of vehicle."

In support of his claim, appellant stated that he was first treated for low back pain on August 19, 1975. A June 11, 1976 report by Dr. D. D. Collins, a chiropractor, confirmed that appellant sought treatment on August 19, 1975. Dr. Collins indicated that appellant was totally disabled due to chronic grade II disc protrusion of L4-L5 and L5-S1 with arthrosis. Dr. Collins also causally related appellant's condition to factors of his federal employment.

In a June 18, 1976 response to an Office of Workers' Compensation Programs request for additional information, appellant noted a 1964 back injury he sustained in a rear-end collision and submitted a September 17, 1975 report from Dr. Collins. Dr. Collins stated:

> "We have treated [appellant] for the past five weeks for a chronic back problem which was injured some years ago.
>
> "He now suffers from an acute manifestation of that chronic disorder which is apparently directly associated with the new job he now has."

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[1] Appellant's October 17, 1975 application for disability retirement based on this condition had been denied by the Civil Service Commission [now the Office of Personnel Management] on February 3, 1976, on the ground that the medical evidence did not indicate that he was totally disabled for useful and efficient service.

In a December 27, 1976 compensation order the Office rejected appellant's claim for compensation on the ground that "The weight of the medical evidence does not show that claimant has a disabling back condition caused or aggravated by factors of his employment."

On January 25, 1977 appellant requested a hearing before an Office hearing representative. At the September 19, 1977 hearing, appellant submitted an April 11, 1977 letter from Dr. Collins into evidence. Dr. Collins restated his diagnosis of chronic grade II disc protrusion of L4-L5 and L5-S1 and suggested light duty.

In a February 13, 1978 memorandum to an Office medical adviser, the hearing representative requested an opinion on the medical evidence of record. On February 17, 1978 the medical adviser, after reviewing the medical evidence, concluded that appellant had a disabling back condition. He diagnosed it as arthrosis (degenerative joint disease) of the lumbosacral spine with residuals of multiple low back injuries. He stated that these conditions had been aggravated by occupational activities beginning in August of 1975.

In a March 15, 1978 decision the Office hearing representative found that factors of appellant's federal employment had aggravated a preexisting back condition. Therefore, he set aside the December 27, 1976 Office decision denying compensation and directed the payment of appropriate compensation.[2]

Appellant subsequently submitted a travel voucher to the Office for trips he made to Dr. Collins' office for treatment. In a June 8, 1979 letter the Office requested additional information before it would authorize payment. Dr. Collins submitted an August 8, 1979 report in which he repeated the diagnosis of chronic grade II disc protrusion of L4-L5 and L5-S1 with arthrosis in the area, and noted that he had been treating appellant continuously since August 19, 1975.

In an August 15, 1979 letter decision the Office denied payment for chiropractic services performed by Dr. Collins. The Office stated:

> "Since your claim for compensation has been accepted for an aggravation of a preexisting back condition, we can no longer honor payment to Dr. Collins. In addition, your physician should be within 25 miles from your residence or place of employment. If this is not practical, the nearest medical facility may be authorized to provide necessary care. There are a number of physicians located in Guymon, Hooker, Beaver, and LaVerne, Oklahoma. We will reimburse you for travel as indicated on voucher submitted, but will not do so in the future."

In a March 10, 1980 report in response to a specific Office inquiry,

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[2] Appellant was examined by several other physicians during the development of his case, including Board-certified orthopedic surgeons and Board-certified neurosurgeons. Their reports are not discussed here because they do not concern the issue on appeal.

Dr. Collins repeated his earlier diagnosis of appellant's condition and added that continuous treatment would be necessary to keep appellant free from pain.

On March 17, 1980 the Office reiterated in a letter to appellant that no further payments would be made for chiropractic treatment or for travel. He was also informed that bills for treatment and travel submitted after August 15, 1979 had been paid in error, and that a current medical evaluation was required.

The case record contains a March 21, 1980 notation of a telephone conversation between appellant and an Office claims examiner, in which the claims examiner indicated that the Office would pay the chiropractic bills but not appellant's travel expenses.

On May 16, 1980 the Office sent appellant a second notice of its August 15, 1979 letter decision in which it refused to pay for chiropractic services and travel expenses. In a July 17, 1980 letter the Office repeated its request that appellant obtain a current medical evaluation.

In an August 11, 1980 letter to the appellant, the Office stated:

> "In follow-up of our conversation on August 11, 1980 you are advised that due to authorization given by phone on March 21, 1980 we will pay for chiropractic treatment until May 16, 1980. On May 16, 1980 you were provided with a second copy of our previous letter regarding termination of payment for chiropractic treatment.
>
> "Travel expenses will not be paid as you were advised on March 21, 1980 that travel would not be paid."

In an August 11, 1980 letter appellant requested a hearing before an Office hearing representative on the issue of the Office's refusal to pay for chiropractic services.

In an August 26, 1980 report and accompanying work restriction evaluation prepared in response to an August 11, 1980 Office request for a medical report, Dr. Collins related the results of his examination of appellant and stated:

> "Comparative x-rays dated August 19, 1975 and August 15, 1980 show marked improvement in vertebral alignment and disc spaces, particularly at the level of L5-S1."

* * *

> "Diagnosis: Chronic grade II disc protrusion of L4-5 and L5-S1."

* * *

> "Prognosis: We expect the patient to continue some form of care in order to be able to continue with the various duties that he is able to perform."

On November 17, 1980 a hearing was held before an Office hearing representative. In a November 24, 1980 letter to the Office, Dr. Collins supplemented his August 26, 1980 report and noted that the diagnosis given previously was a "medical diagnosis," while the "chiropractic diagnosis" was subluxation of L3, L4 and L5.

In a March 26, 1981 decision finalized on March 27, 1981, the hearing representative noted that Dr. Collins' August 26, 1980 report mentioned x-rays without diagnosing a subluxation, while his November 24, 1980 report diagnosed a subluxation without mentioning x-rays. The hearing representative affirmed the Office decision that rejected payment for chiropractic services of Dr. Collins after May 16, 1980 and travel expenses of appellant for his treatment.

Appellant subsequently requested reconsideration and submitted a May 2, 1981 report by Dr. Collins in support of his request. Dr. Collins stated:

> "Our bills are being denied on the basis that reimbursable services of a chiropractor are limited to treatment consisting of manipulation of the spine to correct a subluxation as demonstrated by x-ray.
>
> "We asked Dr. Edward I. Lynch, D. C., Diplomate, American Chiropractic Board of Roentgenology to review [appellant's] x-rays and his report follows:
>
> " 'The L5 segment resides low between the innominates likely causing an instability of the lumbosacral articulation. There is left lateral flexion subluxation of L5 and L4 with a shallow left convexity of the lumbar region extending cephalically through the mid-thoracic region. At the T4-5 vertebral motor segment there is a sharp left lateral flexion of T4 with a sharply angulated right convex scoliosis extending through the cervicothoracic junction. In the cervical region there is right lateral flextion subluxation of C4 with an apparent short curve scoliosis through the cervico-occipital junction.'
>
> "We concur with the above report and from the beginning we have treated [appellant] for subluxation of L3, 4, and 5 as demonstrated by x-ray."

The Office obtained the August 19, 1975 and August 15, 1980 x-rays taken by Dr. Collins and submitted them to Dr. Roger S. Kuharski, a Board-certified radiologist. In a July 7, 1981 report Dr. Kuharski concluded:

> "The only abnormality I see on both series of films is a slight scoliosis of the mid-dorsal curvature with convexity to the right. This is unchanged on either of the films; it is not considered to be a significant amount of scoliosis and is seen in a large number of patients. No significant abnormalities of the cervical, dorsal or lumbar spine are identified. In particular, the lateral film demonstrates no evidence of subluxation on either of the series. The lumbosacral angle is minimally accentuated. There are some minimal degenerative

changes anteriorly in the lumbar area. The interspaces are well maintained and any difference in appearance in the interspace between 1975 and 1980 films is due to the level at which the tube was centered producing a less than true view on the 1975 film. There are no other abnormalities noted.

"CONCLUSION: (1) No evidence of subluxation. (2) Minimal degenerative changes of the lumbar spine. (3) Mild scoliosis of the middorsal curvature noted. (4) No evidence of interspace narrowing or other changes of degenerative disc disease identified."

On July 17, 1981 the Office issued a compensation order denying appellant's request for reconsideration on the ground that "the evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

On July 24, 1981 appellant filed an appeal with the Board. On February 9, 1982 the Director of the Office of Workers' Compensation Programs filed a motion requesting that the case be remanded to the Office for further development. In the motion the Office noted:

> "The medical evidence is in conflict with respect to whether appellant has sustained a subluxation as demonstrated by x-ray. Dr. Collins, a chiropractor, had indicated that appellant has sustained a subluxation of the spine as demonstrated by x-ray."
>
> * * *
>
> "In contrast to Dr. Collins, Dr. Kuharski, a Board-certified radiologist to whom the Office referred appellant's x-rays for evaluation found no subluxation as demonstrated by x-ray."

The Office requested that the Board remand the case to the Office for referral of the case record and the x-rays to a Board-certified orthopedic surgeon for a rationalized opinion as to whether appellant has sustained a subluxation of the spine as demonstrated by x-ray.

In a March 4, 1982 order the Board granted the Office's motion.

On December 18, 1982 the Office referred the case record and x-rays to Dr. George W. Sibley, a Board-certified orthopedic surgeon. The Office requested that Dr. Sibley provide a rationalized medical opinion on the existence of a subluxation of appellant's spine as demonstrated by x-ray.

In a January 19, 1983 report Dr. Sibley reviewed the case record and x-rays. He noted that both sets of x-rays revealed mild degenerative changes throughout the lumbar spine and well-maintained disc spaces. He concluded that appellant's lumbar spine was normal, and noted that "specifically there is no subluxation." Dr. Sibley's diagnosis was a sprain or strain of appellant's back.

On January 20, 1983 an Office medical adviser reviewed Dr. Sibley's report and agreed that there was no evidence of a subluxation. He diagnosed an acute lumbosacral strain, resolved.

In a March 29, 1983 compensation order the Office rejected appellant's claim for payment for chiropractic services on the ground that "the weight of the medical evidence does not show that there is a subluxation of the spine as demonstrated by x-ray . . . "

The Board finds that the case is not in posture for decision.

Appellant's attending chiropractor, Dr. Collins, indicated in his November 24, 1980 report that x-rays taken on August 19, 1975 and August 15, 1980 revealed a subluxation of L3, L4 and L5. In addition Dr. Lynch, a Board-certified chiropractic roentgenologist, reviewed the x-rays and stated that "there is a left lateral flexion subluxation of L5 and L4 . . ."

These x-rays were subsequently evaluated by Dr. Kuharski, a Board-certified radiologist, who concluded that they revealed "no evidence of subluxation." Dr. Sibley, a Board-certified orthopedic surgeon, also reviewed the x-rays of appellant's spine and concluded that "specifically there is no subluxation." Accordingly, there is a conflict in the evidence as to whether there is a subluxation.

To resolve this conflict, the Office should refer the x-rays, the case record and a statement of accepted facts to a Board-certified radiologist for a complete review. The radiologist should be requested to provide a rationalized medical opinion whether the x-rays reveal a subluxation of appellant's spine. After such further development as it may deem necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated March 29, 1983 is hereby set aside; the case is remanded to the Office for further development in accordance with this decision.

In the Matter of CHARLES D. RAY *and* U.S. POSTAL SERVICE, POST OFFICE Woodward, Okla.

Docket No. 83-1141; Submitted on the Record; Issued March 14, 1984

ORDER DENYING PETITION FOR RECONSIDERATION

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The Board issued its decision and order in the above-entitled case on December 28, 1983. The Director of the Office of Workers' Compensation Programs filed a petition for reconsideration, contending that the Board, instead of remanding the case for further development, should have affirmed the March 29, 1983 Office decision.

Appellant was served with a copy of the petition for reconsideration. In his reply he submitted additional medical evidence, including a March 23, 1982 report by Dr. James R. Newcomb, D.C., Diplomate, American Board of Chiropractic Orthopedists, which appellant stated was included in the record. However, the Board notes that the case record does not contain a copy of Dr. Newcomb's report.[1]

The Board, having duly considered the matter, finds that it consists essentially of contentions already considered by the Board, and that it fails to establish any error of fact or law warranting further consideration. The Board notes that the conflict found in the above-entitled case concerned a conflict in the radiological evidence as to whether a "subluxation as demonstrated by x-ray to exist"[2] was present; the case was therefore remanded for referral to a Board-certified radiologist as the most appropriate specialist to resolve the conflict.

Accordingly, IT IS ORDERED that the petition for reconsideration be and it hereby is denied.

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[1] Appellant may wish to submit this evidence to the Office in connection with its further development of his claim.

[2] 5 U. S. C. section 8101 (2).

In the Matter of JOSEPH R. GUAY *and* U.S. POSTAL SERVICE, POST OFFICE, Royal Oak, Mich.

Docket No. 83–1688; Submitted on the Record;
Issued December 28, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellant's March 15, 1982 recurrence of disability from a left hip osteoarthritic condition was causally related to factors of his federal employment.

On January 20, 1976 appellant, then a 48-year-old letter carrier, filed a claim alleging that he had developed arthritis in his left leg since 1972 as a result of his employment. Appellant stated that he first received treatment for his condition from his former personal physician, Dr. William Bauer, on November 22, 1972. Appellant stopped work on January 26, 1976 and returned to his regular duties on February 4, 1976, using sick leave in the interim.

On February 10, 1976 appellant requested repurchase of sick leave. In support of his claim he submitted a January 27, 1976 report by Dr.

Leonard J. Portner, a Board-certified family practitioner. Dr. Portner noted that appellant had complained of arthritis in his left leg since 1972, and diagnosed arthritis of the left hip. The doctor checked the box marked "yes" in response to the question "Do you believe this disability is in any way related to the history of the injury as given above?" Dr. Portner also stated that appellant's disability "could be caused by continuous walking."

In a February 12, 1976 letter to the Office of Workers' Compensation Programs, appellant submitted a January 30, 1976 report from Dr. Martin L. Weissman, a Board-certified orthopedic surgeon, who diagnosed "degenerative osteoarthritis, with aseptic necrosis of the left hip" and recommended that appellant be given light-duty work.

On April 9, 1976 the Office determined that appellant had sustained a temporary aggravation of his arthritic left hip condition and authorized repurchase of sick leave used for this period of disability.

In a January 27, 1977 telephone conversation, appellant informed the Office that he was having a recurrence of his arthritic condition and requested that medical benefits be authorized. The Office issued the requested authorization on that date.

On February 1, 1977 appellant returned to work and filed a notice of recurrence of disability, alleging that he sustained a recurrence of his arthritic condition on January 24, 1977. In a February 10, 1977 report Dr. Weisman related the results of his examination of appellant on that day. Dr. Weissman stated:

> "X-rays taken of the lumbosacral spine and standing pelvis and left hip in the AP [anterior-posterior], lateral and oblique projections reveal progressive narrowing of the left hip joint with degenerative osteoarthritis present.
>
> "I do feel, since it is progressively going on to degenerative osteoarthritis of the left hip, that he should be involved in work that does not involve excessive walking or lifting, perhaps a sedentary job in a sitting type position would be beneficial for him. I feel eventually he will require surgery for correction of this but not at this time."

On June 20, 1977 the Office determined that appellant had sustained a recurrence of his arthritic condition on January 24, 1977 and authorized repurchase of sick leave and the payment of medical benefits.

On March 15, 1982 appellant stopped work. On March 18, 1982 he subsequently filed another notice of recurrence of disability due to his arthritic condition. He stated that he was "in pain daily" and had difficulty walking. In support of his claim, appellant submitted a report of the same date by Dr. Weissman, who stated that "x-rays reveal significant degenerative changes within the joint with complete obliteration of the joint space of the left hip." Dr. Weissman diagnosed arthritis of the left hip and concluded that appellant's current condition was materially aggravated by factors of his federal employment. The doctor also noted that surgery for this condition was being scheduled for the near future.

In an April 20, 1982 response to an Office request for additional information, Dr. Weissman submitted his medical records, including a March 15, 1982 report. In this report Dr. Weissman stated:

> "This gentleman returns back today for evaluation of his hip. He has undergone further degenerative changes; has significant degenerative changes within the joint with complete obliteration of the joint space.
>
> "He does require a total hip replacement. I am sending him for therapy to build up the musculature as much as possible and I think he will do beautifully with the total hip replacement. He is scheduled for this in about six weeks. In the meantime he is to undergo therapy."

On April 27, 1982 appellant was hospitalized for a total hip arthroplasty. In an April 28, 1982 report Dr. Harry D. Tabor, a Board-certified radiologist, related the results of an x-ray examination of appellant performed that day and concluded:

> "In the left hip the joint space is almost completely obliterated. There are numerous subchondral cysts as well as sclerosis and mild spur formation at the joint margins. Changes are consistent with degenerative arthritis. The right hip appears normal. The remainder of the bony pelvis is unremarkable."

On April 30, 1982 Dr. Weissman performed a total hip arthroplasty and removed appellant's arthritic left hip. A prosthesis was inserted and the removed bony tissue was evaluated by Dr. Barbara F. Rosenberg, a Board-certified pathologist. In an April 30, 1982 report Dr. Rosenberg diagnosed severe degenerative osteoarthritis and mild chronic synovitis.

In a May 12, 1982 discharge summary Dr. Weissman diagnosed degenerative arthritis of appellant's left hip and noted that he had been discharged that day. Dr. Weissman reported the following history:

> "[Appellant] is a 54-year-old male who is employed as a letter carrier for the last ten years. This patient has complained of progressive pain and loss of motion of his left hip. There is no history of trauma and the pain is increased by activity."

In a May 18, 1982 response to a second Office request for further information, Dr Weissman submitted a May 17, 1982 report of an examination of appellant he conducted on that day. The doctor noted that appellant's hip had been examined and was in "excellent shape. He concluded:

> "He did hurt himself in 1972. The last ten years of walking as a mailman with constant pressure of that hip undoubtedly created the situation where he required a total hip arthroplasty. There is no question that it did aggravate the preexisting problem. At this stage, I do not feel that he should return to this kind of work."

On June 14, 1982 appellant applied for disability retirement. In support of his application he submitted a report of the same date by Dr. Weissman, who repeated his earlier diagnosis and related the following:

> "Patient has been working for the Post Office, with increasing pain in his left hip radiating down the left leg as he ambulates. There is pain on external and internal rotation when he is lifting bags on the left side, which increases the pain. It worsens as the day goes on."

On September 5, 1982 an Office medical adviser reviewed the evidence and concluded that appellant's federal employment had aggravated his condition. The medical adviser diagnosed aseptic necrosis and degenerative arthritis of the left hip. He concluded:

> "The cause of this disease is usually injury to the circulation of the hip. No such history of trauma has occurred. At times the cause is unknown. Dr. Weissman has also stated his belief, on May 17, 1982, that claimant did aggravate the problem in his hip by employment."

In a September 16, 1982 response to a third Office request for additional information, Dr. Weissman resubmitted his prior medical reports, and he submitted a June 28, 1982 report in which he stated:

> "This patient comes in now for evaluation of his left total hip arthroplasty. Clinically and radiologically it looks excellent. He may slowly return to his usual activity with the exception of excessive bending and lifting. Return back here in three months."

On October 9, 1982 an Office medical consultant reviewed the evidence and stated:

> "I do not feel the medical evidence or factual evidence is sufficient to permit acceptance as yet of causal relationship of work-factors to 1982 total left hip arthroplasty. Dr. Weissman has not been informed of OWCP's definitions of temporary vs. permanent aggravation. Additionally, I cannot determine from the file if claimant continued to work as a letter carrier after Dr. Weissman's January 30, 1976 medical report [recommending] sedentary work."
>
> * * *
>
> "Until the above questions are settled, causal relationship of work-

> walking to total hip arthroplasty via permanent aggravation is not established. I can't deny work-walking temporarily aggravated arthritis with each tour of duty."

On January 10, 1983 the Office referred appellant, the case record and a statement of accepted facts to Dr. Robert H. Finkle, a Board-certified orthopedic surgeon, for examination and evaluation. In a report of the same date, Dr. Finkle related appellant's work history and the results of this examination. He stated:

> "This patient exhibits a left total hip replacement with an excellent operative result and a normal anticipated recovery.
>
> "I have not spoken directly to Doctor Weissman. It is unusual for a patient to be restricted so that he cannot return to normal work duties. I have in the past following a total hip replacement allowed patients to go back to complete and normal work activities including walking in fields to do hunting. I cannot understand the rationale in restricting this patient from returning to his normal work duties as a letter carrier.
>
> "If the patient were not to return to his normal work duties as a letter carrier, he could certainly return to work duties as some type of clerk where he does some sitting and standing. However, I must state that I do not feel that any restriction is necessary for this patient following his total hip replacement arthroplasty.
>
> "At the present time the patient exhibits no orthopedic physical disability or functional impairment associated with his hips and lower extremities.
>
> "Regarding the question of casual relationship. I would not feel that the patient's work duties produced or aggravated his left hip problem. There would be nothing about the work duties associated with the Post Office and a letter carrier that would be unique that would produce degenerative osteoarthritic change or an aseptic necrosis of the left femoral head. Duties performed as a letter carrier would not be unique in aggravating the aseptic necrosis. I have seen patients that have an aseptic necrosis that have continued to deteriorate and subsequently break down while continuing at bed rest. These particular patients would not be walking or doing any standing type of activities.
>
> "At the present this patient can perform his normal daily physical activities. He can perform his normal work duties without restriction. Experience has now shown over the years that these replacement prostheses do hold up routinely for more than twenty-five years. This would be ample time for this patient to finish his normal employment history and reach a retirement age.
>
> "If there is any concern voiced by the attending physician, I would

> definitely feel that this patient could return to a light duty assignment without question."

On February 12, 1983, a second Office medical consultant reviewed Dr. Finkle's report and diagnosed osteoarthritis of the left hip. He stated:

> "[Appellant] has idiopathic degenerative arthritis of the hip. This is a common condition in the middle-aged and elderly age group. There are no known precipitating factors for primary disease, although certainly one may get secondary degenerative joint disease after a dislocation, fracture, congenital abnormality or aseptic necrosis. None of these factors contributed to [appellant's] condition, so, by definition, he has primary (or idiopathic) disease. Primary disease is not occupationally related and progression of his disease over the last five years is consistent with the natural history of the disease."
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> * * *
>
> "I believe Dr. Finkle's remarks regarding [appellant's] ability to return to work are controversial. Many would agree with Dr. Weissman in restricting his work activity since it involves walking with a 70-pound load. Furthermore, Dr. Finkle's statements regarding the longevity of total hip arthroplasty . . . is inaccurate. The failure rate is 20 percent at 15 years."

On April 6, 1983 the Office issued a compensation order rejecting appellant's claim on the ground that the March 15, 1982 recurrence "was not related to factors of employment either by causation, precipitation, acceleration or material aggravation."

The Board finds that the case is not in posture for decision.

The case record contains some medical evidence in support of appellant's claim. The existence of an employment-related aggravation of appellant's osteoarthritis is consistently supported by the medical reports of Dr. Weissman, a Board-certified orthopedic surgeon and appellant's attending physician. In addition, the Office medical adviser and the first Office medical consultant who reviewed the evidence of record concluded that appellant has sustained an employment-related temporary aggravation of his osteoarthritis. The second Office medical consultant, after reviewing Dr. Finkle's report, did not discuss the issue of aggravation. While Dr. Weissman's reports lack sufficient medical rationale and other detail to discharge appellant's burden of proving by the weight of reliable, probative and substantive evidence that appellant's disability was causally related to factors of his federal employment, this does not mean that they may be completely disregarded by the Office. It merely means that their probative value is diminished.[1]

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[1] See *Thomas L. Chisnell*, 32 ECAB 1187.

Dr. Finkle's report does not have sufficient probative value to negate any employment-related aggravation of appellant's osteoarthritis. Dr. Finkle does not provide sufficient medical rationale for his conclusion that appellant's disability was not the result of any work-related aggravation. Under such circumstances, the reports of Dr. Weissman are sufficient to require further development of the record.[2]

The Office should prepare a new statement of accepted facts regarding appellant's employment duties and submit it, along with the case record, to a Board-certified orthopedic surgeon not previously connected with the case for examination of appellant and a rationalized medical opinion as to whether his disability beginning March 15, 1982 was related, by way of aggravation, to factors of his employment. The specialist should indicate whether any aggravation was permanent or temporary and, if temporary, should give the period of such aggravation. After such further development as it may deem necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated April 6, 1983 is hereby set aside; the case is remanded to the Office for further action consistent with this decision.

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[2] See *Horace Langhorne*, 29 ECAB 820.

In the Matter of LEONARD W. WAGGONER *and* DEPARTMENT OF THE AIR FORCE, STRATEGIC AIR COMMAND, VANDENBERG AIR FORCE BASE, Calif.

Docket No. 83-1645; Submitted on the Record;
Issued December 29, 1983

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no disability subsequent to July 14, 1975 causally related to the factors of his federal employment.

On September 24, 1975 appellant, then a 62-year-old firefighter, filed a notice of occupational disease alleging that he sustained a "heart condition brought on and caused by the stress of firefighting duties" first noted on July 18, 1975. Appellant had stopped work on July 16, 1975, utilized sick and annual leave between July 16 to November 3, 1975, when he retired on a civil service disability. He filed a claim for compensation on November 3, 1975.

In support of his claim appellant submitted the medical reports of his attending physician, Dr. R. Bruce McFadden, a Board-certified cardiologist, who indicated that appellant had been hospitalized on July 18, 1975 for a cardiovascular evaluation of chest pain. He stated at the time of appellant's admission to the hospital, as follows:

> "History reveals that approximately 6 months ago, [appellant] had the onset of exertional chest discomfort. He describes this as a severe vice-like sensation involving his retrosternal and upper chest bilaterally, associated with painful sensation on the inner aspect of his left arm, going into his fingers. This will come on with walking perhaps a quarter-mile, lifting gasoline cans or other heavy objects. However he has continued to work full time as a driver on a fire truck and two days ago, did a major run without pain. However, if he starts lifting fire hose, he will develop chest discomfort. With rest, it will disappear within a minute or two. He has had no pain like this at rest of nocturnally. There has been no acceleration or pain in terms of frequency or severity . . ."

Dr. McFadden diagnosed coronary artery disease and stated appellant had, at some time, experienced an anteroseptal wall myocardial infarction, however he was unsure whether the infarct was recent or had occurred 6 months prior when appellant's symptoms of angina were alleged to have begun. He also noted on July 21, 1975 appellant underwent a left and right heart catheterization which revealed a 99 percent obstruction lesion to the proximal portion of the anterior descending coronary artery and total obstruction in the mid portion of the right coronary artery. Dr. McFadden recommended appellant have coronary artery bypass surgery which was declined.

Appellant also submitted his medical records from the employing establishment which included a March 26, 1971 electrocardiograph which noted normal sinus rhythms. Appellant submitted an undated statement with regard to his employment duties as a fire fighter and noted that he had been exposed to various smokes and gases. A coworker of appellant submitted an undated statement in which he indicated witnessing two occasions when appellant complained of chest tightness and pain and had difficulty breathing while performing his routine duties. The first occurrence was stated to be April 27, 1975 and the second on July 14, 1975.

On November 7, 1976 Dr. McFadden filed an attending physician's report form on which he repeated his diagnosis of arteriosclerotic cardiovascular disease with severe angina pectoris. He indicated that appellant's heart disease was "presumptively work-related." In a subsequent report dated November 30, 1978 Dr. McFadden clarified his statement on the causal relationship of appellant's heart condition to his federal employment, stating:

> "When I last saw Mr. Waggoner, March 20, 1978, he continued to have angina pectoris precipitated by any type of physical activity, as well as any type of excitement, such as watching a sports event. These symptoms were controlled by having him avoid stress and by taking nitroglycerin and inderal.
>
> "We had previously documented severe coronary artery disease and I had suggested to him that he proceed with coronary artery bypass surgery in order to improve his exercise tolerance. Mr. Waggoner had elected to continue on a program of medical therapy. In the setting of the symptoms as described, I felt that we should regard him as permanently and totally disabled.
>
> "I understand that Mr. Waggoner was employed as a federal firefighter and that in the course of his employment, he was exposed to smoke inhalation of various chemicals and pollutants. I think it is reasonable to assume that the physical and mental stress of firefighting can certainly serve to accelerate the development of coronary artery disease and aggravate symptoms of angina pectoris. When the development of coronary artery disease is closely associated with this type of occupation, I think it is reasonable to conclude that there may be a causal relationship between occupation and heart disease."

By compensation order dated January 19, 1979 the Office of Workers' Compensation Programs rejected appellant's claim finding that the evidence failed to establish that the disability for which the claim was made was caused or otherwise brought about by factors of his federal employment.

By letter dated March 20, 1979 appellant, through his attorney, requested a hearing before an Office hearing representative. At the hearing held on January 31, 1980 appellant submitted the January 28, 1980 report of Dr. McFadden who repeated his diagnosis and conclusion that appellant's heart condition was causally related to his federal employment. He also submitted the records from his hospitalization in July, 1975 and medical records from the employing establishment.

On February 29, 1980 an Office medical adviser reviewed the medical files and concurred in Dr. McFadden's diagnosis of coronary artery disease with angina and a myocardial infarction by an EKG (electrocardiogram) of undetermined age. He noted, however, that the diagnosed conditions were not related to the factors of appellant's federal employment, stating "the infarction was of undetermined age and any comment on this would be speculative. Treating physician has not provided a detailed medical rationale in pathophysiology of the development of coronary artery disease with resulting angina."

By decision dated March 24, 1980 and finalized March 26, 1980 the

Office hearing representative affirmed the January 19, 1979 compensation order finding that the causal relationship between appellant's cardiac condition and his federal employment had not been established.

By letter dated April 28, 1980 appellant, through his attorney, requested reconsideration of the Office's decision. In support thereof the July 29, 1980 report of Dr. Reuben R. Merliss, a Board-certified internist, was submitted. The doctor noted that appellant had a 65 pack-year history of smoking and indicated that he had no prior history of any cardiac symptomatology prior to the first abnormal electrocardiogram taken in July of 1975. Dr. Merliss opined that the prolonged stress of appellant's federal employment accelerated his arteriosclerosis and caused or precipitated his infarction, angina and resulting disability. The doctor reviewed a series of medical articles concerning stress and its relationship to coronary artery disease and concluded that appellant's "disability developed during the time [he] was employed at Vandenberg as a fire fighter, and probably in the early part of 1975, since that is when the symptoms began."

On December 29, 1980 Dr. John R. Adams, an Office medical consultant in cardiology, reviewed Dr. Merliss' report and stated:

> "In my opinion the report by Dr. Merliss does not constitute a conflict with previous medical reports submitted. For the most part I agree with his conclusions, namely: (1) the patient had a myocardial infarction in the past (as demonstrated by angiography) and has severe coronary artery disease, (2) he is totally disabled, and (3) the disability developed during the time that he was employed as a fireman at Vandenburg AFB. There is however no evidence submitted to substantiate that the claimant did not have severe atherosclerotic coronary artery disease prior to the time of his employment as a federal fireman. He has a 65 pack-year history of smoking, the majority of which was prior to his employment and this fact alone makes him a very high risk having had asymptomatic coronary artery disease prior to his employment. His myocardial infarction was a silent one which may have occurred at any time. His subsequent angina pectoris, which is his current disabling condition, is most likely due to the high grade proximal lesion of his left anterior descending coronary artery. It is not possible to determine when this and other coronary artery lesions first began to develop but the evidence documents that they did not become significant, i.e., disabling, until 1975.
>
> "Dr. Merliss presents a summary of some important medical articles which suggest that stress may accelerate the process of atherosclerosis. Articles are also reviewed that suggest that firemen are possibly more likey to develop arteriosclerotic heart disease than are other workers. In my opinion, the evidence presented does not,

> however, convincingly demonstrate that there is a causal relationship between being a fireman and developing severe coronary artery disease. Thus, I cannot totally agree with his opinion that stress of this claimant's work as a fireman was totally responsible for his disability."

* * *

> "The evidence submitted does not convincingly establish that this patient's disability was caused by the conditions of his employment. The stress of his employment as a fireman may, however, have aggravated or even have precipitated his disability from angina pectoris once this condition became manifest during the time of his employment as a fireman."

On January 6, 1981 the Office requested Dr. Adams to clarify his report in regard to his statement that the stress of appellant's employment may have aggravated or precipitated his disability once his angina became manifest.

On February 16, 1981 Dr. Adams responded:

> "Arteriosclerotic heart disease (ASHD) is a condition thought to begin in childhood and which progresses over many years. It will usually remain silent throughout most of the adult years, becoming manifest in later life only when luminal narrowing of at least one coronary artery results in a reduction in blood and oxygen supply to a particular segment of myocardium. At that time the demand for blood and oxygen by the particular segment of myocardium will outstrip the supply capabilities of the involved coronary artery. As a result of this imbalance between supply and demand for coronary blood flow and oxygen, myocardial ischemia will result. In its less severe forms myocardial ischemia will result only in transient chest pain termed angina pectoris. In its severe and prolonged form myocardial ischemia can result in myocardial infarction (MI). In this instance the ischemia has been prolonged or the involved vessel has become totally occluded and a portion of the myocardium undergoes a process of cellular necrosis and tissue death.
>
> "The precise cause or causes of ASHD have yet to be totally defined. The development of ASHD has been shown to be related to certain risk factors. Major risk factors for the development of ASHD include: increasing age, male sex, previous family history of ASHD, hypertension, cigarette smoking, elevated serum lipids (cholesterol or triglycerides), and carbohydrate intolerance (diabetes mellitus). Many other minor risk factors, i.e., less significant, have been suggested, but the evidence for their participatory role in the development of ASHD is not as convincing or remains unproven. By unproven it is meant that they have as yet failed to meet the

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accepted statistical requirements of the majority of the medical community to be considered as being true. The American Heart Association has been active in investigating this issue. Some of these unproven minor risk factors for developing ASHD include: obesity, sedentary living, water hardness, trace elements, personality type, psychosocial tensions, and others. Psychosocial tensions and psychological stress remain unproven risk factors for the development or aggravation or acceleration of the process of ASHD."

* * *

"Yes, it is a conjectural statement to say that the stress of his employment may have aggravated or even precipitated his disability once his angina pectoris became manifest and I feel that the medical evidence presented in the file does not conclusively support this as fact. This claimant's medical problems and disability are due to the established diagnosis of arteriosclerotic heart disease (ASHD). For reasons stated above I do not believe that the evidence in the file supports a finding that the stress of his employment actually led to the basic underlying coronary atherosclerotic process. His angina pectoris is secondary to this underlying process (ASHD). Angina pectoris will become clinically manifest during times of stress or physical exertion. This pain of angina pectoris, however, is not due to the job itself, but rather to the underlying process of ASHD. Angina pectoris will be precipitated in the presence of physical or emotional stress whether this is recreational or during employment. Thus there is nothing extraordinary to the claimant having angina pectoris during these times. Anything which increases the work load of the heart is going to lead to angina pectoris and one cannot assume that the angina pectoris was due to the particular stressful event that happened to precipitate it at that time.

"Thus, the stress or physical exertion required in being a fireman may have precipitated angina pectoris in this claimant, but the claimant's underlying process of ASHD (which is the real reason why he has angina pectoris) is, in my opinion, unrelated to the factors of his federal employment."

The Office found a conflict between the medical opinions of Dr. Merliss and the medical consultant in cardiology and on June 16, 1981 referred appellant, together with the case record and a statement of accepted fact, to Dr. Pedro A. Diaz, a Board-certified cardiologist, for an impartial examination and opinion on whether there was a causal relationship between appellant's heart condition and his federal employment.

In a report dated June 29, 1981 Dr. Diaz outlined appellant's history of illness and treatment, and indicated that he would conduct a treadmill exercise test to assess appellant's coronary status and capacity and a holter monitor to rule out the possibility of significant cardiac arrhythmia. As to the issue of causal relationship, the doctor stated:

> "I noticed that during his work as a fire fighter, he was working under continuous stress and also exposed to relatively heavy labor and not infrequently to fumes, acids, or flammable fuels. Pertinent information that I have available now points out very clearly that this patient's symptomatology was aggravated by his previously active duties as a fireman.
>
> "The main problem to decide is whether his coronary artery disease was accelerated by or caused by his employment as a fireman and that will be quite difficult to prove. It is possible that he had already latent coronary artery disease a few years prior in 1975 but progressively got worse, up to the point that he developed symptomatology just shortly before or after he had his first myocardial infarction which probably was a silent one and possibly a second one occurred sometime afterwards. The possibility of having acceleration of coronary artery disease is strong in the context of new evidence that not all myocardial infarctions are necessarily secondary to obstructive organic heart disease, secondary to plaques of cholesterol. As a matter of fact we are finding more and more evidence that not infrequently the cause of myocardial infarction is a fresh thrombus formed by deposition of fibrin and platelets and possibly related to a coronary artery spasm. Stress can precipitate myocardial injury on the basis of this mechanism. At the time that [the Office medical consultant] gave you a reply of his letters from December 29, 1980 the concepts of coronary artery spasm as a cause of myocardial infarction and its relationship to certain stressful situations did not come out on the medical literature yet.
>
> "On the overall, I tend to agree with the opinion expressed by Dr. Merliss that this patient's occupation somehow or another aggravated and accelerated the development of his myocardial infarctions. I do not think that his job was the cause of his arteriosclerotic heart disease. The patient also had documentation in the past of chronic obstructive lung disease with some restrictive component and I am not addressing on that area at this point."

Dr. Diaz's report was submitted by the Office to Dr. Ken A. Collingsworth, a second medical consultant in cardiology who, in a report dated July 29, 1981 stated:

> "This consultant finds Dr. Diaz's discussion and opinion somewhat confusing and somewhat contradictory.
>
> "The evidence available in the claimant's file indicated that he first developed symptoms of chest pain in April 1975 which were subsequently found to be angina pectoris. The file also indicates that

the claimant had angina pectoris during heavy physical exertion and an episode which occurred on July 14, 1975 prompted the claimant to seek medical care. On July 18, 1975 an exercise treadmill test was done which was markedly positive for ischemic changes. A coronary arteriogram was done on July 21, 1975 which revealed 99 percent left anterior descending coronary artery narrowing, a totally occluded right coronary artery and significant left circumflex coronary artery obstructions. The left ventricular angiogram revealed the presence of an akinetic inferior wall (which is consistent with the claimant's inferior myocardial infarction suggested by his electrocardiogram), and decreased contractility of the septum and apex of his left ventricle (which is consistent with his anterior septal myocardial infarction pattern seen on his electrocardiogram). The evaluation did not suggest the evolution of a myocardial infarction, when the claimant was seen on July 18, and it was thought that the myocardial infarctions had occurred not on July 14, 1975, but at some previous time. It was noted by one of the cardiologists, Dr. Bruce McFadden, that there had been no specific historical event to correlate with the myocardial infarction patterns seen on the claimant's electrocardiogram. Apparently, the episodes of angina pectoris or chest pain had not been of long enough duration to suggest that a myocardial infarction had occurred at any one particular time. There is a report in the claimant's file that an electrocardiogram performed in 1971 was normal.

"This consultant concurs with Dr. Diaz's view that the claimant's angina pectoris was aggravated by his duties as a fireman. According to the definition of aggravation by the Department of Labor, this would represent a temporary aggravation. The fact that the claimant did get his angina pectoris during heavy physical work duties as a firefighter is evidence to support that his work did aggravate his heart condition by causing angina pectoris. Angina pectoris represents inadequate blood supply to the heart in comparison to the requirements of the heart for blood. In the claimant's case, this was due to his documented severe coronary artery disease. The physical effort of his work and possibly exposure to smoke containing carbon monoxide which reduces the oxygen carrying capacity of the blood, resulted in an inadequate supply of blood and oxygen to the claimant's heart in comparison to the demands of his physical exercise on his heart, thus causing angina pectoris. However, since, as Dr. Diaz later states, his employment was not the cause of his arteriosclerotic heart disease and it should be accepted that his angina pectoris was due to his underlying severe coronary artery disease, the aggravation would be viewed as a temporary aggravation. Dr. Diaz does not make this distinction or even address a specific issue, but there would be no evidence for a permanent aggravation based on current medical evidence. The temporary aggravation would have extended from April 1975 when he first developed his angina pectoris to the last time that he developed angina pectoris on his job which was July 14, 1975. This view of aggravation by his work would be supported by the Guidelines of the American Heart Association in their report on stress, strain and heart disease in the journal *Circulation* in May 1977. The concept of carbon monoxide contributing to angina pectoris is discussed by the American Heart Association in a series of articles in the journal *Circulation* in January 1981. Dr. Diaz actually supports [the first Office medical consultant's] view with regard to the issue of aggravation.

"The issue of whether or not the claimant's underlying coronary artery disease was caused by factors of his federal employment was addressed by Dr. Diaz. As indicated above, he stated that he did not think that the claimant's job was the cause of his arteriosclerotic heart disease. Since the arteriosclerotic disease is the cause of the claimant's angina pectoris, and since angina pectoris does represent the claimant's current disability, it could be concluded that Dr. Diaz implies, although he does not specifically state, that the claimant's current disability or angina pectoris, is not due to factors of his federal employment. Dr. Diaz does not elaborate on his view that the claimant's job did not cause his coronary artery disease, but the medical evidence in the claimant's file would support this view. Dr. Merliss gave the opinion that the claimant's prolonged stress accelerated his coronary artery disease and caused or precipitated his myocardial infarction, angina pectoris and disability. [The first Office medical consultant] stated that the claimant's coronary artery disease was not due to his federal employment. The American Heart Association has stated that stress or strain is not a proven risk factor in the development of coronary artery disease. The American Heart Association has also stated that physical exertion has never been proven to be a risk factor in the development of coronary artery disease, and if any effect, may have slight beneficial effect in retarding or preventing the development of coronary artery disease. There is no evidence that exposure to smoke or fumes plays a role in the development of coronary artery disease. Therefore, there is no evidence to support the view that the claimant's federal employment caused his underlying coronary artery disease.

"The next issue is whether the claimant's myocardial infarction was caused by his federal employment. Dr. Diaz is confusing in his discussion of this subject, although he concluded that the claimant's occupation somehow or another aggravated and accelerated the development of his myocardial infarctions. It should be pointed out that the exact time that the myocardial infarctions occurred has not been identified by any of the physicians who have evaluated the claimant. Since the electrocardiogram from 1971 did not show evidence for a myocardial infarction, it could be reasonably concluded that it did occur after 1971. It has also been pointed out that there was no clinical episode by history which would define when the myocardial infarctions had occurred. The American Heart Association has stated that the occurrence of acute myocardial infarction is fortuitous and not usually related to any specific activity. They base this on the available medical evidence and report it in the journal *Circulation* in May 1977. They do state that an extraordinary episode of physical exertion could possibly precipitate acute cardiac problems, including myocardial infarction, but there is no evidence in the claimant's file that his myocardial infarction did occur related to any extraordinary episodes of physical activity above and beyond his usual physical duties while at his federal work. Dr. Diaz's statement that there was a strong possibility of the claimant's federal work having accelerated his coronary artery disease, directly contradicts his later statement that he did not think that the claimant's job was the cause of his arteriosclerotic heart disease. Dr. Diaz cited information that there was evidence that the precipitating event or cause of the myocardial infarction is a thrombus or possibly related to coronary artery spasm. He stated that stress could precipitate myocardial injury on the basis of this mechanism (presumably he means that myocardial injury is a myocardial infarction). He stated this information was not available at the time of [the first Office medical consultant's] letter of December 29, 1980. An article in the journal *Annals of Internal Medicine* in February 1981 by Oliva titled "Pathophysiology of Acute Myocardial Infarction" addresses some of these issues. Dr. Diaz is accurate in stating that evidence suggests that the actual precipitation of an acute myocardial infarction may be associated with the development of thrombus or coronary artery spasm. However, as pointed out in Dr. Oliva's article, practically all acute myocardial infarctions are associated with very severe and advanced coronary artery disease as the underlying pathologic process. Dr. Oliva also pointed out that coronary artery spasm or thrombus may be the actual precipitating pathologic process on top of the underlying coronary artery disease. Dr. Diaz's statement that stress can precipitate myocardial injury on the basis of these mechanisms, however, is pure conjecture and speculation. There is no evidence to support that coronary artery spasm can be directly caused by physical or emotional stress, especially in relationship to precipitating myocardial infarction. In fact, the available medical evidence suggests that the occurrence of an acute myocardial infarction is usually fortuitous and unrelated to any specific external activity. Therefore, Dr. Diaz's opinion that stress caused the claimant's acute myocardial infarctions and that his occupation aggravated or accelerated development of his myocardial infarctions is pure conjecture and not based on accepted available medical evidence as described by the American Heart Association."

* * *

> "Dr. Diaz's evaluation was performed within the framework of the Statement of Facts. As outlined above, Dr. Diaz's views that the claimant's angina pectoris was aggravated by his federal work is supported by the available medical evidence. Dr. Diaz's concluding view that the claimant's underlying coronary artery disease was not due to his federal work is supported by the available medical evidence. Dr. Diaz's view that the claimant's acute myocardial infarction was caused by or related to his federal work is considered speculation and not supported by the available medical evidence. Dr. Diaz indicated that a Holter monitor and an exercise treadmill test was pending, but the results of those tests would not likely alter the response to the questions that have been posed."

On September 25, 1981 the Office sent a copy of Dr. Collingsworth's report to Dr. Diaz for his review and requested that he clarify his conclusion that "this patient's occupation somehow or other aggravated and accelerated the development of his myocardial infarction." The Office also requested that the doctor state an opinion as to whether appellant's employment caused permanent damage to his heart, or whether the underlying disease was caused to be more severe for a limited period of time and, if so, how long the employment-related disability lasted.

In a report dated December 26, 1981 Dr. Diaz responded:

> "First, I will try to answer the specific question regarding the letter sent to me by Dr. Howard K. Crutcher, Jr. [an Office medical adviser]. I do believe that this man had significant obstructive coronary artery disease a few years prior to 1975, at least his symptomatology became worse during periods of heavy labor or unusual stresses. It is also possible that he sustained a myocardial infarction which was only documented by electrocardiographic criteria, but without significant symptomatology, and this is not an unusual finding in patients with coronary artery disease. When he had his cardiac catheterization in 1975, the right coronary artery was completely closed, and he had a critical lesion in the left anterior descending coronary artery. There was also significant disease in the circumflex coronary artery. Since there was already evidence of a critical lesion at this level, it is possible that he has intermittent superimposed coronary spasm and possibly he sustained his second myocardial infarction involving the LAD [left anterior descending] sometime afterwards when the patient was actively working. It may well have happened while he was working or when he was at home sleeping,

> but he was maintained on the active status, regardless of the final event. I am pretty sure Dr. Collingsworth is pretty familiar with the so-called walking through phenomenon seen in patients with angina pectoris while having a treadmill exercise test, or during routine physical exertion, and the possibility of having coronary arterial spasm on top of organic obstructive coronary artery disease is very strong, although nobody has done angiographic studies to prove that point.
>
> "I do believe that his occupation aggravated his angina pectoris, and possibly precipitated his myocardial infarcts, and as such, he was at least temporarily disabled on the first event, but on the second myocardial infarction, he developed significant left ventricular dysfunction. The point I am trying to make is that this man was kept on the active working status while he was in the acute phase of a myocardial infarct, and that certainly is a liability for the institution where he was working. Differentiation between left ventricular dysfunction and failure is more or less semantics, especially when you are talking about borderline changes. Probably I did not express myself clearly on the paragraph where I said 'the possibility of having acceleration of coronary artery disease is strong in the context of new evidence that not all myocardial infarctions are necessarily secondary to obstructive organic heart disease secondary to plaques or cholesterol.' What I meant was 'acceleration of his angina pectoris' and subsequent myocardial infarct was not necessarily related to progression of atherosclerosis, but related to a possibility of having increasing amounts of catecholamines during the periods of stress and subsequent increase of the amount of free fatty acids and aggregation of platelets and since he already had evidence of critical narrowing of the left anterior descending coronary artery, this could have precipitated eventually, a myocardial infarct. Interestingly enough, this was not accompanied by significant symptomatology. As a result of his cardiovascular problems, he has become incapacitated with his angina pectoris on exertion and at rest, especially at night, and accompanied with a cardiac arrhythmia."

On February 5, 1982 Dr. Collingsworth reviewed Dr. Diaz's second report, and stated:

> "Dr. Pedro A. Diaz has written a letter dated December 26, 1981, with regard to the issues that I raised in my memo of July 29, 1981.
>
> "The area of disagreement between Dr Diaz and myself is the issue of the contribution of the claimant's federal work to the occurrence of his acute myocardial infarctions."
>
> * * *
>
> "Dr. Diaz has stated that the claimant's underlying coronary ar-

tery disease was not due to factors of his federal employment. I agree with that view, and this is consistent with what [the first Office medical consultant] also feels.

"Dr. Diaz stated that he felt the claimant's occupation did aggravate his angina pectoris since the claimant clearly had chest pain associated with the physical requirements of his federal job. I agree that the clinical history does support aggravation of the claimant's coronary artery disease. The approximate dates for this are from April, 1975, when he first developed his angina pectoris, to the last time that he developed angina pectoris on his job, which was July 14, 1975. As I pointed out in my previous memo, I believe the aggravation was temporary since there was no evidence presented that the claimant had sustained his actual myocardial infarctions while at his federal job. Dr. Diaz did state that the occupation-aggravated angina pectoris resulted in a temporary disability."

* * *

"Dr. Diaz stated that the two myocardial infarctions could have happened while he was working or when he was at home sleeping, but that the claimant continued on active status at work. Dr. Diaz felt that the fact that the claimant must have been working at the time of the silent myocardial infarctions represented a liability for the institution where he was working. Dr. Diaz does not indicate why continuing to work could have thus made the clinical course of the claimant's silent acute myocardial infarction worse. Certainly, if an acute myocardial infarction was clinically recognized, the claimant would have been hospitalized immediately and allowed a convalescent period of up to several months. However, the claimant had no clinical symptoms and, thus, it was not possible to know when the acute infarction occurred. The fact that the claimant was likely to continue to work in his job during the period after the clinically silent acute myocardial infarction does not necessarily constitute evidence that the continuation of work in any way altered the course of the claimant's acute myocardial infarction. That is to say, there is no evidence presented that the myocardial infarction was larger than it otherwise would have been if the claimant did not work. While it is unfortunate that the claimant likely was continuing to work during the afterperiod of his two acute myocardial infarctions, there is no evidence presented that the course of the acute myocardial infarctions was in any way altered."

* * *

"Dr. Diaz has stated that the myocardial infarction possibly occurred at work and possibly at home sleeping. In other words, it is really not possible for Dr. Diaz, as for the other physicians evaluating the claimant, to identify when the acute myocardial infarctions occurred."

"Dr. Diaz felt that the claimant's acute myocardial infarctions, however, may have been related to and precipitated by stress at the claimant's job associated with increased catecholamines resulting in increased amounts of free fatty acids and causing platelet aggregation on top of the claimant's severe underlying coronary artery disease, thus precipitating the acute myocardial infarctions."

* * *

"The important issue is that occupational stress and strain on a regular basis has not been shown to be causative of coronary artery disease or to be responsible for precipitating an acute myocardial infarction."

* * *

"Using the views of the American Heart Association, I do not find evidence provided by Dr. Diaz or elsewhere in the claimant's file that his acute myocardial infarctions were related to a physical effort or emotional stress at his federal job. The statistical chance is that the claimant's acute myocardial infarction occurred unrelated to whatever he was doing at that time, whether it occurred at his federal job or at home sleeping or anywhere else."

* * *

"I believe the claimant's acute myocardial infarctions were related to his severe underlying coronary artery disease and would likely have happened whether or not he had ever worked for the federal government."

* * *

"In conclusion, I do not believe that the claimant's underlying coronary artery disease was caused by factors of his federal employment, though I believe he had a temporary aggravation of his coronary disease resulting in angina pectoris as described above. I do not believe that there is evidence provided to support in the claimant's individual case or using the general information provided by the American Heart Association, that the claimant's silent acute myocardial infarctions were precipitated by factors of his federal employment. I do not believe there is any information provided that continuing to work after the silent acute myocardial infarctions has changed the course of his cardiac disease. I believe that the claimant's ongoing disability of severe angina pectoris is due to severe underlying coronary artery disease, as previously documented. Though the claimant's coronary artery disease was aggravated by the physical stress of his federal employment, the reason the claim-

> ant had to discontinue work was because of the development of severe underlying coronary disease. The claimant became symptomatic because of his heart disease while participating in physical exertion which had not previously caused him any symptoms."

By compensation order dated April 1, 1983 the Office modified the January 19, 1979 compensation order finding that a temporary aggravation of appellant's coronary artery disease occurred between April 1975 and July 14, 1975 due to the factors of his federal employment but denied disability beyond July 14, 1975 on the basis that his continuing heart condition was due to the underlying coronary artery disease which was not employment related.

The Board finds that the case is not in posture for decision.

Appellant submitted the reports of Dr. McFadden, a Board-certified cardiologist and his attending physician, and Dr. Merliss, a Board-certified internist, in support of his contention that his heart condition was causally related to the factors of his federal employment. Dr. McFadden stated that a causal relationship existed between appellant's duties as a fireman, which exposed him to smoke, inhalation of various chemicals and pollutants, and the development of coronary artery disease which he said was accelerated by the physical stress of the occupation. Dr. Merliss also supported causal relationship, stating that the prolonged stress of appellant's employment accelerated his arteriosclerosis and precipitated his myocardial infarction, angina and disability.

Thereafter, Dr. Adams, a Board-certified cardiologist and Office consultant, reviewed the case record and found the medical evidence supporting causal relationship to be conjectural in nature and concluded that appellant's angina pectoris was temporarily aggravated during periods of physical exertion but that his underlying coronary artery disease was not related to any factor of his federal employment.

In order to resolve the conflict in medical opinion, appellant was referred by the Office to Dr. Diaz, a Board-certified cardiologist, who submitted a report stating that he agreed with the opinion of Dr. Merliss "that this patient's occupation somehow or another aggravated and accelerated the development of his myocardial infarctions", but concluded that his employment did not cause his underlying coronary artery disease. The Office requested clarification from Dr. Diaz regarding aggravation and causality in an attempt to clarify the ambiguity of his original report. In his response, Dr. Diaz spoke to appellant's "silent myocardial infarctions" which were documented only by electrocardiogram and noted that they may have happened either at work or while appellant was at home. He indicated that appellant's angina and infarctions were not necessarily related to the progression of arteriosclerosis, but possibly related to increasing levels of catecholamines during periods of stress.

While the appellant has the burden of proof to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[1] Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, it has the obligation to secure a supplemental report from the specialist where the original report requires clarification. When an impartial specialist's statement of clarification or elaboration is not forthcoming or if the doctor is unable to clarify or eleborate on his original report or if the doctor's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts, to a second impartial specialist for a rationalized medical opinion on the issues in question.[2]

The Board notes that the medical report and clarification obtained from Dr. Diaz were speculative and not sufficient to resolve the issue of whether appellant's heart condition was caused or aggravated by the employment factors or whether any employment condition was a permanent or temporary residual and the period of disability.

The Office should further develop the record as outlined above and, based on the augmented record, make a *de novo* decision on all aspects of the case.

The April 1, 1983 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings in accordance with this opinion of the Board.

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[1] *Daniel J. Gury*, 32 ECAB 261.

[2] *Roy C. Price*, 32 ECAB 166; *Harold Travis*, 30 ECAB 1071.

In the Matter of KENNETH S. WALKER *and* TENNESSEE VALLEY AUTHORITY, DIVISION OF POWER CONSTRUCTION, Knoxville, Tenn.

Docket No. 83–1464; Submitted on the Record;
Issued December 30, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity after March 9, 1983 due to his February 13, 1975 employment injury.

On February 13, 1975 appellant, then a 38-year-old lineman, injured his right knee when he caught the cleats in his boot on a piece of steel in a line tower. He was examined by Dr. Claud H. Taylor on February 19, 1975 and diagnosed as having sustained a "severe strain, right knee."

Dr. Earl R. Campbell, an orthopedic surgeon, examined appellant on February 27, 1975 and concluded that he "probably has a medial meniscus tear." On a December 16, 1975 attending physician's form report Dr. Campbell diagnosed "internal derangement of the right knee with *possible* meniscus tear."

Appellant did not stop work but was reassigned to a groundman's position which did not require climbing. However, because the groundman's position earned a lower wage appellant was awarded compensation for a loss of wage-earning capacity for the period November 28, 1975 to January 26, 1977, at which time he was re-classified as a lineman.

On November 25, 1980 the Office referred appellant to Dr. Paul C. Thompson, a Board-certified orthopedic surgeon, for evaluation to be used in determination of appellant's entitlement to a schedule award. Dr. Thompson examined appellant on December 16, 1980 and submitted the following report:

> "ORTHOPEDIC EXAM: Revealed a 6'1", 180 pound, well-developed and nourished, 46-year-old, . . . male in no acute distress. Inspection of lower extremities revealed no definite abnormalities. The left thigh measured 52 and the right 54 cm. in circumference with measurements obtained 30 cm. above the tibial tubercle with the knee in full extension. Measurements of the left calf were 38 and the right 37 with measurements obtained 14 cm. below the tibial spine with the knee in full extension. There was no definite effusion of knee with full range of motion without definite grating. There was no anterior posterior cruciate or medial collateral ligament instability. Patient complained of pain on palpation about the popliteal area, although there was no detectible Baker's cyst formation. There was full range of both flexion and extension with some complaint of pain on extremes of flexion. Neurologic exam of lower extremities negative with reflexes active and equal and with normal dorsalis pedis and posterior tibial artery pulsation. On further examination complained of some soreness on palpation along the posterior medial aspect of the knee in region of the medial semilunar cartilage.
>
> "X-RAY EXAM: AP, lateral, patella and right and left oblique views of right knee revealed no definite abnormalities.
>
> "DIAGNOSIS: Pain, chronic, moderate, knee, right, secondary to possible posterior peripheral tear of medial cartilage.
>
> "TREATMENT: Felt that patient should continue with normal work activities and if further evaluation is needed or indicated, arthrograms and arthroscopic examination for diagnostic purposes should be considered."

When asked by the Office whether appellant had "any atrophy and/or weakness secondary to his torn right medial meniscus", Dr. Thompson responded that "there was a two centimeter atrophy of the left thigh and a one centimeter atrophy of the calf."

Based on Dr. Thompson's evaluation the Office issued a May 6, 1981 schedule award for a four percent permanent loss of use of appellant's right leg, which covered the period December 16, 1980 through March 6, 1981.

On August 2, 1982 appellant was reclassified as a groundman due to his work restrictions and received compensation for his loss of wage-earning capacity.

When appellant failed to respond to an October 20, 1982 request for an updated medical report, the Office referred him to Dr. Thompson for reevaluation. Dr. Thompson examined appellant on February 11, 1983 and submitted the following report:

> "Returns after several years absence. Continues with work activities limited and states has intermittent painful discomfort about posterior aspect of right knee. No history of swelling or locking, but occasionally giving away. Orthopedic exam reveals full range of motion. No ligament instability. No definite soreness on palpation, although complains of pain localized about posterior aspect of joint. Review of old x-rays revealed no abnormalities and felt that symptoms are not sufficient to consider arthroscopic exam. Feel that patient can return to work activities as prior to injury."

An Office medical advisor reviewed Dr. Thompson's report and concurred with the opinion that appellant could return to his preinjury work.

By compensation order dated March 16, 1983, the Office terminated appellant's compensation on the ground that the injury of February 13, 1975 no longer caused disability for work and loss of wages or loss of capacity to earn wages.

The Board finds that the case is not in posture for decision.

It is unclear from the case record whether the employing establishment would reclassify appellant as a linesman, his position at the time of injury, which Dr. Thompson believed him capable of performing. Subsequent to the injury he had been classified as a groundman a less strenuous position at a lower rate of pay. The case will be remanded to the Office to secure information from the employing establishment as to whether its medical restriction against climbing is still valid and for any recent medical evaluation it may have made of him. The Office should also furnish the employing establishment with a copy of Dr. Thompson's most recent report and request a statement whether the employing establishment regards appellant as physically capable of performing the duties of the position he held when injured. Upon further development as deemed necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated

March 16, 1983 is hereby set aside and the case remanded for further development in accordance with this decision of the Board.

In the Matter of ERNIE CHAVEZ *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Long Beach, Calif.

Docket No. 83-1661; Submitted on the Record;
Issued December 30, 1983

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issues are (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation for failure to undergo a medical examination and (2) whether the Office properly suspended appellant's compensation under 5 U.S.C. 8113(b) for failure to cooperate with vocational rehabilitation as directed by the Office.

On August 14, 1976, appellant, then a 35-year-old nursing assistant, was rising from a patient's bedside when he struck his lower back against a vent extending from a window frame. He stopped working that day. Dr. Herbert H. Shey, a specialist in occupational medicine, stated in a September 3, 1976 report that x-rays were negative. He diagnosed a superficial tissue trauma to the lumbosacral spine. Dr. Wesley R. Lochausen, a Board-certified family practitioner, indicated that appellant had pain and tenderness over the sacrum. He diagnosed "pain, trauma, and contusion sacrum."

Appellant received continuation of pay from August 15 through August 19, 1976 and from August 23 through September 28, 1976. The Office of Workers' Compensation Programs then commenced payment of temporary total disability compensation.

In a February 23, 1977 form report, Dr. Lochausen stated that appellant was still totally disabled. He referred appellant to Dr. Wilmer J. Irvine, a Board-certified orthopedic surgeon, who stated in a March 17, 1977 report that appellant complained of constant low back pain extending primarily to the left side of his body, headaches, neck pain, left arm, leg and foot pain, and spasms in the left calf, particularly when sitting. The doctor indicated that x-rays were normal, except for a spina bifida occulta at S1.

Dr. Irvine commented:

> "Mr. Chavez' long list of subjective complaints ranging from his head to literally his toes is very much out of proportion to any

> findings on clinical or radiological examination. His symptoms are very vague and seem to me to be rather low grade. The prolonged period of disability and discomfort stemming from this unusual accident in August, 1976 is puzzling and difficult to explain.
>
> "It seems to me that he certainly could return to his usual working activities as a nurse at this time. He may benefit from an exercise program such as William's exercises for his low back complaints and range of motion as well as manual resistive exercises for his cervical complaints. Nothing other than an excercise program in indicated presently."

In a December 1, 1977 report, Dr. Irvine stated:

> "The duration and extent of disability caused by what seemed to be a relatively minor accident over a year ago continues to be out of proportion to any objective findings on orthopedic and radiological examination. I have been unable to discover any pathological changes present to account for Mr. Chavez' long period of disability. Orthopedically, the examination is within normal limits. The same may be said for the x-ray examination of his cervical and lumbosacral spine.
>
> "He does have generalized hyper-reflexia, the etiology of which is not clear. His complaints are related to the entire left side of his body including the upper and lower extremities. From an orthopedic point-of-view, I feel that he should probably be declared permanent and stationary in that he is able to return to his working activities as a nursing assistant. However, in view of the isolated finding of hyper-reflexia, it is my opinion that he should undergo neurological examination in order to rule out any pathology of the central nervous system that may account for his hyper-reflexia and possibly his subjective complaints."

By a February 8, 1978 letter to appellant the Office directed appellant to make an appointment with Dr. Charles Spicer, a Board-certified neurosurgeon. In a July 14, 1978 letter, after a May 25, 1978 reminder, the Office suspended appellant's compensation because he had failed to make an appointment with Dr. Spicer for an examination. Appellant was examined on July 28, 1978. In his report, Dr. Spicer stated:

> "It is this examiner's initial opinion this represents the case of a 37-year-old man, who has worked for some 15 years in the field of nursing, who previously did a year of warehouse work, and without report of any spinal discomforts or injuries prior to 8-14-76. The patient on that date, reported coming up from a squatting position, at a patient's bedside, catching the lumbosacral spine across under the edge of a shelf-like vent, extending out reportedly from a window frame, and with reported local contusion to that area, with imme-

diate local pain and without radicular pain, and with the report that it was not until the patient sat down at lunch, he began to notice local pain. The patient was seen, as noted by the emergency room, and x-rays revealed no evidence of bony injury, and it was felt that the patient had perhaps a day or two of disability, and recommendations were made. The patient not only continued to maintain his reported local soreness and aching, but as he stated over the next few weeks, he developed involvement reportedly of the whole left side of his body, consisting of headaches coming from the left side of his neck, of trapezius muscle pain, of some occasional left rib pain, apparently not acute, and of low back pain, and instead of reporting specific radicular pain, such as with a valid impingement, the patient reported primarily numbness of his left upper extremity, and weakness and numbness and weakness of the left lower extremity.

"(2) The patient does not have valid evidence of localization specifically to any impingement of the cervical, dorsal or lumbar nerve roots.

"(3) The patient does present with postural deterioration, which in this examiner's opinion, along with the inactivity of not working, and with attention to his residual symptoms, can produce sub-occipital neuralgia with periodic tension headaches, mediated over the greater occipital nerves. The patient shows a partial thoracic outlet syndrome on the left. This examiner cannot associate this with an injury to the lumbosacral area of mild contusion, and would be of the opinion that again, this is associated with the patient being inactive, and with postural deterioration.

"(4) The patient reports low back discomfort of continued nature. He has a small congenital defect, which this examiner does not feel is contributory, and in spite of the patient's complaints, he demonstrated excellent mobility, no pain while seated in the office chair during survey of the medical history, and certainly moves about well, and yet, reports the multitude of subjective symptoms.

"This examiner, on objective neurological testing, can only report that the sensory patterns are not of anatomical type, that the patient's reported symptomatology is not confirmed, nor associated with specific atrophy, reflex and valid sensory change."

* * *

"The patient was asked about any family history of neurological disorders, such as multiple sclerosis and denied such. This examiner explained that this examiner is a neurological surgeon, and this examiner would be looking for organic pathology such as cervical discogenic disease or lumbar discogenic disease, and the general testing, he also would be looking for any vascular abnormalities or degenerative central nervous system diseases. This examiner would agree with Dr. Irvine that as far as careful evaluation from a neu-

> rological surgical standpoint, it is this examiner's opinion that the patient should be able to return to his work as a nursing assistant, and yet, the patient stated that he is unable to do so, and that he confirmed that his family physician was also of the opinion that he remains hence, disabled."
>
> * * *
>
> "This examiner is fully aware that an individual with a functional disability of nonorganic type, can, with such a fixation, be just as disabled, and limited as an individual with a fully organic one. This examiner feels that this is one of the most important parts in the recommended survey, would be psychometric studies, as can be obtained through a rehabilitation center, and then, psychiatric survey specifically."

Appellant submitted a November 27, 1978 note from Dr. Shey and a January 8, 1979 note from a physician with an illegible signature from the employing establishment health office. Dr. Shey stated that appellant had been unable to work at his regular job since July 1978 and had applied for a light duty position. The other physician indicated that appellant should not return to his old job but should try a clerical position. He stated that appellant should not be involved in heavy lifting or frequent bending.

The Office, in a March 23, 1979 letter, indicated that appellant's compensation would be reinstated effective July 20, 1979.

As recommended by Dr. Spicer, the Office referred appellant to Dr. Haydon Rochester, a Board-certified psychiatrist. In a June 25, 1979 report, Dr. Rochester stated:

> "From the data available in the reports which had been forwarded and from my personal evaluation of Mr. Chavez, it is my opinion that he does have a psychiatric disability. Diagnostically in my opinion, he is suffering from a Depressive Reaction with Somatization or perhaps better stated, with psychophysiological symptoms manifested in back symptoms as well as by a rather regressed personality.
>
> "The last almost three years of inactivity and unemployment, and the concurrent medical goings on are factors here too. In my opinion, as long as he sustains his present attitude, he will not be employable. I, therefore, recommend that he be given an opportunity for psychotherapeutic intervention over at least several sessions in trial attempt to see if he can be reached, or if his personality can be bridged in some way.
>
> "In my opinion, Mr. Chavez's emotional problems are in large part 'his own,' i.e., existed prior to the injury. The injury served only to release and to give a point of focus for his preexisting problems. The long intervening time passage with no direct psychiatric

intervention has resulted in solidifying his regression and increasing his depression-resentment posture."

An Office medical adviser reviewed Dr. Rochester's report and stated that it was unclear from the report whether appellant's injury caused the emotional condition or whether appellant was waiting, consciously or unconsciously, to be injured for his symptoms to appear. The Office therefore referred appellant to Dr. Malvin Braverman, a psychiatrist of professional rank, for an examination and opinion on whether appellant's condition was causally related to his employment injury.

In a March 14, 1981 report, Dr. Braverman stated:

> "*DIAGNOSIS:*
>
> "(1) Post-traumatic anxiety-depressive reaction with psychophysiologic reaction of the musculoskeletal system and the head. That psychiatric diagnosis was immediately, proximately caused by the work injury described above which occurred in the course of and arising out of his employment. But for that back injury at work, EC [appellant] in all probability would not have his present psychiatric diagnosis.
>
> "(2) Longstanding passive-dependent personality with underlying hysteric features with that personality being stable, well-contained, well-controlled, without any indication of work disability based upon that personality formation or the expectation that as an outgrowth of that personality formation EC would have been expected to develop symptoms constituting work disability."
>
> * * *
>
> "*WORK DISABILITY (PSYCHIATRIC):*
>
> "In terms of the 'whole man', EC has a disability of 50%. This disability is entirely related to, caused by, emerging out of and in the course of his work. The back injury at work served as the primary trigger for the development of symptoms described. There was no indication in background history that this man would have developed mental or emotional problems constituting work disability.
>
> "*WORK RESTRICTIONS (PSYCHIATRIC):*
>
> "EC cannot work in an area of employment that would entail any significant physical stress, particularly involving the back. Under such circumstances, as noted, that physical stress would constitute psychiatric stress and would result in marked aggravation of the symptoms described which to a very significant extent are determined by psychogenic factors.
>
> "*RESUME:*
>
> "EC has a work injury, August 1976, which has resulted in psychiatric symptoms constituting a post-traumatic anxiety-depressive reaction with psychophysiologic factors, as outlined above. At pres-

> ent, in terms of 'the whole man,' his disability is 50% determined by, related to and caused by the work injury described. EC did not have any mental or emotional problems prior to work injury that would have resulted in work disability. He does require at present rehabilitation work evaluation, rehabilitation training, in association with psychiatric follow-up. There is every reason to anticipate that EC will respond to such a treatment approach. He is definitely capable of participating in such a treatment approach with the restriction that he not be required to perform any heavy physical work. It is strongly recommended that EC remain in the medical area in connection with his training.
>
> "In respect to your specific inquiry, EC cannot work in his usual and customary employment, based upon the criteria for LVN-NA, outlined in your report. The disability is primarily determined by the marked fixation on the physical symptoms, particularly with inability to do any work entailing usage of the back.
>
> "In respect to the work restriction evaluation form, OWCP-5, EC does not have any restrictions regarding interpersonal relations . . . Further, . . . he can work eight hours a day in an area that does not entail any physical effort. Further, . . . I do anticipate that he will need vocational rehabilitation in order to return to work . . . EC has not reached maximum improvement which requires additional treatment and rehabilitation. However, in respect to the benefits of not working and resting for approximately four years, he has reached maximum improvement in respect to that form of care."

Dr. Stephen F. Morin, a clinical psychologist and Office consultant, reviewed Dr. Braverman's report. In an April 14, 1981 memorandum, he commented:

> "The diagnosis emerging from this evaluation is a post traumatic anxiety-depressive reaction with psychophysiologic reaction of the musculoskeletal system and the head. The claimant is also thought to suffer from a long-standing passive-dependant personality with underlying hysterical features.
>
> "The post-traumatic anxiety-depressive reaction is thought to be proximately caused by the injury of 8/14/76. This finding is based on reasoning that these symptoms were not present prior to the injury, and if it were not for the back injury sustained at work, the claimant would not have his present psychiatric diagnosis.
>
> "Based on the IME [impartial medical examiner] Dr. Braverman, it seems medically reasonable that the claimant could not work in his past employment as a nursing assistant. The claimant would be unable to do so because of an inability to do any work entailing use of the back.

> "The claimant retains the mental residual functional capacity to work up to eight hours a day in an area that does not entail any physical effort. The claimant has the mental residual functional capacity to be involved in work which includes interpersonal relations.
>
> "According to the IME, the claimant is amenable to vocational rehabilitation in order to be returned to the work force. This vocational rehabilitation along with supportive psychiatric treatment appear to be warranted in this case."

The Office referred appellant to a private vocational rehabilitation service. In a February 16, 1982 report a rehabilitation counselor indicated that, for eleven years prior to his injury, appellant had worked with the ill and infirm in a variety of settings. The counselor stated that appellant wished to pursue a medical career, preferably as a registered nurse. Appellant claimed that the employing establishment would not retrain him and that he planned to continue training at a local college and eventually obtain a position as a registered nurse or a medical administrator. The counselor indicated that appellant stated that he wished to return to suitable employment but his own perception was that this was not a "high priority item" for appellant. He also noted that appellant's physical abilities as reported by appellant were not consistent with full-time, competitive employment because it was unlikely that many employers would allow an employee to alternate between sitting and standing.

The vocational rehabilitation service also submitted an April 24, 1982 work restriction evaluation from Dr. L. F. Summers who indicated that appellant could work eight hours a day at any activity and could lift up to 75 pounds. The doctor remarked, however, that he had not examined appellant in relation to his work restrictions and therefore his report might not be reliable.

On May 20, 1982 the Office referred appellant to Dr. Braverman for an evaluation.

In a July 2, 1982 letter to the Office, the counselor at the vocational rehabilitation service reported:

> "It would appear that Mr. Chavez has again disappeared on us. He was due to have called me back, subsequent to a meeting, about three weeks ago. We have been unable to reach him by telephone and he has not, as yet, responded to a mailgram sent to a verified address and requesting an immediate telephone call.
>
> "In addition, I think you should be aware that Mr. Chavez has been admitted to a nursing program at Long Beach City College which is scheduled to commence in February 1983. I have a few questions about the physical appropriateness of such a program, all

> of which Mr. Chavez rejects. I also note that he seems quite adamant about entering into this program.
>
> "Mr. Chavez has retained the services of an attorney and indicated to me that he would be discussing his proposed program with this individual. It may be that his attorney has advised him to no longer cooperate with us or simply that he feels his money will continue to come in whether or not he works with us. Whatever his motivation might be, I have not been able to speak with him since our meeting on June 3, 1982 nor has he responded to our telegram of June 21, 1982. Please advise what further action you would like us to take on this case."

In a July 16, 1982 report, the vocational counselor indicated that, at a June 3, 1982 meeting, appellant appeared hostile and admitted he had negative feelings toward rehabilitation. Appellant indicated that he had been accepted to a registered nurse program at a local college that would begin in February 1983. The counselor requested information on the program which appellant agreed to submit within a week to ten days. However, appellant did not send the material and did not respond to subsequent attempts to contact him.

In a August 2, 1982 letter the Office suspended appellant's compensation effective July 15, 1982 for his failure to cooperate with the medical referral of May 20, 1982 and his failure to cooperate with the vocational rehabilitation service. The Office advised him that compensation would remain suspended pursant to sections 8113(b) and 8123(d) until he cooperated with rehabilitation service and it received a medical report from Dr. Braverman.

In an August 17, 1982 letter, Dr. Braverman's secretary informed the Office that appellant had not made an appointment for an examination.

In an April 15, 1983 compensation order, the Office suspended appellant's compensation effective August 18, 1982 because he failed to cooperate with medical examination and with vocational rehabilitation efforts.

The Board finds that the Office properly suspended appellant's compensation for failure to undergo a medical examination.

Section 8123 of the Federal Employee's Compensation Act requires an employee who claims disability as a result of an employment injury to undergo such physical examinations as the Office deems necessary. Section 8123(d) provides that if an employee refuses to submit to an examination ordered by the Office, his right to compensation is suspended.[1]

In this case the Office directed appellant on May 20, 1982 to report to Dr. Braverman for an examination. The direction was repeated in an August 2, 1982 letter. The doctor's office reported in a August 17, 1982 letter that appellant did not make an appointment for an examination. The Office therefore acted properly in suspending appellant's compensation for refusal to undergo a medical examination.

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[1] *Dorine Jinkings*, 32 ECAB 1502.

The Board finds, however, that the Office improperly found that it could suspend appellant's compensation until he cooperates with vocational rehabilitation effort.

In its April 15, 1983 order suspending compensation, the Office recognized that section 8113 allows it to reduce future benefits based on probable earning capacity when there has been a failure to undergo vocational rehabilitation without good cause. However, the Office erroneously concluded that this also was a basis for suspension. The Board hereby modifies the Office's order to delete the failure to undergo vocational rehabilitation as a proper basis for suspension.

The decision of the Office of Workers' Compensation Programs, dated April 15, 1983, suspending appellant's for failure to undergo a medical examination is affirmed as modified.

In the Matter of PEDRO M. DE LEON, JR. *and* DEPARTMENT OF THE ARMY, CORPUS CHRISTI ARMY DEPOT, Corpus Christi, Tex.

Docket No. 83-1890; Submitted on the Record;
Issued December 30, 1983

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant has more than a five percent permanent loss of use of his right lower extremity for which he received a schedule award.

On March 3, 1969 appellant, a 38-year-old aircraft sheet metal worker, sustained an injury to the right side of his chest and right knee when he slipped and fell at work. He was absent from work for four days. The record reveals that he was treated by Dr. C. Veatch, an employing establishment physician, on April 7, 1969 for contusion of the right knee. The Office of Workers' Compensation Programs determined that the contusion of the right knee resulted from the March 3, 1969 employment injury.

Appellant continued to work until he experienced a recurrence of disability on July 31, 1981, and entered into a sick leave status. His supervisor completed the notice of recurrence on appellant's behalf and stated the following:

> "No specific recurrence. Employee complained of pain and swelling of knee. Was referred to Dr. Joseph Wright, [a Board-certified orthopedic surgeon] for examination. Dr. Wright has scheduled surgery for 7-13-81."

Dr. Wright hospitalized appellant on July 12, 1981 and performed a right knee meniscectomy on July 13, 1981 to repair a tear of the lateral meniscus.[1] In a report dated August 12, 1981, Dr. Wright reported the following:

> "Based on the patient's statement to me when he was seen in this office on May 1, 1981 that his problem with the knee began in 1969 following injury when working on a helicopter and stating to me that he had had some recurrent problems off and on, but nothing severe since that time up until several weeks prior to the office visit when symptoms had increased, then it would be assumed that his condition of April 29, 1981 was related to the injury in 1969. In any event, the patient did have a torn knee cartilage there with some fragmentation of the articular surface of the lateral femoral condyle which could indicate that this was of some duration.
>
> "Hopefully Mr. De Leon is going to steadily improve following the meniscectomy and should be healed sufficiently to return to work in his previous capacity in three to four weeks."

In a subsequent report dated September 14, 1981 Dr. Wright reported that the strength in appellant's extremity had improved; that there was no effusion in the right knee joint; and that appellant experienced discomfort when he squatted. Appellant returned to work on September 15, 1981 in a light duty capacity.

By letter dated September 14, 1981, the Office asked Dr. Wright to address the following questions with respect to the causal relationship between appellant's current condition and the March 3, 1969 employment injury:

> "(1) Given the particular right knee condition Mr. De Leon has, is it medically reasonable that Mr. De Leon sustained the injury on March 3, 1969, worked up to the present with some recurrent problems, at which time its severity required surgery?
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> "(2) Mr. De Leon suffered a left knee injury in 1970 while playing softball (not job related and not claimed). This resulted in a lateral

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[1] The record reveals that appellant sustained a nonwork-related injury to his left knee while playing baseball. The exact date of this injury is unclear from the record, although it appears it occurred in 1970. Appellant was hospitalized by Dr. Rufino Gonzalez, a Board-certified orthopedic surgeon, on October 13, 1971, who performed an arthrotomy and lateral meniscectomy on appellant's left knee on November 3, 1971. He was discharged on November 6, 1971 with a diagnosis of "old tear lateral meniscus, left knee." Appellant returned to work "after about seven weeks of sick leave."

meniscectomy of the left knee in [November] 1971. Could this injury, by altering Mr. De Leon's walking pattern, etc., have solely caused the right knee condition?"

Dr. Wright responded to the Office's questions on September 28, 1981 as follows:

> "1. Yes.
> "2. It is possible, but is not likely."

On October 6, 1981, Dr. Wright reported that the October 5, 1981 examination of appellant revealed no evidence of effusion or tenderness; that appellant had a full range of motion; and that appellant experienced pain over the anterolateral aspect of his knee "when extending the internally rotated knee." The doctor went on to say:

> "I feel that his residual symptoms are related to the degenerative changes seen in the lateral femoral condyle. It is possible as time lapses that this will improve.
>
> "At the present time there is nothing more to do and I feel that the patient should be able to work in his previous capacity without limitation."

The Office prepared a statement of accepted facts and referred it, together with appellant and the case record, to Dr. Charles S. Clark, Jr., a Board-certified family practitioner, for a current evaluation. Dr. Clark examined and evaluated appellant on August 25, 1982, and in a report dated September 2, 1982 stated the following:

> "[T]he patient's history, subsequent physical findings, and operative findings certainly suggest that his pathology is secondary to the injury sustained in 1969. Frequently meniscal injuries are initiated by a traumatic twisting event and, with time, the tear enlarges with day to day activities and eventually becomes symptomatic enough to warrant operative intervention.
>
> "Dr. Wright's findings of degenerative changes in the knee and the anatomy of the meniscus at the time of surgery certainly indicate that the lesion was old. The patient's x-ray findings at the present are those of degenerative changes with some joint space narrowing and periarticular osteophytes. These are certainly the findings of a knee which has had a meniscal tear for a prolonged period of time and also a knee which has been treated with meniscectomy. For future management at the present time, I would recommend extensive quadriceps and hamstrings, rehabilitation program. The possibility of the patient also having a torn medial meniscus cannot be ruled out and perhaps an arthrogram to evaluate the status of the same would be indicated. It is possible that he may need a repeat arthroscopic examination to insure complete removal of the lateral

> meniscus and/or tear of the medial meniscus. I feel that the patient, at the present time, has a permanent physical impairment of the involved lower extremity of 25%. This will probably not improve and may, in fact, worsen with time."

The Office submitted the case record to Dr. Alan Barber, an Office consultant, for his review and comment. To the question of whether appellant's current condition was causally related to the March 3, 1969 employment injury, Dr. Barber responded as follows:

> "No. I feel the lapse of time of 12½ years from alleged injury to surgery is far too long to maintain any chain of causation. This is especially true when it is noted that throughout all this time no complaints of R [right] knee problems were made and that clmt [claimant] saw an orthopedic surgeon in 1971 who removed his left lateral meniscus. It is hard to believe that Dr. Gonzalez would have overlooked problems with the R knee.
>
> "The pathology specimen from 1971 was of an ovoid meniscus suggestive of a discoid meniscus. If such was a bilateral condition that could explain his recent problems. I see only speculative reasoning connecting the 1969 injury with the 1981 surgery."

Dr. Barber stated that the Office should accept appellant's contusion of the right knee as resulting from the March 3, 1969 employment injury, and not the torn right lateral meniscus, degenerative arthritis of the right knee compartment and torn left lateral meniscus. The doctor stated that appellant had no residuals resulting from the March 3, 1969 employment injury.

The Office prepared a statement of accepted facts and referred it together with the case record and appellant, to Dr. Pete E. Garcia, an internist, for an evaluation. Dr. Garcia examined appellant on December 2, 1982 and in a report of the same date stated the following:

> "X-rays revealed lateral joint space narrowing of the right knee with some degenerative changes and periarticular osteophyte formation
>
> "Examination reveals no tenderness of the knee. He has a full range of motion on the knee. He can hear a gritting noise when he takes the knee through a range of motion. The knee stability is good. There is no laxity of medial or lateral collateral ligaments. There was no instability on anterior or posterior movement of the knee. No muscle atrophy was noted around the knee.
>
> "OPINION: I believe the lesions of the lateral meniscal tear were old. Over a period of time, after and before meniscectomy, he can develop degenerative changes with a torn meniscus and even after it has been removed.
>
> "The injury was old and he probably developed the degenerative

changes before the meniscectomy. I recommended he continue the quadriceps and hamstring rehabilitative program.

"I feel he does have a permanent physical disability involving the right lower extremity of 25 percent."

Dr. Garcia also submitted a work restriction evaluation wherein he enumerated appellant's physical restrictions, and emphasized that appellant should be restricted from kneeling and squatting too long. The doctor indicated that appellant had reached maximum medical improvement; that he was capable of working an eight-hour day; and that rehabilitation was not necessary.

Dr. Barber reviewed the evidence of record and stated that although Dr. Garcia pointed out that appellant's injury was old, he offered no opinion as to the causal relationship between appellant's current condition and the March 3, 1969 employment injury. Dr. Barber reported that appellant's current diagnoses were post left medial meniscectomy and post right lateral meniscectomy and added that there was no evidence of record supporting a causal relationship for either of the conditions. The doctor concluded that appellant had no significant limitations, had a full range of motion, no tenderness, and was fully employable with restrictions.

Dr. Barber completed a schedule award work sheet and assigned five percent for "amputation loss lat[eral] meniscus." Utilizing the American Medical Association's (AMA's) *Guides to the Evaluation of Permanent Impairment*, Dr. Barber calculated that appellant sustained a five percent permanent impairment of the right lower extremity.

By letter dated January 28, 1983 the Office informed Dr. Garcia that it took "note of the range of motion, stability and lack of atrophy" in his December 2, 1982 report, and asked him to complete an enclosed copy of a schedule award work sheet which, he was informed, would be used by the Office medical adviser in evaluating the evidence of record.

Dr. Garcia completed the work sheet on February 21, 1983, and assigned five percent for appellant's pain and other subjective complaints and 20 percent for degenerative changes. Utilizing the combined Values chart of the AMA's *Guides*, Dr. Garcia calculated that appellant had a 25 percent permanent impairment of the right lower extremity.

Dr. Barber reviewed the evidence of record and stated:

> "The info[rmation] provided is neither specific nor consistent with the AMA guidelines. There is no section for 'degenerative changes' and it certainly would not be 20% impairment in face of full motion and no atrophy.
>
> "No change from past . . . report.
>
> "Upon consideration of the new data there is nothing of probative value. There is no basis for an opinion change."

On July 14, 1983, the Office granted appellant a schedule award for a five percent permanent loss of use of the right lower extremity entitling him to 14.40 weeks of compensation for the period December 2, 1982 (the date of Dr. Garcia's report) to March 12, 1983.

The Board finds that the case is not in posture for decision and must be remanded for further development.

Both Drs. Clark and Garcia reported degenerative changes in appellant's right knee and evidence of a meniscal tear of long duration. Although Dr. Clark did not provide any supporting rationale, he did report that appellant's "history, subsequent physical findings, and operative findings certainly suggest that his pathology is secondary to the injury sustained in 1969." Dr. Clark estimated appellant's permanent impairment of the right lower extremity as 25 percent. It is unclear from the record why the Office referred appellant to Dr. Garcia before asking Dr. Clark for an explanation of his estimate. Further, there was an apparent conflict in medical opinion between Drs. Clark and Barber concerning the causal relationship between appellant's condition and the March 3, 1969 employment injury.

The Board also notes that Dr. Barber did not assign anything for pain and appellant's other subjective complaints as reported by Drs. Clark and Garcia. Moreover, he did not take into consideration appellant's preexisting degenerative changes which Drs. Clark and Garcia also reported. The Board further notes that Dr. Barber as the Office's consultant acting in the stead of a medical adviser was required by the Office's procedures to document his calculations to show how he arrived at the percentage of impairment, which calculations were to incorporate "all preexisting impairments of the scheduled member." [2] He offered no explanation as to why the degenerative changes were not considered when calculating the schedule award.

In determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[3] As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him." [4]

The Board therefore finds that there is a conflict in medical opinion between Drs. Garcia and Clark and Dr. Barber, regarding the percentage of permanent impairment of appellant's right lower extremity, which necessitates referral to an impartial specialist for resolution pursuant to 5 U.S.C. section 8123(a).

On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to an impartial

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[2] See Federal Employees' Compensation Act (FECA) Procedure Manual, Chapter 3-600, page 1. See also *Raymond E. Gwynn*, 35 ECAB 247.

[3] See *Raymond E. Gwynn*, *supra*, and cases cited therein.

[4] Larson, *The Law of Workmen's Compensation*, sections 12.20 and 58.21 (1982). See also *Raymond E. Gwynn*, *supra*.

Board-certified orthopedic surgeon, for a rationalized medical opinion as to appellant's permanent impairment of the right lower extremity resulting from the March 3, 1969 employment injury, taking into account all preexisting impairment of the leg.

The decision of the Office of Workers' Compensation Programs dated July 14, 1983 is set aside; the case is remanded for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

In the Matter of JOHNNY R. ROBISON *and* U.S. POSTAL SERVICE, POST OFFICE, Tallahassee, Fla.

Docket No. 83-1852; Submitted on the Record;
Issued January 5, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant's loss of wage-earning capacity effective October 8, 1981 was properly determined.

On February 15, 1978 appellant, then a 50-year-old letter carrier, filed a claim alleging injury to his left lower side caused by lifting a tray of magazines. He was treated on that date by Dr. L. L. Pararo, a Board-certified surgeon, who stated that appellant had pulled and strained some tissue at the site of a previous hernioplasty in the left inguinal region. The physician recommended that appellant not return to work for five days, and he received continuation of pay from February 16 to 22, 1978.

Appellant returned to work in a light duty capacity on February 23, 1978. He stopped work on March 3, 1978 and sought treatment from Dr. Pararo who, in a report dated March 9, 1978, indicated that appellant had bursitis in both hips, worse on the left side, low back pain and pain in the left groin. On March 20, 1978 the physician indicated that appellant was capable of light-duty work with limitations on stooping and lifting restrictions of under 15 pounds. Appellant returned to work March 21, 1978 and received continuation of pay for the period of March 4 to 20, 1978.

The Office of Workers' Compensation Programs accepted appellant's left groin strain as employment related to the February 15, 1978 lifting incident.

On May 26, 1978 appellant stopped work and was off duty until June 16, 1978 for which period he received continuation of pay. His last date of work at the employing establishment was June 26, 1978.

On October 11, 1978 Dr. Pararo submitted a report stating:

> "This man has pain at the site of recurrent left inguinal hernia repair. He also has arteriosclerosis, high blood pressure, intermittent claudication and left hip bursitis. He is not able to perform his duties as a mail carrier due to these several problems added together.
>
> "The groin pain by itself would limit his ability to work but not totally. He could work on a limited basis in a sedentary position. This would cause him discomfort but it could be done. Add the other problems to this groin pain and he is disabled for any duty that involves walking, lifting or standing for long periods (three hours) of time."

On November 27, 1978 an Office medical adviser reviewed the case record and noted that Dr. Pararo's report indicated several severe physical restrictions which precluded remunerative employment.

On December 13, 1978 the Office found that appellant was entitled to compensation for temporary total disability commencing June 17, 1978.

On January 7, 1981 the Office medical adviser referred appellant to Dr. Thomas G. Bouland, a Board-certified surgeon, for evaluation of possible work limitations due to the residuals of his recurrent left inguinal hernia and left groin strain. After examining appellant, Dr. Bouland provided the Office with a list of work restrictions which indicated that appellant had only a partial ability to walk, bend, kneel, and stand and no ability for lifting over 10 to 20 pounds, squatting, climbing, or twisting. He stated that appellant could work eight hours a day and noted: "The above evaluation is done only in relation to the groin condition and does not include work restrictions due to arteriosclerotic peripheral vascular disease and hypertensive cardiovascular disease."

On September 9, 1981 the Office medical adviser reviewed the list of work restrictions prepared by Dr. Bouland and concurred in his conclusion that appellant was capable of full-time employment.

On September 21, 1981 an Office loss of wage-earning specialist reviewed the case record and stated that appellant was capable of performing the duties of a cashier I, Department of Labor's *Dictionary of Occupational Titles*, Code No. 211.362-010. The physical requirements of this position are the ability to reach, handle, finger, feel, talk, hear, see and lift up to ten pounds. The specialist stated that the Florida state employment service advised that the position was reasonably available in appellant's commuting area at a weekly wage of $134.00.

Based on the above evidence, the Office found on November 9, 1981 that appellant was no longer totally disabled and was qualified for the position of casher I. Applying the principles of the *Shadrick* case,[1] the Office in a decision dated November 19, 1981 determined that he had a

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[1] *Albert C. Shadrick*, 5 ECAB 376.

68 percent loss of wage-earning capacity. It reduced his compensation effective October 8, 1981.

On December 18, 1981 appellant, through his representative, requested reconsideration and in support thereof submitted an affidavit from Dr. Pararo who indicated that he reviewed the job description for the position of cashier and concluded that appellant would be unable to perform the duties.

On February 16, 1982 the Office referred the cashier position description to Dr. Bouland for an opinion on whether appellant would be able to perform the duties required. In a response dated March 10, 1982 Dr. Bouland indicated that appellant was capable of performing the duties described by the job description.

By compensation order dated May 27, 1982 the Office denied appellant's application to modify the November 9, 1981 decision finding that the evidence submitted in support thereof was not sufficient to warrant review of the prior decision.

On June 18, 1982 appellant, through his attorney, requested reconsideration and in support thereof submitted copies of the April 21, 1978, May 16, 1978, and October 8, 1978 reports of Dr. Pararo which indicated that appellant had preexisting arteriosclerosis, high blood pressure, intermittent claudication of his legs and left hip bursitis in addition to his accepted condition.

By compensation order dated July 15, 1982 the Office denied appellant's application for review finding that the evidence submitted in support thereof was not sufficient to warrant modification.

On July 29, 1982 appellant requested a hearing which was held on February 16, 1983. Appellant did not submit any new evidence at the hearing. In a decision dated and finalized May 27, 1983 the Office hearing representative affirmed the November 9, 1981 wage-earning capacity determination finding that the only condition compensable under the Federal Employees' Compensation Act was his accepted recurrent inguinal hernia and related conditions and that all other conditions listed by his physician did not appear to be disabling at the time of injury on February 15, 1978.

In determining loss of wage-earning capacity where residuals of an accepted employment-related condition prevent an employee from performing his regular duties, physical ailments which preexisted the accepted condition must be taken into consideration when selecting a job for purposes of determining wage-earning capacity.[2]

The Board finds that this case is not in posture for decision. Dr. Bouland, the Board-certified surgeon who supplied a work tolerance report to the Office, indicated that appellant had only a partial ability to perform certain activities and that he could work eight hours a day.

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[2] *Henry R. West*, 30 ECAB 1478.

Dr. Bouland qualified his evaluation of work restrictions by noting that he only considered appellant's groin condition and not any restrictions due to his arteriosclerotic peripheral vascular disease. Dr. Pararo, also a Board-certified surgeon and appellant's attending physician, reviewed the job description for the position of cashier and concluded that appellant would be unable to perform the required duties due to his accepted condition and preexisting disabilities.

Appellant, along with the case record and statement of accepted facts, should be referred to a Board-certified specialist for an opinion on whether appellant has any preexisting conditions unrelated to his employment and, if so, the doctor should set forth the work limitations imposed by these conditions as well as the accepted left hernia condition. The augmented case record should be reviewed by the Office medical adviser and a loss of wage-earning capacity specialist for selection of a job within the described work limitations. The Office should then issue a *de novo* decision on appellant's loss of wage-earning capacity.

The May 27, 1983 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings in accordance with this decision of the Board.

In the Matter of WAYNE K. BRAUER *and* POSTAL SERVICE, POST OFFICE, Sedalia, Mo.

Docket No. 83-146; Submitted on the Record;
Issued January 10, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issues are (1) whether the Office of Workers' Compensation Programs properly determined the date of appellant's maximum improvement for schedule award purposes and (2) whether appellant should have received compensation for temporary total disability instead of a schedule award while he was undergoing vocational rehabilitation from January 13, 1981 until his return to work on March 20, 1982.

Appellant, then a 30-year-old letter carrier, filed a claim on January 8, 1979 alleging that on January 6, 1979 he sustained a twisted knee, stiff neck and an upper back injury when he attempted to get away from a dog which attacked him. He stopped work on January 7, 1979 and returned to work on January 15, 1979. Appellant again stopped work on March 3, 1979 and returned to work on March 19, 1979.

In a report dated March 21, 1979, Dr. H. John Erickson, a Board-certified orthopedic surgeon, diagnosed appellant's condition to be internal derangement of the left knee.

Dr. William G. Quinn, a Board-certified orthopedic surgeon, stated the following in a letter dated November 16, 1979:

> "Wayne Brauer was first examined by me on September 26, 1979 for an injury he sustained in January of 1979 while working for the post office. He states that the pants of his left leg were bitten by a dog and this in turn resulted in a twisting injury to his left leg. He subsequently developed pain in his left knee and also intermittent pain radiating up and down his leg. He had a previous arthrogram done which was read as normal and a previous electromyogram on his left lower extremity which was also read as normal.
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> "On examination on September 26, the patient had no evidence of ligamentous instability and no effusion, but there was a definite McMurray's, but the point could not be localized. An arthrogram was performed on September 28 which suggested a peripheral tear in the posterior horn of the left medial meniscus. Consequently, an arthroscopy was performed on October 2. However, it revealed a normal medial and lateral meniscus with evidence of only mild chondromalacia of the medial tibial plateau. Otherwise, the arthroscopy was within normal limits.
>
> "The patient was again examined on October 12, 1979 at which time he was still lacking 10-15 degrees of flexion. He was instructed to work on range of motion exercises. He is to be examined again in approximately two weeks if he has not obtained full flexion."

On February 23, 1980, appellant again stopped work and claimed compensation for the period beginning on said date.

On April 21, 1980, Dr. Erickson stated:

> "I feel patient's knee is in an essentially unchanged state at this time and that it is not rapidly deteriorating or improving. He definitely has some permanent residual disability from his injury. I rate him at 20 percent of the leg at the knee. Patient is unable to stand on his leg for any period of time or to walk as well as he did previously. It is impossible to state at this time if the patient ever will be able to resume his previous activities as arthroscopy performed by the Columbia Orthopedic Group showed chondromala cia of the medial tibial plateau and this condition is generally progressive."

In a letter to the Office of Workers' Compensation Programs dated May 23, 1980, the employing establishment stated that it controverted appellant's allegation that his left knee condition was causally related to the employment incident of January 6, 1979. In support thereof, the employing establishment submitted a May 8, 1980 report from Dr. John

W. Beeks, a specialist in occupational medicine, who stated that he was "highly skeptical that his [appellant's] disability can be traced to the dog-bite incident of January 1979."

In view of a conflict in medical opinion, appellant, along with the case record and a statement of accepted facts, was referred on June 13, 1980 to Dr. Larry F. Glaser, an orthopedic surgeon, for examination and evaluation regarding his alleged employment-related left knee condition:

In a comprehensive report dated October 21, 1980 Dr. Glaser stated in part:

> "Based on the facts to my knowledge, Mr. Brauer apparently initiated the onset of this chondromalacia problem as a result of the weight bearing, twisting injury of 6 January 1979. Once this process is initiated, there is generally gradual progression of a problem that rarely returns itself to a normal articular surface. His continued complaints of knee pain and his objective evidence of left quadriceps atrophy are all supported by the diagnostic arthroscopic observations made on 12 September 1980.
>
> "In summary, it is my opinion that Mr. Brauer sustained the onset of his chondromalacia as the result of the injury of 6 January 1979 and that this condition persists to date. I found no evidence to suggest a problem with the left knee prior to 6 January 1979, nor any evidence that any additional work or nonwork-related injuries of significance have occurred to the left knee.
>
> "In your correspondence of 13 June 1980 you specifically asked four separate questions regarding Mr. Brauer. 'Was his disability beginning 12-17-79 causally related to the injury of 1-6-79?' It is my opinion that his disability beginning 12-17-79 was causally related to the injury of 1-6-79. As discussed above, the weight bearing, twisting injury of January 1979 apparently produced the early chondromalacia changes in his knee and they did not actually resolve during that 12 month interval but were still present as evidenced by continued complaints and re-referrals to several different physicians. The fact that an arthrogram of the left knee performed in March 1979 did not reveal any chondromalacia is not incompatible with this observation of posttraumatic chondromalacia having begun in January 1979. An arthrogram is done mainly to evaluate the meniscus of the knee and will not normally show chondromalacia of any articular surface.
>
> "Did the injury of 1-6-79 permanently or temporarily aggravate the underlying chondromalacia of the left patella?" I found no evidence to support the contention that this patient had any underlying chondromalacia of the left knee prior to 1-6-79. For this reason, it is inappropriate to speculate on whether or not this condition predated the 1-6-79 injury. Given the fact that he sustained this twisting

injury to the left knee on 1-6-79, it is my opinion that he has a permanent problem of chondromalacia of the left knee as a result of the injury of 1-6-79. Chondromalacia of this magnitude is rarely temporary.

"Do you feel that Mr. Brauer is capable of gainful employment in any type of position?" It is my opinion that Mr. Brauer is capable of gainful employment with certain physical limitations. Since I am not of the opinion that there was any preexisting difficulty with the left knee prior to 1-6-79, I have no need to consider any nonemployment-related conditions.

"Based on Mr. Brauer's present diagnosis, I would place the following limitations on his employment: No job that requires repetitive squatting or bending such as stair climbing or ascending from one level to another; no job that required him to remain constantly ambulatory through a normal work day; no job that required repetitive standing and twisting or turning from one side to the other as this tends to rotate his knee; no job that requires constant exposure to rapid temperature changes or any job that required him to be outdoors in cold weather. Based on these limitations, his best employment opportunity with respect to his physical problems would be a job indoors which allows him to sit a portion of the time, which allows him the freedom to get up and move about (changing position of his knee) and one that does not require repetitive flexing of the knee such as pushing levers or foot pedals.

"What are your recommendations for care?" At the present time, I have no further recommendations for any diagnostic nor therapeutic measures concerning his left knee problem. Based on the natural history of chondromalacia of the articular surfaces of the knee, I would consider his prognosis guarded. It is quite possible that he will incur additional medical expenses related to his complaints of left knee pain. Depending upon the severity of progression of his problem, it is possible he may undergo another surgical procedure on this knee at sometime in his lifetime. That procedure may require resurfacing of the intra-articular surfaces (such as a total knee replacement), or an osteotomy to shift the weight from his medial compartment of this knee. I do not recommend any of these procedures at this time. As stated before, the natural history of this problem is one of progression, but is impossible at this time to predict with accuracy the severity of the progression in a given time frame."

An Office medical adviser reviewed Dr. Glaser's report and on November 25, 1980 stated that he agreed with the doctor's findings and conclusions.

On January 26, 1981, the Office informed appellant that it had accepted his claim for chondromalacia of the left medial femoral condyle, medical tibial plateau and patella. The Office paid appellant compensation for temporary total disability for the period beginning February 23, 1980.

In a report dated November 17, 1981, Dr. Glaser stated in part:

> "Based on my examination of Wayne K. Brauer on 10 November 1981, I am of the opinion that he is able to return to work with restrictions. I am still of the opinion that those restrictions appropriate are the ones basically outlined in my report dated 21 October 1980: No job that requires repetitive squatting or bending such as stair climbing or ascending from one level to another; no job that requires him to remain constantly ambulatory through a normal work day; no job that requires repetitive standing and twisting or turning from one side to the other as this tends to rotate his knee; no job that requires constant exposure to rapid temperature changes, or any job that requires him to be outdoors in cold weather. Based on these limitations, his best employment opportunity with respect to his physical problem, would be a job which allows him to sit a portion of the time, which allows him the freedom to get up and move about (changing the position of his left knee) and one that does not require repetitive flexing of the knee such as pushing levers or foot pedals."

On January 6, 1982, the Office referred appellant back to Dr. Glaser for examination and evaluation regarding the issue of whether he sustained any permanent residuals of the January 6, 1979 employment injury.

On February 10, 1982, Dr. Glaser stated in part:

> "As you may or may not know, I have seen and treated Wayne K. Brauer from 8 July 1980 through 9 November 1981 for complaints of left knee pain."
>
> * * *
>
> "It is my opinion that Wayne K. Brauer has reached maximum clinical improvement at this time as a result of his previous surgery and of his previous injury. He now has anatomical changes as evidenced by sclerosis in the medial compartment. He has sustained functional loss of the left lower extremity as demonstrated by his quadriceps atrophy. He continues to have subjective complaints of pain, weakness and occasional buckling episodes causing further impairment. In considering these findings in conjunction with the AMA *Guides to Evaluation of Permanent Impairment*, it is impossible to accurately recommend a percentage of impairment based strictly on their recommendations. Most of those recommendations have to do with range of motion and do not correlate well with the functional loss as a result of sclerosis in the medial compartment,

> chondromalacia of the patella, and quadriceps atrophy. However, having done numerous evaluations of orthopedic problems for both Social Security Disability and functional impairment, I am of the opinion that this patient has a permanent partial impairment of function of the left lower extremity at the knee level of forty percent (40%)."

On March 8, 1982, an Office medical adviser expressed the opinion that appellant had reached maximum improvement on October 21, 1980, the date of Dr. Glaser's first report. The medical adviser indicated that appellant had a 40 percent permanent loss of use of the left lower extremity as a result of the January 6, 1979 employment injury.

On May 18, 1982, the Office requested Dr. Glaser to provide information regarding "the estimated date of maximum medical improvement. Our District Medical Director determined October 21, 1980. Do you agree?"

In response to the Office's request, Dr. Glaser on May 27, 1982 stated: "I am in agreement with the District Medical Director's determination that this patient reached a maximum medical improvement effective 21 October 1980."

On September 27, 1982, the Office issued a schedule award finding that appellant had a 40 percent permanent loss of use of the left lower extremity, entitling him to 115.20 weeks of compensation. The schedule award was for the period of October 21, 1980 to January 5, 1983. During this period of time until March 20, 1982 when appellant returned to work, he had already received compensation for temporary total disability. The decision informed him that the amount due under the schedule award, $27,830.68 for the period October 21, 1980 to January 5, 1983, was to be offset against the amount he had already been paid for temporary total disability, $20,288.79 for the period of October 21, 1980 to March 19, 1982, so that the balance payable under the schedule award was $7,541.89.

On appeal, appellant, by his representative, contends that the compensation order issued on September 27, 1982 improperly commenced the period of the schedule award on October 21, 1980 because, first, Dr. Glaser stated in his February 10, 1982 report that he treated appellant from July 8, 1980 through November 9, 1981, and second, that Dr. Glaser stated in the same report that "at this time" appellant had reached maximum medical improvement. This issue was extensively treated by the Board in its two decisions in *Marie J. Born.*[1]

In *Born*, appellant received an amended schedule award on November 18, 1975 for a foot impairment. The Office fixed the award's period as March 29, 1974 to February 1, 1976. She had already received compensation for the part of this period up to November 18, 1975. The basic issue on appeal in that case was the propriety of the Office's action in fixing the commencement of the schedule award on a date long before that of the award, thus "retroactively converting a whole year of compensation that had been paid for temporary disability into compensation under the schedule award."[2]

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[1] 27 ECAB 623 and 28 ECAB 89.

In the first decision in the *Born* case, the Board repeated the well-settled rule that the period covered by a schedule award commences on the date that the employee reaches maximum improvement, which "means that the physical condition of the injured member of the body has stabilized and will not improve further."[3] In the second *Born* decision, the Board pointed out that a retroactive determination of the date of maximum improvement is not *per se* erroneous. The determination of such date is to be made in each case on the basis of the medical evidence; it "may properly be set at 'some distant time in the past' if the medical evidence establishes this was the proper date. However, because of the adverse effect such a retroactive determination would have on the employee, the evidence must be strong enough so that it 'clearly and convincingly establishes' the maximum improvement had in fact been reached by that date."[4]

With respect to the issue of whether the Office properly determined that date of maximum improvement, the Board finds the case not in posture for decision.

Dr. Glaser in his October 21, 1980 report stated that "I have no further recommendations for any diagnostic or therapeutic measures concerning his [appellant's] left knee problem." The doctor did not provide an opinion regarding the extent of permanent impairment of appellant's left lower extremity, nor the date of appellant's maximum medical improvement.

Dr. Glaser in his February 10, 1982 report indicated that he had treated appellant from July 8, 1980 through November 9, 1981 for complaints of left knee pain. The doctor, in response to an Office request, stated that it was his opinion that appellant sustained a 40 percent permanent impairment of the left lower extremity and that he "has reached maximum clinical impairment at this time as a result of his previous surgery and of his previous injury."

The Board notes, however, that Dr. Glaser indicated on May 27, 1982 in response to an Office inquiry that he agreed with an Office medical adviser's determination that appellant reached maximum medical improvement on October 21, 1980.

The statements from Dr. Glaser concerning the date of maximum medical improvement are inconsistent. In his October 21, 1980 report, Dr. Glaser seems to imply that maximum medical improvement had been reached. In his February 10, 1982 report, the doctor states that he treated appellant up to November 9, 1981 and that maximum medical improvement had been reached; however, in his May 27, 1982 report Dr. Glaser states his agreement with the Office medical adviser's determination of October 21, 1980 as being the date of maximum medical improvement. Therefore, it cannot be said that the evidence "clearly and convincingly establishes" that maximum improvement had been reached by October 21, 1980.

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[2] See 28 ECAB at 93.

[3] 27 ECAB at 629.

[4] 28 ECAB at 94.

In view of the foregoing, the Office should request Dr. Glaser to provide a rationalized opinion regarding the date appellant's employment-related left knee condition reached maximum medical improvement.

With respect to the issue of whether appellant should have received compensation for temporary total disability instead of a schedule award while he was undergoing vocational rehabilitation from January 13, 1981 until his return to work on March 20, 1982, the Board notes that the Director of the Office in an "Answer to Appeal" requested the Board to remand the case to the Office so that "the Office can issue an appropriate decision which (1) will reflect entitlement to compensation under 5 U.S.C. 8105 for the period of the vocational training program and (2) will establish the dates of the interruption and the resumption of the schedule award." The Board hereby grants the Office's request.

The compensation order of the Office of Workers' Compensation Programs, dated September 27, 1982, is set aside and the case remanded to the Office for further proceedings as outlined above, to be followed by a *de novo* decision on all aspects of the case.

In the Matter of ERNEST DONELSON, SR. *and* U.S. POSTAL SERVICE, BULK MAIL CENTER, Memphis, Tenn.

Docket No. 83-2004; Submitted on the Record;
Issued January 12, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs acted properly in recomputing appellant's loss of wage-earning capacity based on a change of his actual earnings.

On August 11, 1975 appellant, then a 46-year-old foreman of mails, twisted his left knee while climbing a ladder. At that time, he was a level 15, step 4. The Office accepted that appellant sustained a strain of the left knee, with joint effusion producing low grade phlebitis and lymthangitis as a result of this incident and paid him compensation for resulting periods of disability. He also received a schedule award for a 19 percent permanent loss of use of his left leg, entitling him to 54 weeks of compensation for the period September 25, 1976 through October 13, 1977.

On February 28, 1976 appellant returned to work at the employing establishment in the position of mail flow controller, a job compatible with the physical limitations imposed by his injury-related conditions. This position was at level 14, step 4. By decision dated September 18, 1978 the Office reduced appellant's compensation to reflect a five percent loss of wage-earning capacity based on his actual wages as a mail flow controller.

Appellant requested reconsideration of this decision which was denied by the Office in a July 26, 1979 compensation order. He then requested a hearing before an Office representative which was held on February 15, 1980. In a decision dated April 1, 1980, and finalized on April 4, 1980, the Office representative affirmed the Office's two prior decisions.

Appellant appealed this decision to the Board which issued a February 11, 1981 order remanding the case.[1] In that order the Board found that the Office had "used the wrong rate of pay in calculating appellant's compensation." On remand the Board directed the Office to "recalculate appellant's compensation for his loss of wage-earning capacity for the period after September 10, 1976, using his pay rate as of September 10, 1976, (when he had an employment-related recurrence of disability) and pay him the additional compensation to which he is entitled."

On remand, the Office recalculated appellant's loss of wage-earning capacity according to the Board's order and issued a March 20, 1981 compensation order to reflect this revision.

In a letter to the Office dated October 7, 1982, the manager of the employing establishment wrote that appellant's salary as a mail flow controller had exceeded the current salary of appellant's position at the time of injury. Specifically, he stated that appellant's current salary at level 14, step 6, was $26,582, while the current salary of a level 15, step 4 foreman was $24,699.

An October 4, 1982 report submitted by Dr. Joseph C. Boals, III, appellant's attending orthopedic surgeon, stated that appellant's "condition was unchanged over previous examinations. His work status should remain the same."

In a letter to appellant dated March 15, 1983, the Office wrote: "Since the job you now hold as a mail flow controller pays more than the current rate for the job held at the time of injury, you no longer have a loss of wage-earning capacity. Therefore, compensation will be terminated effective February 24, 1983." By compensation order dated June 17, 1983 the Office found that appellant "has no loss of wage-earning capacity after February 23, 1983."

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[1] Docket No. 80-1898. (issued February 11, 1981).

The Board finds that the evidence does not support the Offices's finding that appellant had no loss of wage-earning capacity after February 23, 1983 because of a change in his actual earnings.

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[2] A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[3] The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the *capacity* to earn and not on actual wages lost.[4]

In the present case, the Office has not met its burden of establishing a material change in the nature and extent of appellant's injury-related condition or that he has been retrained or otherwise vocationally rehabilitated or that the original loss of wage-earning capacity was erroneous. The Office based its original wage-earning capacity determination on appellant's actual earnings as a mail flow controller. There is no evidence of record to demonstrate a change in appellant's capacity to earn wages in the job determined to represent his earning capacity. The Office improperly found that appellant had no loss of wage-earning capacity and terminated appellant's compensation solely on his current actual earnings exceeding those of the position he held when injured.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 17, 1983 is set aside and the case remanded for reinstatement of payment of compensation for partial disability at the rate established in the original wage-earning capacity determination.

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[2] *Roy Mathew Lyon*, 27 ECAB 186.

[3] *Elmer Strong*, 17 ECAB 226.

[4] *Robert M. Caldwell*, 13 ECAB 437; *Ernest O. Smith*, 19 ECAB 324; *Ronald M. Yokota*, 33 ECAB 1629.

In the Matter of MARCUS FRANKLIN GILL, JR. *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Texarkana, Ark.

Docket No. 83–1055; Submitted on the Record
Issued January 13, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly found that appellant forfeited his right to compensation for the period of March 27, 1977 to April 20, 1981 under section 8106(b)(2) of the Federal Employees' Compensation Act.

Appellant, a 38-year-old supervisory air traffic control specialist, filed a claim on August 20, 1976 alleging that on August 19, 1976 he was mistakenly given a flu shot at work to which he had an adverse reaction causing him to experience weakness, numbness, and respiratory distress. He stopped work on August 19, 1976, returned to limited duty on October 20, 1976 and to full-time duty on November 1, 1976 and claimed a recurrence of disability on January 25, 1977. The Office determined that appellant's conditions of hysterical neurosis and Guillain-Barre' Syndrome were causally related to his employment.[1]

Appellant proceeded against the government under the Federal Tort Claims Act and accepted no further compensation from the Office effective October 30, 1976. He retired on disability on September 9, 1977. By decision dated February 17, 1981 the United States Court of Appeals, Fifth Circuit, reversed a District Court judgment for appellant in the amount of $700,000 on the ground that appellant's injury fell within the coverage of the Federal Employees' Compensation Act. He was thereafter paid temporary total disability compensation by the Office commencing March 26, 1981. By decision dated October 8, 1981 the Office awarded him schedule awards covering the period of April 21, 1981 to November 26, 1989 for a 35 percent permanent loss of use of each of his arms and a 40 percent permanent loss of use of each of his legs.

By letters dated May 19 and June 26, 1981 the Office requested from appellant a detailed history of his employment from August 19, 1976 to the present, including the name of his employers, the period of time he worked for each and the amount of pay he received.

In a July 13, 1981 response appellant stated that from August 19, 1976 to September 6, 1977 he was employed at the employing establishment, and that from July 20, 1978 to December 19, 1980 he worked for Bill Heil Chrysler on a part-time basis. He stated that in 1978 he earned $4,200; in 1979, $1,500; and in 1980, $2,000. Appellant also stated that from January 27 to March 20, 1981 he worked part time for Jordan Ford, earning $560.

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[1] Appellant had initially received continuation of pay from August 19 to October 4, 1976. However, the Office subsequently determined that appellant did not sustain a traumatic injury, and although entitled to disability compensation subsequent to August 19, 1976 he was not entitled to continuation of pay. The case record shows that the Office paid appellant temporary total disability compensation for certain periods subsequent to August 19, 1976, but the exact periods are not clear.

With appellant's consent the Office obtained an itemized statement of his earnings for the period of January 1976 through December 1981 from the Social Security Administration. (The statement indicated that as to the period subsequent to December 1980 the report might be incomplete because of the time required to receive and process reports.) The Social Security Administration statement indicated that in 1978 appellant worked for North Star Dodge and Bill Heil Chrysler, receiving $3,628.60 and $7,072.36 in wages from these employers respectively. In 1979, the report indicated, he worked for Bill Heil Chrysler, earning $1,154.68. In 1980 he earned $3,315.25 at Bill Heil Chrysler, $360.00 at Coffee System Inc., $1,920.60 at Dow Chemical Co., and $4,251.27 at Broadway Dodge.

At the recommendation of the Office an investigation was conducted. In a November 9, 1982 interview a personnel employee at Jordan Ford stated that records did not reveal that appellant was ever an employee there. He did state that appellant could have been there on a trial basis and paid on a contract basis. In an interview conducted on November 18, 1982 appellant stated "the reason that my Social Security record does not coincide with my income report to [the Office] is that I only reported to [the Office] my net earnings subject to income tax." The December 1, 1982 investigative report pointed out the discrepancies between appellant's actual earnings as set forth in the Social Security Administration Report and his statement of those earnings.

By compensation order dated February 11, 1983 the Office found that "compensation during the period March 27, 1977 through April 20, 1981 is forfeited under Section 8106(b)(2) [of the Federal Employees' Compensation Act]."

The Board finds that the Office properly determined that appellant had forfeited his right to compensation for the period of March 27, 1977 to April 20, 1981 under section 8106(b)(2) of the Federal Employees' Compensation Act.

Section 8106(b)(2) states the following:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. The employee shall include in the affidavit or report the value of housing, board, lodging, and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. An employee who knowingly omits or understates any part of his earnings forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if al-

> ready paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title [recovery of overpayments], unless recovery is waived under that section."[2]

In the present case, the Office made two requests to appellant dated May 19 and June 26, 1981, for a detailed employment history covering the period August 19, 1976 to date. In a statement dated July 13, 1981 he informed the Office that from 1978 to 1980, working for Bill Heil Chrysler, he earned a total of $7,700 and that in 1980, working for Jordan Ford he earned $560. The earnings set forth in the itemized statement from the Social Security Administration were not consistent with appellant's statement. The Social Security Administration statement revealed that from Bill Heil Chrysler alone from 1978 to 1980 appellant earned $11,542.29. It also revealed that in those same years, 1978-1980, working for four other companies, he earned a total of $10,160.47. Appellant attempted to explain this discrepancy, stating that it represented the difference between his gross earnings, which were reported in the Social Security statement and his net earnings, which he reported to the Office. This does not explain appellant's failure to inform the Office of his earnings from four other companies from 1978 to 1980.

Since the Office requested an earnings statement from appellant for the period of March 27, 1977 to April 20, 1981 and since appellant knowingly omitted a part of his earnings during that period the Office was correct in declaring a forfeiture for the entire period. The statute provides that the forfeiture shall be "with respect to any period for which the affidavit or report was required."[3]

The February 11, 1983 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[2] 5 U.S.C. section 8106(b)(2).

[3] See *Ronald H. Ripple*, 24 ECAB 254 and *Charles A. Griffin*, 22 ECAB 94. The Board notes that in its two requests, dated May 19 and June 26, 1981, the Office asked appellant for an employment history covering the period from August 19, 1976 to date. As to the beginning date of the forfeiture being March 27, 1977 the Office stated that appellant claimed compensation commencing that date. As previously noted, the record concerning compensation claimed and paid is not totally clear.

In the Matter of GERALD A. MAHER *and* DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Omaha, Nebr.

Docket No. 83-1978 Submitted on the Record;
Issued January 16, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's employment-related loss of wage-earning capacity.

On September 13, 1976 appellant, then a 46-year-old special agent, sustained a "twisting injury to both knees and lower back" as a result of moving a heavy crated object. He was examined the following day by Dr. Steve Schwid who diagnosed "partial avulsion of right quadriceps tendon at right patella." Appellant returned to work on September 20, 1976.

On February 9, 1978 appellant underwent an "arthrotomy medial meniscus" for an internal derangement of the knee by Dr. Max Kinney. He returned to work on April 11, 1978 and worked until May 21, 1978 when he alleged a recurrence of disability due to the 1976 employment injury.

Appellant came under the care of Dr. Louis F. Tribulato, an orthopedic surgeon, in January 1978. In a February 6, 1979 report that doctor described appellant as "not suitable for any significant work or labor at the present time." On February 20, 1979, Dr. Tribulato stated that appellant would "be on medication indefinitely."

The Office of Workers' Compensation Programs accepted that appellant's disability after May 21, 1978 was related to his September 13, 1976 injury and authorized payment of compensation for all periods not covered by leave.

In response to a January 15, 1980 Office request for an evaluation of appellant's employment-related disability, Dr. Tribulato submitted the following February 29, 1980 report:

> "He can sit, but he cannot walk for a long period. He cannot do strenuous lifting or squatting. He cannot do too much climbing. Kneeling would definitely bother his knees considerably. Standing in one position for a long period would bother him. He can lift twenty to fifty pounds, I would say. There are no specific hand restrictions. Simple grasping is okay. Pushing and pulling as long as it is mild. Fine manipulation is okay. He can reach above his shoulders. He can use his feet to operate foot controls but nothing strenuous. He can operate a car. No hearing or cardiac residuals. Cold and heat would bother his knees particularly. There are no neuropsychiatric problems, that I know of. He could work eight hours if he got a limited type work within his limitations."

In October 1980 appellant began a vocational rehabilitation program to be licensed as a commercial pilot instructor. A September 3, 1980 letter from the vice-president of appellant's flight school stated that as "a certified flight instructor, [appellant] has the potential of earning $12,000 to $15,000 per year."

In a May 11, 1982 letter, appellant's rehabilitation counselor reported that appellant "has completed the flight training he requested in his rehabilitation. He is qualified for jobs as a pilot and is currently working in that capacity on a part-time basis. He stated his earnings are rather low at this point, but he is qualified for jobs which pay $12,000 per year or more."

In response to an Office request, Dr. Tribulato submitted the following May 19, 1982 report:

> "It is my understanding that Mr. Maher injured both knees in September 1976. I have been following him for several years. He has had a problem with both knees all this time. He has had symtomatic treatment for both of them. Yes, I would judge that the present right knee problem is a result of the injury of 1976 because he has persistent and chronic complaints relating back to this injury according to my history."

Based on Dr. Tribulato's reports, an Office medical adviser completed a work restriction evaluation form which stated that appellant was capable of full-time work which required no more than intermittent walking, sitting and standing (up to 8 hours); lifting and kneeling (up to 4 hours); and bending, squatting, climbing and twisting (up to 6 hours).

An Office loss of wage-earning capacity specialist reviewed appellant's case record and concluded that the position of commercial airplane pilot represented appellant's loss of wage-earning capacity.[1] This position was described as light work requiring reaching, handling, fingering, feeling, talking, hearing and seeing. An Office vocational rehabilitation specialist verified that this "job was being performed in sufficient numbers so as to make it reasonably available to the claimant within his commuting area."

An Office medical adviser reviewed the case record and concluded that appellant "is capable of performing the duties of a commerical airplane pilot on a full-time basis."

By compensation order dated December 7, 1982 the Office informed appellant that the medical evidence established that he was no longer totally disabled due to the effects of his employment injury and that as of March 16, 1982 he had a 39 percent loss of wage-earning capacity based on his ability to perform the full-time duties of a commercial airplane pilot.

Appellant requested reconsideration of its decision asserting that the restrictions placed on his certificate by the Federal Aviation Administration due to his knee problems reduced his "ability to respond to flight assignments on short notice which is the majority of the type work assignments such employment generates." In support of this assertion, appellant submitted the following March 10, 1982 letter from Dr. Audie W. Davis, Chief of the Aeromedical Certification Branch of the FAA:

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[1] Department of Labor, *Dictionary of Occupational Titles*, No. 196.283.

> "Our review of your medical records has established that you are eligible for a second-class medical certificate.
>
> "The certificate you now hold is valid until the normal date of expiration.
>
> "You are cautioned to abide by Federal Aviation Regulations, Section 61.53, relating to physical deficiency. Because of your history of knee problems, operation of aircraft is prohibited at any time new symptoms or adverse changes occur [and] for 24 hours after use of medication (Darvocet)."

Appellant also submitted the following June 29, 1983 letter from Dr. Davis:

> "We have received your recent application for medical certification. You indicated on your application that you have been treated and hospitalized for a condition requiring the use of Feldene and Darvocet."
>
> * * *
>
> "The use of any medication on a continuing basis for any purpose usually contraindicates the performance of pilot duties, although the underlying condition(s) for which the medication is required may be disqualifying insofar as medical certification is concerned."

By compensation order dated August 24, 1983 the Office denied appellant's application for review on the ground that the evidence submitted was "found to be either irrelevant and immaterial or lacking substantial probative value and is not sufficient to warrant review of the prior decision."

The Board finds that the case is not in posture for decision.

The FAA medical certification letters submitted by appellant in support of his request for reconsideration were sufficient to require further development of the evidence by the Office.[2] Such further development is especially important in light of the fact that the Office did not request a work tolerance evaluation of appellant from Dr. Tribulato, his attending physician.

Therefore, the case shall be remanded so that the Office may obtain a work tolerance evaluation from Dr. Tribulato, who should also be requested to provide an opinion on whether appellant, in light of his physical limitations and any medications he may be taking for his employment-related condition, is capable of performing the duties of a commerical airplane pilot and, if so, whether on a full or part-time basis. The Office should then ascertain from the FAA whether appellant is physically and otherwise qualified for such position. Upon further development of the case record deemed necessary, the Office shall recalculate appellant's loss of wage-earning capacity and issue a *de novo* decision.

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[2] Horace Langhorne, 29 ECAB 820.

The decisions of the Office of Workers' Compensation Programs dated December 7, 1982 and August 24, 1983 are hereby set aside and the case remanded for futher development in accordance with this decision and order of the Board.

In the Matter of HENRY BOND *and* U.S. RAILROAD RETIREMENT BOARD, Detroit, Mich.

Docket No. 83–2149; Submitted on the Record;
Issued January 19, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's throat condition was causally related to factors of his federal employment.

On January 28, 1983, appellant, then a 44-year-old contact representative, filed a claim alleging that an "extremely cold" temperature in his office three or four days in December 1982 caused an inflammation of his throat, for which he missed work from December 27, 1982 through January 10, 1983. Following the submission of his claim, the Office of Workers' Compensation Programs, by letter dated February 10, 1983, requested appellant to submit a statement setting forth in detail the factors of employment he believed contributed to his condition, and to obtain rationalized medical opinion evidence establishing causal relationship between his condition and factors of his employment.

In a statement submitted on March 3, 1983, appellant stated that his office was very cold the week of December 20, 1982, when he "began coughing and catching a cold, which resulted in a stripped throat . . ." He also submitted statements of coworkers stating that the office was uncomfortably cold during the period in question. The regional director of the employing establishment reviewed appellant's statement and related the following on March 16, 1983:

> "[I]t comes as no surprise to me, that office has had this problem in the past, but our best efforts to correct it have met with failure . . . We were assured by [General Services Administration] that

the temperature setting that existed in the Detroit office on the day in question with within the range set and controlled by that agency.

> "More than this I cannot comment on except to point out that no other employee took exception to the temperature any more on the day in question than they would on any like day. None other became ill nor did they comment on it to their supervisors."

The assistant district manager of the employing establishment submitted a statement indicating that on or about December 21, 1982, appellant complained about the low temperature. He stated that he requested the GSA to check on this matter and was told that the temperature was 68 degrees.

Appellant submitted a March 23, 1983 report of Dr. Robert S. Michaels, a Board-certified internist and nephrologist, which states as follows:

> "[Appellant] was seen in our office on December 27, 1982. His temperature was 100 degrees F; his blood pressure was 130/98. At that time, he complained of a sore throat for approximately 96 hours prior to his visit.
>
> "Physical examination showed an alert male. Bilateral tonsillitis was appreciated. The patient was treated with Penicillin VK 250 mg. four times a day for ten days. The patient's throat culture demonstrated alphastrep. In that respect, the patient probably had viral tonsillitis.
>
> "At the time of the visit to the office, the patient complained that he was working in an uncomfortable environment. The patient noted that the office where he spent the majority of his time was somewhat cool, and he felt that possibly this exposure contributed to conditions which allowed him to be susceptible to this upper respiratory type infection.
>
> "At the present time, I have no other information concerning other occupational stresses and exposures which may be a factor in this gentleman's problem. If [he] can make me aware of these factors, perhaps we can amend this letter appropriately."

The case record, along with a statement of accepted facts, was reviewed by Dr. James E. Morgan, an Office medical consultant. He stated in a July 13, 1983 report that he did not believe the appellant's tonsillitis diagnosed by Dr. Michaels on December 27, 1982 was causally related to factors of employment. He further stated:

> "The office reported temperature control was set at 68 degrees which is [within] acceptable limits. The tonsillitis was due to an infection with alpha strep which can strike anyone regardless of climate."

By compensation order dated August 31, 1983, the Office rejected appellant's claim for compensation, finding that it had "not been established that the condition claimed is causally related to factors of employment."

The Board finds that the medical evidence of record fails to establish that appellant's throat condition was causally related to factors of employment.

Appellant had the burden of establishing by the weight of the reliable, probative, and substantial evidence that the disability for which compensation is claimed is caused or aggravated by his employment.[1] He has failed to meet this burden.

Following the submission of his claim, appellant submitted a statement describing the cold environment at work that he alleged caused his throat condition. He also submitted statements of coworkers substantiating the cold environment at work. The regional director of the employing establishment also indicated that appellant's office had had problems with cold temperatures. The assistant district manager stated that the General Services Administration informed him that the temperature on December 21, 1982, when appellant had complained about the cold, was 68 degrees.

The only medical evidence submitted in support of the claim was the March 23, 1983 report of Dr. Michaels, a Board-certified internist and nephrologist. This report diagnosed a condition of viral tonsillitis and repeated appellant's complaints about the temperature at work, but it did not contain an opinion on causal relationship. Dr. Morgan, an Office medical consultant, reviewed the record and stated that appellant's tonsillitis was caused by "an infection with alpha strep which can strike anyone regardless of climate." The evidence is therefore insufficient to meet appellant's burden of proof.

The decision of the Office of Workers' Compensation Programs dated August 31, 1983 is hereby affirmed.

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[1] *Ernest R. Lala*, 31 ECAB 260.

In the Matter of MARGARET ROSE, claiming as widow of STANLEY A. ROSE *and* DEPARTMENT OF JUSTICE, Washington, D.C.

Docket No. 83-241; Hearing December 6, 1983;
Issued January 19, 1984

Appearances: *Douglas A. Dahlin, Esq.* for appellant;
Brenda J. Stovall, Esq. for the Director, Office of
Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the employee's death on July 23, 1977 due to cardiac arrest was causally related to factors of his federal employment.

On August 17, 1978 appellant filed a claim for death benefits asserting that her husband's death due to cardiac arrest on July 23, 1977 was caused by the stresses of his job as Chief of the Economic Litigation Section in the Civil Division of the Department of Justice. A death certificate filed with the claim stated that the employee died of "cardiac arrest due to arteriosclerotic heart disease."

The case record shows that the employee was hospitalized by Dr. John P. Mandanis, a specialist in cardiovascular disease, on March 29, 1968 with a diagnosis of myocardial infarction of the anterior wall. He remained under the regular care of Dr. Mandanis and eventually resumed full-time employment. However, the employee was readmitted to the hospital on September 9, 1970 with recurrence of an acute myocardial infarction. The employee filed no claims for these occurrences.

On July 19, 1977 the employee entered the hospital for a nonemployment-related inguinal herniorrhaphy performed on July 20, 1977. On July 23, 1977 while resting in his hospital room, the employee went into cardiac arrest and died.

In support of her claim, appellant submitted the following April 4, 1979 report by Dr. Mandanis:

> "I have reviewed the records concerning Mr. Rose both in my office and at Arlington Hospital. I have also reviewed a statement by Dr. John Rose, brother of Mr. Rose and presently Dean of Georgetown Medical School who referred Mr. Rose to me for treatment. I have also reviewed statements provided to me by counsel for Mrs. Rose, of Mr. Irving Jaffe, a former co-worker, now retired, and of a former secretary of Mr. Rose.
>
> "It was my strong impression while Mr. Rose was alive that his position with the Justice Department entailed a great deal of responsibility and was fraught with considerable daily stress. His heart disease, I am certain, increased from, and was related to, his work. This is particularly supported by the fact that one of his acute myocardial infarctions occurred at his Justice Department office.
>
> "While his heart disease could not have been reversed, his desire to work and to continue to work was central to his personality make-up. I knew Mr. Rose to thrive on what his job demanded of him and I always had difficulties convincing him to say home to convalesce when he thought that working was better than resting at home. I am convinced that the intensity of his dedication to his job greatly contributed to gradual deterioration of his heart disease process. In

> fact, his desire to have the herniorrhaphy was prompted by his main objective of staying at work without major restrictions.
>
> "My last office cardiovascular examination of Mr. Rose was required for preoperative clearance. It was my opinion that at that time the patient's heart disease was stable and that the surgical risk was recognizable but by no means excessive under the plan devised by Dr. Frank Cardenas, his surgeon. Indeed, Mr. Rose went through the operation and the immediate post-operative period without any serious complications. His death occurred at a time of minimal stress and it cannot be linked to the surgical procedure performed several days previously.
>
> "I can thus say without qualification that Mr. Rose's death from cardiac arrest was due to severe, chronic coronary artery disease which was greatly aggravated and closely related to his chosen work."

In a letter dated July 16, 1979, an Office of Workers' Compensation Programs' medical adviser requested Dr. Mandanis to provide medical rationale for the opinions expressed in his April 4, 1979 report. Dr. Mandanis responded with the following:

> "I must confess that I find the last sentence of your letter dated July 16, 1979, quite puzzling. You ask me to respond to the question of what I consider as the primary cause of Mr. Stanley Rose's death. In my statement dated April 4, 1979, the contents of which are available to you I conclude: 'I can thus say without qualification that Mr. Rose's death from cardiac arrest was due to severe, chronic coronary artery disease which was greatly aggravated and closely related to his chosen work.'
>
> "Try as I might, I cannot today respond in any other fashion to your renewed question. It remains a fact that his primary disease was coronary atherosclerosis which was the cause of his death. Are you prepared as physician to say that this man's personality makeup and what it brought to bear on his job had nothing to do with his premature death? Do we really know for certain what is the ultimate, basic etiology of coronary atherosclerosis? Mr. Rose followed all the rules: he adhered to a regular exercise program, took his medications regularly, observed dietary restrictions, abstained from smoking but continued 'putting in' a full work schedule wrought with stressful conditions. I have several patients who retired from the Federal Government because those stresses were unbearable to them. They are alive several years after retirement and lead healthy lives they would not have had had they continued working.
>
> "My original statement clearly expresses the above views and I believe represents the current thinking as to precipitating or aggravating factors. You will agree no one can go beyond it. Fifty

> years from now, perhaps, emotional stress will be established as one of the major causes but *now* we can only strongly suspect that it is so."

Because it regarded Dr. Mandanis' response as lacking in medical rationale in support of his opinions, the Office referred the employee's case record to Dr. Bernard J. Walsh, a specialist in cardiovascular disease, for review and opinion on the causal relationship issue. Dr. Walsh submitted the following May 6, 1980 report:

> "As requested, I reviewed Mr. Rose's file. From it I learned that he was 61 years of age at the time of his death of July 23, 1977. He was known to have a very significant amount of coronary arteriosclerotic heart disease, having had three documented myocardial infarctions, the first of which occurred in 1968, the third in 1970. The last was complicated by the development of congestive heart failure and by the appearance by x-ray of what might have been a left ventricular aneurysm. He had been known to have hypertension since 1966 and to have elevated serum lipids. He had been a long time, conscientious, and very able section chief at the Department of Justice, who, from the statements given by his secretary, by his former supervisor Mr. Goldbloom and by his brother, Dr. John Rose, enjoyed his work in the Department of Justice very much and derived great satisfaction from it. He died suddenly late on the third post-operative day while he was still a patient in Arlington Hospital following an uneventful repair of an inguinal hernia. His death almost certainly came from ventricular fibrillation, a manifestation of his long time serious coronary artery disease without new myocardial infarction.
>
> "Sudden death occurs about 1200 times daily in the United States. In 75 percent of the sudden deaths severe multivessel coronary artery disease is found, a condition present in Mr. Rose prior to his death.
>
> "The fact that Mr. Rose's death occurred in a hospital several days after he left his work in order to have his hernia repaired excludes any possible acute physical or emotional stress element in the production of his death.
>
> "While emotional stress, which is present everywhere and cannot be measured, is often considered to be a possible important factor in the causation or aggravation of coronary artery disease, there is actually no scientific proof to support such a relationship. Physicians and those in executive positions and those in professional and business life are often considered to be hard drivers and high achievers, yet mortality and longevity studies of American physicians indicate a decreased incidence of cardiovascular disease with an over all male mortality rate among physicians only 75 percent of that for age-

matched white males. Studies of 270,000 male career employees of the Bell Telephone System have shown that those who attained executive position had less coronary artery disease than employees of similar educational level who failed to achieve executive status. It is also a fact that since 1963 mortality due to coronary artery disease and to cerebral vascular disease has decreased in each age group with significant increase in life expectancy. This gain in life expectancy has exceeded that attained during the preceeding fourteen years, though the earlier period reflected the development and widespread use of antibiotics.

"That there is no relationship between one's occupation and the development of coronary artery disease has been reported by two committees of the American Heart Association, the first report published in Circulation in 1962 and the second report in Circulation in May 1977. Also, Dr. William B. Kannel, codirector of the Framingham Study (a study of 5,000 adults followed for thirty years) reported in the American Journal of Cardiology in February 1976 as follows: 'Little evidence of psychologic or social influences on the incidence of coronary disease was uncovered at Framingham. In a detailed analysis, the personality coping with it, poor handling of hostility, and evidence of anxiety were found unrelated to the incidence of coronary disease or its precursors'.

"In summary, there is no valid scientific evidence to support a relationship between Mr. Rose's coronary artery disease and his death to his work for the Department of Justice."

In a June 9, 1980 letter, the Office requested Dr. Walsh to answer the following questions:

"1. Was the condition or disability reported by Doctor Mandanis on April 4, 1979 due to precipitated, accelerated, aggravated, or proximately caused by the accepted injury or conditions of employment?

"2. Is the diagnosis established? State diagnosis.

"3. Recommendations if indicated.

"4. Did claimant's hernia operation in any way precipitate or accelerate the July 23, 1977 myocardial infarction?

"5. Was claimant's death proximately caused by factors of his federal employment?

"6. In your considered opinion would any of the activities alleged by Mr. Rose precipitate or accelerate the progression of severe, chronic coronary artery disease?"

Dr. Walsh responded with the following:

"I have reviewed Mr. Rose's file again. I have also reviewed and reconsidered my report to you dated May 6, 1980, which was sent to you following my initial consideration of the file. The following

> are my responses to the questions directed to me contained in your request of June 9, 1980.
>
> "As to the first question, I disagree on all counts with the opinions stated by Dr. Mandanis on April 4, 1979 and in his second report of August 1, 1979 directed to your office. The reasons for my firm opinion that Mr. Rose's severe and progressive coronary arteriosclerotic disease was the cause of his death on July 23, 1977 was not precipitated, accelerated, aggravated, or proximately caused by his government employment are stated in the fourth, fifth, and last paragraphs of my report of May 6, 1980.
>
> "As to the second question, there can be no doubt that the diagnosis of long time, progressive coronary disease in Mr. Rose was firmly established as far back as 1968.
>
> "The third question requires no answer as the patient is deceased.
>
> "As agreed to by Dr. Mandanis, the answer to the fourth question about the possible relationship of Mr. Rose's hernia operation to his death can be stated clearly to the effect that the operation did not precipitate or accelerate his death on July 23, 1977, and it almost certainly did not come from a recurrence of myocardial infarction. As stated in the first paragraph of my May 6, 1980 report, his death was almost certainly due to ventricular fibrillation, a common terminal feature in those with severe multivessel coronary disease such as Mr. Rose had.
>
> "The fifth question's answer is contained in my answer to the first question.
>
> "As to the sixth question, I restate the content of my report of May 6, 1980 summed up in the last paragraph of that report."

An Office medical adviser reviewed the employee's case record and concluded that there was "no evidence where stress played any part in the employee's build-up of atherosclerosis and coronary disease."

In order to resolve the conflict in medical opinion, the Office referred the employee's case record to Dr. James M. Bacos, a Board-certified internist specializing in cardiovascular disease, for review and opinion on the causal relation issue. Dr. Bacos submitted the following October 15, 1980 report:

> "I have just completed a detailed review of the file on Mr. Stanley Rose. As you have requested I am summarizing my thoughts about the mechanism of death and its relationship to his occupation.
>
> "The only pertinent facts which are worth reiterating are as follows: Mr. Rose was a gentleman who was known to have hypertensive vascular disease, together with hyperlipidemia which most assuredly was an inherited characteristic. The data strongly suggests that he had premature coronary disease with multiple infarctions leaving him profound cardiac muscle dysfunction and continued

> ischemia as manifested by both anginal complaints and ventricular electrical irritability. His demise came suddenly in the wake of an elective surgical procedure while he was quietly relaxing in his hospital room. This most certainly represented ventricular fibrillation.
>
> "In my view the above sequence is a classic and is the end product of premature coronary artery disease which is predestined by inherited characteristics. The process of atherosclerosis occurred early in Mr. Rose's life and was obviously extensive resulting in multiple heart attacks at a relatively early age. This sequence of events is exceedingly common and inexorable, and the only surprise is that he did not succumb at an earlier period in his life. This was no doubt due to the excellent care given to him by Dr. Mandanis. There is nothing in the literature that would relate the process of artherosclerosis to one's employment. I would have to totally agree with Dr. Bernard Walsh that there is *no association* between this man's atherosclerotic picture or his demise to his former employment." (Emphasis in original)

A second Office medical adviser reviewed the medical evidence of record and concurred with the opinion of Dr. Bacos.

By compensation order dated November 26, 1980, the Office rejected appellant's claim on the ground that "the weight of the medical evidence shows that the employee's death was not related to factors of his federal employment."

Appellant requested a hearing before an Office representative which was held on May 26, 1982. She also submitted hospital records and statements which had been previously considered by the Office. Also submitted was the following September 9, 1981 report by Dr. Mandanis:

> "I previously furnished a statement on the late Stanley D. Rose as his attending cardiologist of many years.
>
> "I subsequently answered an inquiry from the District Medical Officer, reaffirming my opinion that Mr. Rose's death was probably work related.
>
> "I am now informed by Mrs. Rose's counsel, that the Department of Labor obtained two opinions from other cardiologists, in and out of the Department, asserting that my opinion was speculative, or not specific enough, and that certain research studies were evidence opposed to the idea that stress can cause coronary artery disease. The question of the relationship of cause of death to employment was questioned. These statements were not made available to Mrs. Rose or to me until now.
>
> "Mrs. Rose's counsel has related to me new information from Mr. Rose's former assistant and secretary, concerning telephone calls to and from Mr. Rose while he was recuperating in Arlington Hos-

> pital from his hernia operation. In addition, the counsel has informed me of the contents of a conference with a Labor review examiner in which the question arose as to my specific 'theory' on the cause of Mr. Rose's death and its connection to his work.
>
> "With reference to the above, I can only reiterate my previous statement that Mr. Rose's death was most likely work related.
>
> "It is quite clear that Mr. Rose was a 'workaholic'. As his doctor, I could see that work-related stress contributed greatly to his cardiovascular disease. Indeed, Mr. Rose carried his job 'around in his hat', as the review of the assistant attorney indicates. Despite his previous heart attacks, he continued working intensively and productively. Other opinions to the contrary, I think it highly probable that Mr. Rose's length of time on his stressful job gradually took its toll. Mr. Rose's telephone contacts from the hospital with his office during convalescence was certainly proof of his concern in his work. They could have easily triggered the complicated chain of events leading to the terminal cardiac arrest. This is not speculative, but probable in my judgment: recent research on the role of catecholamines in coronary heart disease would strongly support my view. I am not aware of any research studies negating this view and I am certain that every *practicing cardiologist* would support it." (Emphasis in original.)

Appellant also submitted the following May 20, 1982 report by Dr. Michael Davidov, a specialist in cardiology and internal medicine:

> "I have been requested by Mrs. Rose to review the medical case history of the claim regarding the death of her husband, Stanley D. Rose.
>
> "I agree with Dr. Mandanis on the point that a practicing cardiologist, as distinguished from a researcher or administrator, sees more cases where the occupation of a patient can clearly be seen to endanger the life of a patient through stress. I presently have cases where I have had to advise the patient to cease working at a particular occupation — lawyers are among them.
>
> "Having examined the files made available to me in the case of Stanley D. Rose I agree on the question of the effect of Mr. Rose's stressful legal career as a cause or aggravation of the heart condition he had, of bringing on an attack, and of causing death.
>
> "I would say that given the kinds of stress I have seen, the amount of continuing contact with the job was sufficient to base a finding of cause, even though Mr. Rose was in the hospital for a hernia operation when he died.
>
> "Obviously, there is no certainty in these matters — there was no autopsy here, for example. But I believe that the opinion of the

> attending physician who was a cardiologist should be given greater weight in this case."

In a decision dated August 10, 1982, the Office hearing representative affirmed the November 26, 1980 compensation order.

The Board finds that the evidence fails to establish that the employee's death due to cardiac arrest was causally related to his employment.

The weight of the medical evidence is represented by the report of Dr. Bacos, the only Board-certified specialist in cardiovascular disease represented in the record. The Office referred the employee's case record to Dr. Bacos for resolution of a conflict in opinion on the issue of causal relation. Upon review of that record, Dr. Bacos concluded "that there is no association between [the employee's] atherosclerotic picture or his demise to his former employment." As a Board-certified and impartial specialist, Dr. Bacos' opinion is to be accorded special weight.[1] Dr. Walsh, a specialist in cardiovascular disease, also supported Dr. Bacos' opinion.

There is evidence from cardiologists Drs. Mandanis and Davidov, both of whom support appellant's claim. Dr. Mandanis, the employee's attending physician, speculated that work-related stress contributed to the employee's cardiovascular disease but without sufficient rationale to support his conclusion. Dr. Davidov, who reviewed the employee's medical records for appellant, concurred with Dr. Mandanis' opinion, but provided no medical rationale to support that opinion.

The decision of the Office of Workers' Compensation Programs dated August 10, 1982 is hereby affirmed.

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[1] *Gertrude M. Wilson*, 32 ECAB 77.

In the Matter of Robert T. Shea *and* U. S. Postal Service, Main Post Office, Boston, Mass.

Docket No. 83-2129; Submitted on the Record;
Issued January 20, 1984

Before E. Gerald Lamboley, Margaret Pallansch, Michele von Kelsch

The issue is whether appellant sustained his burden of proof in establishing that his right leg condition was causally related to a March 30, 1983 employment incident.

On March 30, 1983 appellant, then a 61-year-old mail clerk, filed a claim alleging that on that date he sustained a torn muscle of his right calf caused by a "faulty work floor."[1] He stopped work on that date. On the reverse of the claim form, appellant's supervisor indicated that the employing establishment controverted appellant's claim, stating:

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[1] Appellant's supervisor submitted a statement acknowledging the defective condition of the floor noting that previous work orders had been submitted for its repair.

> "The employee claims this accident [took place] at 6:00 a.m. I arrived at 6:10 a.m. and observed this individual walking around distributing mail. In fact, he walked or stood all morning and he reported the accident at 9:00 a.m. and at this time he was slightly limping. I observed this individual from 6:10 a.m. and he was having no problem. He also stated that he believed that this was a recurrence of an injury that he had last September [which was] not work related."

In support of his claim, appellant submitted two April 6, 1983 attending physician's reports from Dr. Christos A. Hasitosis, a Board-certified surgeon, who noted that "approximately three months ago the patient experienced a rupture of the plantaris muscle." He indicated that appellant had swelling and discoloration of his right leg with an apparent marked injury to the leg. He gave a diagnosis of a musculoligamentous tear with questionable thrombophlebitis. Dr. Hasitosis indicated that appellant's disability was causally related to the employment incident described by appellant.

By letter dated April 13, 1983 the Office of Workers' Compensation Programs requested appellant to describe in detail how the incident of March 30, 1983 occurred, to describe any other related or previous injuries to his leg sustained on or off duty, and to explain the discrepancy between his claimed disability at 6:00 a.m. and his supervisor's observations at work between 6:10 a.m. and 9:00 a.m.

In an undated response appellant stated:

> "In reply to your letter of April 13, 1983.
>
> "Our work room floor at the post office in Chestnut Hill in different areas has been in desperate need of repair and had been brought to the attention of our manager.
>
> "March 30, 1983 between 5:30 and 6:00 a.m. I was distributing trays of mail to the carriers desk. While carrying two trays of letter mail to route 19, I stepped around a pouch of mail, my right foot came down on the edge of a large depression in the floor that threw me off balance and twisted my right leg. I could feel something pull between the calf and ankle in my right leg. . . I continued to work in hopes it would ease and become more bearable.
>
> "I had both knees injured while in the service. [In] September, 1982 I ruptured a muscle in the same leg and I was treated at the Milford Whitenville Hospital in Milford, Mass. This injury was not work related.
>
> "Following my assignment of mail distribution I was processing the business reply and postage due mail while sitting down. My leg was swelling and became most uncomfortable. I had to stand to

> distribute the second truck mail upon finishing and writing business reply. I reported to Mr. Pratt because of the discomfort."

On April 28, 1983 appellant was examined by a post office medical officer who found him capable of returning to light-duty for 4 hours daily for a two week period commencing May 3, 1983. Appellant returned to light duty work on May 3, 1983 and received continuation of pay for the period of March 31 to May 14, 1983.

On May 31, 1983 an Office medical adviser reviewed the record and noted that appellant had a history of having ruptured the plantaris muscle of his right calf three months prior to the employment incident. He stated that the diagnosis was not confirmed by the medical evidence of record and recommended that more medical evidence be requested.

By letter dated June 16, 1983 the Office requested that appellant submit a detailed medical narrative report with an opinion concerning the causal relationship between his leg condition and the reported employment incident.

On July 8, 1983 appellant submitted the medical reports from Dr. Thomas N. Maki, a Board-certified surgeon, and Dr. John Skalicky, a Board-certified orthopedic surgeon, who treated him between September 20, 1982 and December 20, 1982 for a right leg rupture of the plantaris muscle. The November 9, 1982 report of Dr. Maki indicated that appellant had ruptured his plantaris tendon while walking up an incline and noted cellulitis of his right lower extremity. Appellant was hospitalized on November 8, 1982 and treated with antibiotics and local heat. He was discharged on November 16, 1982 with a final diagnosis of cellulitis of the right leg made by Dr. Skalicky.

By compensation order dated August 4, 1983 the Office rejected appellant's claim for continuation of pay and/or compensation finding that he did not submit a narrative medical report with a definite diagnosis and had not met his burden of proof to establish his claim.

The Board finds that the March 30, 1983 employment incident occurred, as alleged. However, the case is remanded for further development as to whether appellant's current right leg condition is causally related to such incident.

The evidence adduced reveals that on September 11, 1982 appellant sustained a nonemployment injury to his right leg when he ruptured his plantaris muscle. He received treatment for this condition and was diagnosed as having resolving cellulitis of the right lower extremity.

The April 6, 1983 reports of Dr. Hasitosis indicate that appellant was treated on March 30, 1983 for swelling, pain and discoloration to the right leg. He diagnosed a musculoligamentous tear and indicated possible thrombophlebitis of the extremity. The doctor stated, without rationale, that this was related to the employment incident described by appellant. While Dr. Hasitosis' report is insufficient to establish that appellant's disability was causally related to the March 30, 1983 employment incident, the report does indicate that appellant could have sustained an aggravation of the preexisting rupture of his right leg plantaris muscle and is sufficient to require further development of the medical evidence by the Office.[2]

On remand the Office should prepare a statement of accepted facts with respect to appellant's nonemployment-related leg condition and subsequent employment incident of March 30, 1983. It should then refer appellant to Dr. Hasitosis or to another Board-certified specialist for a rationalized report on whether appellant's disability was causally related to or aggravated by the March 30, 1983 employment incident and the period of disability resulting therefrom. If the emloyment incident caused a temporary aggravation, the specialist should be asked to specify when the employment-related aggravation ceased. After further consideration and development as it finds necessary, the Office should issue a *de novo* decision.

The August 4, 1983 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development in accordance with the decision.

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[2] *Horace Langhorne*, 29 ECAB 820.

In the Matter of JAMES R. FLETCHER *and* U. S. POSTAL SERVICE, POST OFFICE, Orlando, Fla.

Docket No. 83-1931; Submitted on the Record;
Issued January 20, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly rejected appellant's claim on the ground that he did not establish fact of injury in the performance of duty.

On April 16, 1983, appellant, then a 38-year-old mailhandler, filed a claim alleging that he sustained a pinched nerve in the left hip at work on March 11, 1983. In response to the question on the claim form asking the cause of injury, appellant stated: "While picking up sack of mail, turning to throw sack on belt, which could not be extended to the floor, injury occurred."

Appellant was examined on March 12 and 17, 1983 by Dr. T. E. Chambers, Jr., an osteopath, who diagnosed lumbar intervertebral disc disease with acute left sciatic neuritis. He was examined on March 18, 1983 by Dr. Donald E. Pearson, a Board-certified orthopedic surgeon, who recorded the following history in his offfice notes of that same date:

> "Appellant is a thirty-eight-year old . . . male who comes in regarding his left leg. He was picking up a sack of mail weighing some seventy pounds some three months ago and has had soreness in his back since that time. . ."

Dr. Pearson indicated that appellant had left sciatica.

Appellant missed work commencing March 12, 1983, using sick leave to cover his absence through March 28, 1983. Pursuant to an April 6, 1983 attending physician's report of Dr. Pearson, which stated that appellant was totally disabled from March 29 through April 8, 1983, he began receiving continuation of pay effective March 29, 1983. He received regular treatment from Dr. Pearson and Dr. William K. Bott, a Board-certified orthopedic surgeon who is an associate of Dr. Pearson. Dr. Bott stated in his office notes of April 14, 1983:

> "Appellant is seen today in follow-up. He has completed his therapy and has made good improvement. He continues to have soreness in the left sacroiliac area and a tingling sensation in his left calf. Examination reveals there is no tenderness or spasm today. There is fairly good range of motion. Neurological examination is intact. . . I will keep him off duty for an additional ten days and will allow him to return to work on 4/25/83 assuming that he has no problems in the interim period. . ."

The employing establishment submitted to the Office of Workers' Compensation Programs an April 18, 1983 memorandum of a conversation with Dr. Chambers' office which states that "Dr. Chambers' office was not aware that appellant had injured himself at work," and that Dr. Chambers' records "reflected that appellant was responsible for the bills." The employing establishment also submitted the January 24, 1983 office notes of an employing establishment physician, which stated as follows:

> "Appellant has complained of pain in left hip intermittently for past 3 months. Pain has a sciatic distribution. Referred to orthopedic surgeon."

The employing establishment stated in an April 19, 1983 letter to the Office that it first learned of an alleged injury at work on March 30, 1983, when appellant completed his claim form.

By letter dated June 10, 1983, the Office notified appellant that additional evidence was required to establish fact of injury in the performance of duty and to establish causal relationship between the injury and his condition. The Office also requested appellant to comment on the statements and documents submitted by the employing establishment.

Appellant submitted the following statement on July 18, 1983:

> "On approximate date of 11-24-82 at about 3 a.m. I was injured picking up a sack of mail weighing about 65–70 lbs. . . We opened the door and due to the mail being stacked fairly high it fell outside the truck onto the dock. The #1 sack in question was laying directly below our extendable belt along with others which had to be moved before the belt could be extended towards the truck. The belt is about 3$^1/_2$–4 ft. off the dock before angling into the trailer. I picked up this sack, turned and with an upward motion put it onto the belt and felt pain in my lower back. I reported this to my immediate supervisor Dick Wells at this time and told him I would make out a CA–1 [notice of injury and claim form] at quitting time if the pain was bad enough and he said o.k. He did not order me to do so. . .
>
> "From the time I reported my injury to Mr. Wells till 1-24-83 when I went to the Post Office doctor. . . I was in some pain and also limped most of the time which Mr. Wells knew about because we talked about it more than a half dozen times at least, mainly because he walked with and still does, a limp. At no time during any of these talks did he ask me to make out a CA–1."

* * *

> "On 3-11-83 I called in sick for 3-12-83 because of terrible pain in my hip again, reaggravated the nite before. The pain was bad enough that it prevented me from getting any sleep that day.
>
> "The first thing that Sat. a.m. I called my family doctor Dr. Thomas E. Chambers. . . and he had me come to the office right away."

* * *

> "I had no contact with my supervisor or anyone in supervision till I came to the post office about two weeks after I called in sick and met my Union Rep. and together we got the CA–1 Form from supervisor Charles Warren, sup. on Tour II. . ."

Appellant submitted a statement dated June 17, 1983 and signed by a coworker, Kenneth Vanaua, which states as follows:

> "In approx. November of last year I was working in a truck unloading a mixture of sacks #1-2-3 and boxes. Mr. Fletcher attempted to lift a sack of mail—I do not know or remember what size—but Jim did hurt his back area and did report it to the dock foreman Mr. Wells."

Appellant also submitted the following June 28, 1983 statement of Dr. Chambers:

> "Mr. Fletcher was evaluated in this office on 3-12-83 and again on 3-17-83 for low back injury incurred at work in the weeks prior to these evaluations. He was advised to abstain from his work duties following both of these evaluations."

By compensation order dated August 12, 1983, the Office denied appellant's claim for compensation, finding that he "failed to discharge his burden of proof of establishing that his disability after March 11, 1983 was causally related to picking up and throwing a sack of mail on March 11, 1983."[1]

The Board finds that appellant's claim filed on April 16, 1983 and his letter submitted July 18, 1983 constitute the filing of a claim for an injury on or about November 24, 1982 with disability commencing on March 12, 1983. The Board further finds that an employment incident of picking up a mail sack and feeling pain in the lower back occurred on or about November 24, 1982.

Appellant's claim filed on April 16, 1983 alleged that he had a pinched nerve in the left hip caused by picking up a mail sack and turning and throwing it onto a belt. He stated the date of injury was March 11, 1983. He was examined on March 12 and 17, 1983 by Dr. Chambers, an osteopath, who diagnosed lumbar intervertebral disc disease with acute left sciatic neuritis. In his June 28, 1983 statement submitted after the Office requested appellant to supply clarifying evidence on the circumstances of the alleged injury, Dr. Chambers stated that he examined appellant for a "low back injury incurred at work in the weeks prior" to the March 1983 examinations. Appellant was examined on March 18, 1983 by Dr. Pearson, a Board-certified orthopedic surgeon, who indicated a diagnosis of left sciatica and gave a history of injuring the back while lifting a mail sack "some three months" previously.

In his statement submitted on July 18, 1983 in response to the Office's request for additional evidence, appellant stated that the incident of lifting the mail sack and feeling low back pain occurred on or about November 24, 1982. He further stated that he kept working, although he told his supervisor about the incident right away and said he would fill out a notice and claim form if the pain was "bad enough." He stated that the pain continued in the ensuing months and that on March 11, 1983 he called in sick for his March 12 shift due to the pain "reaggravated the nite before."[2]

This statement was supported by the reports of Dr. Chambers and Dr. Pearson, who stated they were given a history of appellant injuring his back while lifting mail sacks at work some months earlier, and by the January 19, 1983 office notes of the employing establishment physician, who stated appellant had "complained of pain in left hip intermittently for past 3 months." Appellant's statement was also supported by the June 17, 1983 statement of Mr. Vanaua, a coworker, that appellant had hurt his "back area" while lifting a mail sack in November 1982.

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[1] Although the compensation order is couched in terms of causal relationship, it is clear from a July 26, 1983 claims examiner's memorandum incorporated by reference into the decision that the case turned on the issue of fact of injury.

[2] He did not state whether the "reaggravation" was an incident at work or whether the pain simply became worse without provocation.

Although the claim form filed by appellant stated the date of injury as March 11, 1983, the subsequent statement submitted by him is, under the circumstances, sufficient to clarify that he intended to state that as the date of an alleged "reaggravation," and that the initial injury allegedly occurred on or about November 24, 1982. The Board notes that it would have been preferable for appellant to have filed a new claim form, alleging November 24, 1982 as the date of injury and March 12, 1983 as the date disability began. However, in view of the statements subsequently submitted and the indication that appellant had some confusion about the filing of a claim form, it is appropriate to consider the claim as alleging an injury occurring on or about November 24, 1982.[3]

Concerning the establishment of fact of injury, the Board has stated:

> "While the burden is on a claimant to establish that he sustained an injury at the time and in the manner alleged, his statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by substantial evidence. Corroboration by an eyewitness or other evidence is not necessary when the claimant's statements are consistent with the surrounding facts and circumstances and his subsequent course of action." [4]

The reports of Dr. Chambers, Dr. Pearson, and the employing establishment physician who examined appellant are consistent with a history of appellant injuring his back while lifting a mail sack on or about November 24, 1982. Although the claim form on its face is inconsistent with an injury having occurred on that date, the clarifying statement of appellant submitted on July 18, 1983 and the June 17, 1983 statement of Mr. Vanaua, a coworker, compensate for any inconsistency.

Following remand, the Office should develop the case record concerning the issue of causal relationship between the alleged injury occurring on or about November 24, 1982 and any disability commencing March 12, 1983. The Office should then issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated

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[3] This case is analogous to those in which the Board has found that claims were properly filed, even though the official claim forms were not used, when the claimants had submitted informal statements together setting forth the essential elements of a claim. See, e.g., *Marion L. Shafer*, 27 ECAB 130; *Hyman Modelevsky*, 30 ECAB 411, and cases cited therein.

[4] *Denny D. Williams*, 32 ECAB 373.

August 12, 1983 is hereby set aside and the case remanded for further proceedings consistent with this decision of the Board.

In the Matter of ELEANOR E. DRINGUS, claiming as widow of STEPHEN J. DRINGUS *and* DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 83-1823; Submitted on the Record;
January 23, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether the employee's death on July 22, 1977 was causally related to his employment.

On October 5, 1978 appellant (the deceased employee's widow) filed a claim for death benefits. She attributed the employee's death on July 22, 1977 from lymphoblastic lymphoma to his exposure to benzene and other carcinogens in his 28 years of employment for the federal government.

The employee's death certificate, prepared by Dr. Robert C. Calvo, Board-certified in internal medicine and hematology, stated that the immediate cause of death was reticulum cell lymphosarcoma. Dr. Calvo's report on the employee's hospitalization from June 6, 1977 until his death on July 22, 1977, listed a final diagnosis of lymphoblastic lymphoma with leukosarcoma, and noted that the employee was known to have lymphoblastic lymphoma since July 1971.

In a September 28, 1978 report Dr. Calvo indicated that the employee's terminal disease was causally related to his 28 years of benzene exposure at work, stating "Hematologic malignance risk increased by benzene exposure." In an April 17, 1979 report Dr. Calvo stated "In view of this man's long exposure to known carcinogenic agents and the development of hematologic malignancy I submit there may well be a relationship of this man's serious hematologic malignancy and his previous employment." In an August 24, 1979 report Dr. Calvo stated that, with regard to the employee's exposure to asbestos and other toxins at work, it was his medical opinion that "the development of malignancy in [the employee] may be directly or indirectly related to his occupational exposure."

In a September 12, 1979 letter appellant stated that the employee worked for the federal government for 28 years, first from January 1942 to 1950 for the Port of Embarkation in New York as a telephone repairman, from 1950 to 1955 as a motion picture projector repairman, from 1955 to 1965 for the Brooklyn Naval Shipyard as an electrician, and from 1965 to 1970 as an electrician at the Philadelphia Naval Shipyard (herein referred to as the employing establishment). Appellant contended that the employee used carbon tetrachloride almost every day for years until it was banned, and that he was exposed to rodent repellent and silicone with which wires were covered.

The Office of Workers' Compensation Programs submitted a copy of appellant's letter to the employing establishment for its review and comments. On October 22, 1979 the employing establishment's administrator of employee service stated that, based on appellant's letter, it was the employing establishment's recommendation that she be paid widow's benefits. The employing establishment submitted a copy of a job description for the position of electrician, and indicated that the employee retired in August 1970, that it did not have any medical records regarding the employee, and that he had been exposed to welding and burning fumes and chemical solvents for one to four hours per day.

On December 31, 1979 an Office medical adviser reviewed the record and noted there was no documented evidence of exposure to carcinogens. By a May 2, 1980 letter the Office requested the employing establishment to supply information on whether the employee was exposed to carcinogens, asbestos, or benzene, and, if so, the extent of such exposure. In reply the administrator of employee services stated that the Office's questions had already been answered to the best of his ability. In a June 24, 1980 letter the employee's former foreman stated that the employee had been exposed to "asbestos and other toxic substances for his entire stay" at the employing establishment, and that such exposure occurred about seven hours every work day.

On October 14, 1980, November 20, 1980 and December 31, 1980 the Office requested the employing establishment to provide information on the employee's exposure to benzene. No additional information was supplied in response to these requests.

On May 13, 1981 the Office referred the case record including a statement of accepted facts to Dr. Arthur J. Weiss, Board-certified in internal medicine and medical oncology, for an opinion whether the employee's death could be attributed to his exposure to asbestos or other substances. In a June 4, 1981 report Dr. Weiss stated that the employee's history indicated that he was probably significantly exposed to asbestos, but that the type of malignancies induced by asbestos exposure were well-defined and did not include malignant lymphoma or leukemia of any type. Dr. Weiss stated:

> "It is probable that the late Mr. Dringus was exposed to other materials that could possibly be implicated as a carcinogen during his working at the naval shipyard; however, I know of no evidence

> that would suggest that such exposure is significantly greater than that to which any individual living in a civilized community, such as a modern city, would be exposed to.
>
> "There is no evidence, that I know, that would statistically relate to the development of malignant lymphomas to employment in the shipyards. The disease that Mr. Dringus developed is a relatively common one and while it is known that its incidence can be increased by exposure to certain specific chemicals, primarily drugs used in treating various types of cancer and possibly by radiation, I do not believe that it is possible that the late Mr. Dringus was exposed to such compounds during his employment nor can I see any way in which he would have been exposed to enough radiation to be a possible factor in the development of his malignancy.
>
> "In summary, I believe that the late Mr. Dringus developed a reticulum cell sarcoma from causes unrelated to his employment and that the probability is that he would have developed this malignancy regardless of the type of work that he performed."

By a compensation order dated October 19, 1981 the Office denied appellant's claim on the ground that the employee's death was not causally related to factors of his employment.

Appellant requested a hearing which was held before an Office hearing representative on February 12, 1982. Appellant contended that the employee was exposed at work to fumes from painting and welding, and that he cleaned wires with benzene. She submitted a March 16, 1982 report from Dr. Susan M. Daum, a Board-certified internist, who stated that the employee had prolonged exposure to solvents such as carbon tetrachloride and benzene. Dr. Daum stated that studies showed increased risk of the type of malignancy from which the employee died in workers exposed to benzene and chlorinated hydrocarbon solvents. The doctor concluded "that, it is likely that [the employee's] malignancy was causally related to his occupational exposures to solvents over the many years that he worked." Dr. Daum submitted a National Institute for Occupational Safety and Health (NIOSH) revised recommendation for an occupational exposure standard for benzene; this document included summaries of studies of diseases of rubber workers exposed to benzene and a recommendation that benzene should be considered carcinogenic because it causes progressive malignant disease of blood-forming organs.

By a decision dated July 6, 1982 and made final on July 8, 1982 an Office hearing representative remanded the case for further attempts by the Office to ascertain the levels of benzene and other chemicals to which the employee was exposed, to be followed by referral of the case record to Dr. Weiss for a further opinion on causal relation.

On August 9, 1982 the Office advised the employing establishment that it needed information on the employee's exposure to benzene and other chemicals. In a November 15, 1982 letter the establishment replied that it could neither deny nor corroborate appellant's claim, and that there were no air sampling results available which would demonstrate the employee's possible exposure to benzene, carbon tetrachloride, or asbestos during his employment there from 1965 to 1970.

By a November 30, 1982 letter the Office submitted the additional evidence to Dr. Weiss and requested his opinion whether Dr. Daum's report showed that the employee's death was causally related to his exposure to solvents at work, whether there was enough documentation to show that the employee ws exposed to benzene and hydrocarbon solvents, and whether the employee's job as an electrician entailed enough exposure to carcinogens to be a causal factor in his lymphosarcoma.

In a February 14, 1983 report Dr. Weiss stated:

> "I have reviewed the information that you have presented to me in regard to the late Mr. Dringus, including the correspondence from Dr. Daum and find nothing in the information presented that would change my opinion as put forth in my letter of June 1981. I believe it is necessary for all to realize that an absolute answer to question raised cannot be given with absolute assurance that is available to medicine today for several reasons. It is known that most malignancies induced by an agent such as radiation therapy or a drug occur years after the exposure. The tumors induced by these agents are identical histologically and chemically with tumors that arise in individuals that have not been exposed to any carcinogen and thus there is no signature that will allow identification of a specific malignancy as being induced by a carcinogen or arising *de novo*.
>
> "Malignant lymphomas as a group are relatively common tumors that, in the group of lymphomas being the 4th or 5th most common malignancies in the United States. Thus with any large group of individuals a certain percentage are going to develop malignant lymphomas. The only practical test that will enable an individual investigator to answer the question proposed would be to show an increase in incidence in workers doing similar jobs at the navy yard, this would be quite suggestive that an external carcinogen was present that was inducing the malignancies.
>
> "If on the other hand, the incidence of malignant lymphomas in the group in question was statistically not different from the population at large then this would be evidence that no active agent was present in the environment that would induce the specified malignancy; in this case of malignant lymphoma. Since I know of no evidence that workers at the shipyard doing similar jobs or

> workers doing similar type of labor in similar environments have increases of malignant lymphoma, and I believe that no evidence could be brought forth to suggest that Mr. Dringus' lymphoma was a result of his environmental exposure.
>
> "It is true that benzene, if the exposure is quite high, can induce leukemia and possibly lymphoma. However in those populations in which this has been shown to happen, the exposed level of drug is much higher than presented here.
>
> "The best source of definitive information could probably be arrived through the Epidemiology section of the National Cancer Institute, probably they have evidence on the exact relationship between the incidents of malignancies in workers at the naval shipyard as compared to the population at large. The section on carcinogens of the National Cancer Institute. The latter may also be able to give you a definitive opinion as to the U.S. Governments' position on the relationship between the sporadic and limited exposure of benzene seen in electrical workers [and] the various malignancies seen in the human."

The same Office medical adviser reviewed the case record and stated:

> "In the report by Susan M. Daum, M.D. with opinion in the matter of malignancies associated with benzene exposure, it is scientifically acceptable in determining circumstances of exposure to high levels with malignancy developed years after the exposure.
>
> "However, Dr. Daum's opinion *is not applicable* in this case in which exposure to benzene on the job of the decreased claimant *has not been documented* in the records.
>
> "Possibility of benzene in high concentration in different areas at the Phila. Naval Shipyard, according to my knowledge, has not required special studies and investigations by the National Cancer Institute *because* there are not enough records of co-workers in that plant developing lymphomas attributed to benzene exposure. *However*, information on the matter should be requested.
>
> "FINALLY, my opinion is there is *no documented evidence* in fthe records to support exposure to benzene of Mr. Dringus on his job as an electrician at P.N.S.Y from 1965-1970.
>
> "*Consequently*, no evidence to support alleged exposure to benzene — not documented — as the cause of death of Mr. Dringus, diagnosed as 'reticulum cell lymphosarcoma.' " (Emphasis in original)

By a compensation order dated May 27, 1983 the Office found that the employee's death was not causally related to his employment.

The Board finds that the case is not in posture for decision.

Dr. Weiss, the Board-certified specialist in medical oncology to whom the Office referred the employee's case record, stated that "the only practical test" of whether the employee's death was causally related to his employment was whether epidemiologic studies showed an increased incidence of malignant lymphomas among workers performing similar jobs. Dr. Weiss suggested that such information could be obtained from the National Cancer Institute. An Office medical adviser stated that such information should be requested. It was improper for the Office to reject appellant's claim without attempting to procure this information, which is in the possession of another government agency.

The Board finds that the Office further erred by submitting the case to Dr. Weiss without first determining whether the employee was exposed to the substances implicated by appellant's claim. The Board has held that "A failure to establish the facts of an employee's working conditions, before the [Office] submits a case to a medical expert, is error *per se* unless the facts are not in issue."[1]

In the present case Dr. Weiss' conclusion that the employee's death was not causally related to his employment was based in part on an assumption that his exposure to carcinogens was not greater than the exposure of a person living in a modern city. Dr. Daum, a board-certified internist, supported appellant's claim, based on a history of prolonged exposure to solvents such as carbon tetrachloride and benzene.

The Office's development of the evidence regarding the employee's exposure to solvents, especially carbon tetrachloride and benzene, was inadequate. Although the Office attempted, with limited success, to obtain information on such exposures from the employing establishment where the employee worked from 1965 to 1970, the Office made no effort to ascertain the employee's exposure to these substances in his federal employment from 1942 to 1965. During this latter period the employee worked for two federal employers at two positions other than that of electrician, his position at the employing establishment.

The decision of the Office of Workers' Compensation Programs dated May 27, 1983 is hereby set aside. The case is remanded to the Office, which should attempt to obtain epidemiologic studies on the incidence of malignant lymphomas among workers performing jobs similar to those the employee performed throughout his federal career. The Office should also attempt to obtain information on the employee's exposure to solvents, especially carbon tetrachloride and benzene, throughout his federal employment. The Office should then refer the augment case record to an appropriate medical specialist for an opinion whether the employee's death was causally related to his employment. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

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[1] *Lowry H. Goodson*, 9 ECAB 404 at 405.

In the Matter of DAVID SMITH *and* DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, Tex.

Docket No. 83-1318; Submitted on the Record;
January 23, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 26, 1981 based on his refusal to accept suitable employment with the employing establishment.

On December 10, 1969 appellant, then a 53-year-old warehouseman, was struck on the head by a box falling from a shelf. He was examined on January 8, 1970 by Dr. Robert Fitzgerald of the employing establishment who reported that neck x-rays showed "long-standing degenerative arthritis."

Appellant retired on disability effective June 15, 1972 and by decision dated March 11, 1975 the Office "found that the injury of December 10, 1969 aggravated his preexisting degenerative disc disease and caused his inability to work after August 30, 1970."

On March 26, 1979, while hospitalized for recurring back pain, appellant came under the care of Dr. Morris H. Lampert, a Board-certified neurologist. On June 6, 1980 Dr. Lampert submitted a work tolerance limitations report which indicated that appellant was capable of full-time "light work" which required lifting up to 20 pounds, continuous sitting, walking and standing, and intermittent lifting, bending, squatting, climbing, kneeling and twisting.

The Office forwarded the above information to the employing establishment with the suggestion that efforts be made to place appellant in suitable employment. On November 20, 1980 the employing establishment offered appellant a position as a "copier/duplicating equipment operator" at an annual salary of $12,700. An attached job description described this position as requiring light lifting and carrying up to 15 pounds, use of fingers and hands, walking and standing up to one hour, near vision and ability to hear. It also described the knowledge and skills required of this position. The letter also informed appellant that "If you decline this offer there is a possibility that your compensation may be reduced or terminated." By letter dated December 6, 1980 appellant informed the employing establishment he was to be hospitalized for x-rays on December 8, 1980 and didn't "know how long it [would] take [him] to recuperate."

In a December 2, 1980 progress note appellant, Dr. Lampert concluded that further diagnostic studies were not indicated.

Upon notification of appellant's refusal of employment, the Office proceeded to determine his wage-earning capacity. The Office compared the current pay rate of the position appellant held when his disability began (warehouseman) with the $12,700 annual salary of a duplicating operator position offered him and determined that he had a 12 percent loss of wage-earning capacity.

In a decision dated March 26, 1981, the Office informed appellant that his compensation would be reduced according to his ability to perform the duties of a "GS-3 copier/duplicating equipment operator," effective February 26, 1981.

Appellant requested reconsideration of this decision and submitted March 25 and May 6, 1981 reports by Dr. Lampert which did not address the issue of disability. December 10, 1980 and December 12, 1980 hospitalization reports by Dr. Raymond H. Hernandez, Jr., a Board-certified family practitioner, and by Dr. C. Lozano also failed to discuss the disability issue.

By compensation order dated June 19, 1981 the Office denied appellant's request for reconsideration.

Appellant requested a hearing before an Office representative which was held on April 21, 1982. He submitted a February 10, 1982 report by Dr. Hernandez which diagnosed "(1) Degenerative Disc Disease of Cervical Spine. (2) Post-Traumatic Arthritis" and concluded that appellant was "still unable to do stooping, lifting, bending or excessive walking since these activities aggravate his chronic conditions. He is, therefore, unable to perform any work activities."

By decision dated April 21, 1982 the Office hearing representative affirmed the March 26, 1981 wage-earning capacity decision.

Appellant appealed this decision to the Board which issued a December 14, 1982 decision and order finding that appellant's wage-earning capacity was improperly determined.[1] The Board found that the Office failed to follow the established procedures for determining appellant's employment-related loss of wage-earning capacity, confusing those procedures with the principles of section 8106(c) of the Federal Employees' Compensation Act.[2] The Board, therefore, remanded the case to the Office for a redetermination in accordance with its decision and order, to be followed be a *de novo* decision.

On remand, the Office reviewed appellant's case record and noted that on November 20, 1980 appellant had been offered a position as a copier/duplicating equipment operator with the employing establishment. It determined that the physical requirements of this position were in accordance with limitations set by Dr. Lampert, appellant's attending physician. Finally, the Office noted that while appellant claimed that he was unable to accept the offered position because of a hospital admission, such admission was not recommended by his attending physician, Dr. Lampert. Therefore, by compensation order dated February 7, 1983, the Office terminated appellant's compensation, effective February 26, 1981, on the ground that he refused a valid job offer and as such was not entitled to further compensation in accordance with Section 8106(c) of the Act.

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[1] 34 ECAB 409.

[2] 5 U.S.C. section 8106(e).

Section 8106(c) of the Act provides, "A partially disabled employee who . . . (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."

The Board finds that the light duty position offered by the employing establishment on November 20, 1980 was suitable in that it met the physical restrictions or work tolerance limitations set forth by Dr. Lampert. Appellant refused the offer on the ground that he was hospitalized for x-rays on December 8, 1980. However, this hospitalization was not recommended by his attending physician, Dr. Lampert, nor was there any evidence that a hospitalization for x-rays would necessitate a recuperative period preventing acceptance of a light duty position. Although Dr. Hernandez stated that appellant's degenerative disc disease and post-traumatic arthritis prevented his performing "any work activities", he offered no opinion on how these conditions were related to appellant's 1969 employment.

The decision of the Office of Workers' Compensation Programs dated February 7, 1983 is hereby affirmed.

In the Matter of Richard E. Travers *and* General Services Administration, Chet Holifield Field Office, Laguna Niguel, Calif.

Docket No. 84–5; Submitted on the Record;
Issued January 23, 1984

Before E. Gerald Lamboley, Michele von Kelsch, David S. Gerson

The issue is whether the Office of Workers' Compensation Programs properly calculated appellant's employment-related loss of wage-earning capacity, based upon the position of a courier driver.

On December 23, 1981, appellant, a 34-year-old air conditioner mechanic, injured his back and right leg when he slipped at work. He apparently lost no time from work. The Office determined that he sustained a low back strain.

On October 29, 1982, appellant again injured his back at work when he lifted a tool box. He completed his shift but did not return to work. As of the date of this injury, he was earning $11.56 per hour. Effective November 14, 1982, his pay was increased to $12.02 per hour.

The Office determined that appellant sustained a herniation of the L4-5 disc as a result of the October 29, 1982 injury. He received temporary total disability compensation, for all periods not covered by leave or continuation of pay, through June 13, 1983.

On June 29, 1983, the Office determined that effective June 14, 1983, appellant was no longer totally disabled; it found he had an employment-related loss of wage-earning capacity based upon the position of a courier driver, which entitled him to a compensation rate each four weeks of $929.44. It made this determination as follows: The Office found that the position of courier driver paid $160.00 per week. Applying the principles of the *Shadrick* decision,[1] it calculated that $160.00 per week equalled 33 percent of the current weekly pay of $480.80 ($12.02 per hour) for appellant's position at the time of injury. This percentage, when applied to appellant's weekly salary at the time of injury which was $462.40 ($11.56 per hour), amounted to $152.59 and represented his wage-earning capacity. The loss of wage-earning capacity therefore equalled $309.81 ($462.40-$152.59). Because appellant has dependents, this figure was multiplied by three-fourths, equalling a weekly compensation rate of $232.36 and a four-week compensation rate of $929.44.[2]

On appeal, appellant objects that his compensation was based upon the $11.56 per hour he was earning on the date of injury rather than the subsequent pay increase that became effective while he was disabled.[3]

The Board finds that the Office properly calculated appellant's four-week compensation rate as $929.44. Section 8101(4) of the Federal Employees' Compensation Act specifies that where there is no recurrence of disability, the compensation awarded should be computed on the basis of the employee's pay at the time of injury or at the time disability begins, which in this case is the same. The Board has held that there is no authority in the Act for basing a claimant's compensation benefits on a pay increase which became effective after the date of the claimant's injury, beginning of disability, or recurrence of disability.[4] Here, the pay rate at the time of injury and the date disability began, October 29, 1983, was $11.56 per hour. Appellant was not entitled to have his compensation rate based upon the November 14, 1982 pay increase to $12.02 per hour, which became effective after the beginning of his disability. The Office properly applied this principle, as well as the principles of the *Shadrick* decision, in computing appellant's compensation rate.

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[1] 5 ECAB 376.

[2] A health benefits subscription and optional insurance were deducted from this figure, resulting in net compensation each four weeks of $836.68

[3] Appellant states that his pay was increased from $11.56 to $12.06 per hour in December 1982. However, the record indicates that the increase was from $11,56 to 12.02 per hour on November 14, 1982.

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[4] *Thomas Y. Dempsey*, 30 ECAB 1266.

In the Matter of ESTHER MORGINSKY, claiming as widow of SOLOMON GROSS *and* U. S. POSTAL SERVICE, POST OFFICE, White Plains, N. Y.

Docket No. 83–1216; Submitted on the Record;
Issued January 23, 1984

Before MARGARET PALLANSCH, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether the employee's death on November 26, 1980 was causally related to the employment injury he sustained on July 7, 1969.

On March 30, 1981 appellant (the employee's widow)[1] filed a claim for death benefits, alleging that the death of the employee on November 26, 1980 due to "heart condition — occlusive coronary arteriosclerosis" was causally related to the work-related injury he sustained on July 7, 1969.[2]

In support of her claim, appellant submitted an April 3, 1981 report by the employee's attending physician Dr. Jack A. Goldberg, a Board-certified cardiologist of professorial rank. Dr. Goldberg noted the employee's 1969 myocardial infarction and stated that he had last treated him for congestive heart failure on November 11, 1980. He diagnosed the cause of death as pulmonary edema, causally related to the 1969 myocardial infarction, and concluded:

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[1] Appellant, under the name Esther Morginsky, has filed a claim for death benefits, claiming as the widow of Solomon Gross. The death certificate of Solomon Gross named as surviving spouse an Esther Langlieb. The case record reveals that an Esther Langlieb married Solomon Gross on July 16, 1957. The case record reveals that an Esther Morginsky divorced a Harry Morginsky in 1948. Upon return of the case record, the Office should undertake further development to insure that Esther Morginsky is in fact Esther Langlieb, and that she was the wife of Solomon Gross at the time of his death on November 26, 1980. If Esther Langlieb Gross has legally changed her name to Esther Morginsky, she should file the appropriate court documents with the Office. If her name has not been legally changed the Office should give consideration to her legal name in awarding any benefits, if she is so entitled.

[2] On August 12, 1970 the Office of Workers' Compensation Programs determined that the employee had sustained a work-related myocardial infarction on July 7, 1969, and authorized repurchase of sick leave and the payment of compensation for temporary total disability from the date of the injury until he returned to work on November 5, 1969. On April 1, 1972 the employee sustained a recurrence of his heart condition, at which time he came under the care of Dr. Jack A. Goldberg, a Board-certified cardiologist of professorial rank. The Office subsequently approved the claimed recurrence and began paying him compensation for temporary total disability from that date. On December 6, 1974 he retired on disability, and elected to continue to receive benefits under the Federal Employees' Compensation Act.

> "Extensive myocardial injury resulted in an 'ischemic cardiomyopathy' with anasarca and pulmonary edema (proven by catheterization). This was a direct result of the myocardial infarction. In the ensuing 11 years, patient had no angina but had multiple episodes of pulmonary edema and congestive heart failure."

On June 18, 1981 an Office of Workers' Compensation Programs medical adviser reviewed the evidence and disagreed with Dr. Goldberg's conclusion of causal relationship. He stated:

> "[The employee] has had multiple episodes of myocardial infarction in keeping with the natural progression of severe arteriosclerotic heart disease and coronary artery disease with additional problems due to diabetes and gout."

On February 25, 1982 the Office submitted the case record and a statement of accepted facts to Dr. Michael V. Cohen, a Board-certified cardiologist of professorial rank. In an April 1, 1982 report Dr. Cohen reviewed the employee's history and diagnosed "coronary disease with multiple myocardial infarctions and severe congestive heart failure." He concluded:

> "[The employee's] death in November 1980 was undoubtedly related to his cardiac disease. The myocardial infarctions, the severe congestive heart failure and ultimately the [employee's] death are all symptoms of the underlying coronary artery disease. The [employee's] demise cannot be related to any one event, specifically the myocardial infarction in 1969. At the time of the [employee's] infarction in 1969 he undoubtedly had significant coronary artery obstuctive disease even though his symptoms predated the episode by only approximately three months. The development of coronary artery disease cannot be related to the decedent's federal employment but is instead a function of unknown biological processes. Although the myocardial infarction in 1969 in some way may have been related to the [employee's] employment, his demise cannot be.
>
> "In summary, [the employee] had severe coronary artery disease and left ventricular dysfunction. His demise in November 1980 was undoubtedly a result of his underlying heart disease but there is no relationship between the [employee's] death and either the myocardial infarction in 1969 or the [employee's] federal employment."

The same Office medical adviser reviewed Dr. Cohen's report and agreed with his conclusions. He noted that Dr. Cohen had stated that the employee's death was due to "antecedent heart disease," and that this condition was in no way related to his federal employment.

In an April 21, 1982 compensation order, the Office rejected appellant's claim for death benefits, on the ground that "there is no relationship between the [employee's] death and the previously accepted condition for which compensation was being paid." In its determination, the Office found:

> "*** [T]hat due to conflict of medical opinion, the entire case file was referred to a board-certified specialist in Internal Medicine and Cardiovascular Disease; that based on the findings of the impartial specialist, the weight of the medical and factual evidence of record establishes that claimant's death was the result of his underlying heart disease and there is no relationship between his death and either the myocardial infarction in 1969 or factors of his federal employment."

On July 19, 1982 appellant requested reconsideration of the Office decision. In support of her request, appellant submitted an October 8, 1982 report by Dr. Seymour S. Cutler, a Board-certified cardiologist of professorial rank, and an October 12, 1982 report by Dr. Goldberg. In his report, Dr. Cutler reviewed the employee's history and stated:

> "I have reviewed [Dr. Cohen's April 1, 1982 report] and the facts in this matter seem quite clear."
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> * * *
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> "On November 26, 1980 [the employee] died of heart failure superimposed upon his occlusive coronary arteriosclerosis. It is perfectly clear that [the employee] never recovered from the effects of his causally related myocardial infarction. The myocardial infarction resulted in a most significant loss of ventricular contractile power resulting in his persistent congestive heart failure. A substantial and permanent loss of coronary artery circulation resulted from the occlusion of the injured vessel in 1969, and thus sharply diminished his coronary artery reserve, thereafter making him more vulnerable to further spontaneous occlusive episodes than he would be had his coronary circulation not been permanently injured in 1969. His life after his 1969 episode was that of a cardiac invalid, and on numerous occasions the bouts of pulmonary edema could have caused his death. When he finally succumbed on November 26, 1980, it was at the end of an unbroken period of disability stretching back to his compensable heart attack of 1969.
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> "It is impossible to dissociate his death from his compensation injury, and it is my firm belief that [the employee's] demise is a direct result of his compensable accident."

In his October 12, 1982 report, Dr. Goldberg stated:

> "I have reviewed the information available concerning [the employee], including Dr. Michael Cohen's report.
>
> "The patient had an acute myocardial infarction in July 1969, secondary to atherosclerotic heart disease. This was complicated by congestive heart failure. A determination was evidently made that this was a compensable injury by his employer, the U. S. Postal Service.
>
> "Subsequently, the patient had further difficulty with recurrent myocardial infarction in 1972 and probable pulmonary embolization. Cardiac catheterization in November 1972 revealed a dilated, poorly contracting left ventricle and severe triple vessel coronary artery disease. Despite his exceedingly poor condition at that time, he did improve with medical treatment and became ambulatory and was able to function at a fairly low level until his demise.
>
> "It is my opinion that the acute myocardial infarction that [the employee] sustained in 1969 resulted in damage to his left ventricle. Subsequent infarctions damaged the ventricle further, and the results of these injuries to his myocardium was increasing congestive heart failure. Therefore, the damage sustained in 1969, and that sustained subsequently, all the result of atherosclerotic heart disease, were ultimately responsible for the patient's death."

On January 21, 1983 a second Office medical adviser reviewed the medical evidence and stated that it did not establish that the employee's death was in any way related to the accepted myocardial infarction of July 7, 1969.

In a January 28, 1983 merit decision, the Office denied appellant's request for modification of the April 21, 1982 compensation order, on the ground that "the evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

The Board finds that there is a conflict in the medical evidence, necessitating referral to an impartial medical specialist pursuant to 5 U.S.C. section 8123(a).

Drs. Cutler and Goldberg, both Board-certified cardiologists of professorial rank, diagnosed coronary artery disease and extensively discussed the process by which they thought the employee's death was related to his July 7, 1969 myocardial infarction. Both doctors provided medical rationale in support of their conclusions, and both opinions demonstrated a thorough knowledge of the employee's history and the relevant medical evidence. Dr. Cohen, a Board-certified cardiologist of professorial rank, also diagnosed coronary artery disease; however, he concluded that the employee's death was due solely to the underlying coronary artery disease and not to the July 7, 1969 myocardial infarction. Dr. Cohen also supported his conclusion with medical rationale. Similarly, his opinion demonstrated a complete knowledge of the employee's history and the medical evidence of record. Because he came to a contrary conclusion on causal relation, a conflict in the medical evidence exists.

The case will be remanded to the Office for referral of the case record and a statement of accepted facts to a Board-certified cardiologist. The cardiologist should be requested to provide a medical opinion whether the employee's death on November 26, 1980 was causally related to his July 7, 1969 myocardial infarction. Furthermore, he should be requested to support his conclusion with sufficient medical rationale, and to discuss the reports of Drs. Goldberg, Cutler and Cohen in the process. After such further development as it may deem necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated January 28, 1983 is hereby set aside; the case is remanded to the Office for further proceedings consistent with this decision.

In the Matter of GENE COLLINS *and* DEPARTMENT OF THE AIR FORCE, MALMSTROM AIR FORCE BASE, Mont.

Docket No. 83-1943; Submitted on the Record;
Issued January 24, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's exposure to airborne contaminants at work caused a permanent impairment of his lungs or a period of temporary disability.

On July 28, 1977 appellant, then a 48-year-old quality assurance specialist, filed a claim for a lung condition which he attributed to his exposure to "fumes, industrial products, welding, chemicals encountered on job. . ." In an April 5, 1978 letter appellant further described his employment at three Air Force bases from December 1974 to June 1, 1977, which entailed inspection of welding and other items in connection with the updating of Minuteman missile silos. He contended that this inspection work exposed him to welding fumes, paint fumes, asbestos, and dust from grinding, sandblasting, and sanding.

In a July 27, 1977 report Dr. Donald G. Fletcher, a general practitioner and general surgeon, diagnosed pulmonary fibrosis, indicated this condition was causally related to appellant's employment, and stated that appellant should avoid working with welding or gas fumes. In a September 26, 1977 report Dr. Fletcher's findings were pulmonary fibrosis shown by x-ray, and a limited stress test.

Dr. R. Warren Pierson, an internist, reported that a November 23, 1976 chest x-ray was "within normal limits showing some pulmonary fibrotic changes bilaterally, but no interval changes in the year and a half period he was observed here." Dr. E. H. Kalmon, a Board-certified radiologist, stated that a July 14, 1977 chest x-ray was negative. Dr. Charles L. Shupack indicated, in an August 24, 1977 report, that appellant's chest x-ray was normal; he concluded that appellant had pulmonary fibrosis and should not work around welding, fumes, or gases.

The employing establishment indicated that appellant's description of his working conditions was factual, and that he had not worked with a welding crew since receipt of Dr. Fletcher's letter recommending no exposure to welding or gas fumes.

In a September 6, 1978 report Dr. David E. Anderson, a Board-certified internist, stated that July 1978 pulmonary function studies showed improvement in some measurements but a decrease in others as compared to January 1978 studies. Dr. Anderson concluded:

> "It is my impression, therefore that he [appellant] has combined restrictive and obstructive pulmonary disease. Restrictive pulmonary disease is most likely related to exposure to welding fumes and other air pollutants with his job. The obstructive pulmonary disease may be related to this as well as his smoking. Although his pulmonary problems appear to be stable at this time, I would suspect that if his FEV1 or FEF25-75 decreased further he would have significant limitations as far as his working potential, especially if he has to continue working in the conditions where he is exposed to noxious fumes."

In a July 3, 1979 report Dr. Edward E. Adkins, a Board-certified family practitioner, interpreted pulmonary function tests done in June 1979 to show bronchial obstructive disease of the small airways with air trapping.

On July 21, 1980 an Office of Workers' Compensation Programs medical adviser reviewed the medical evidence and a statement of accepted facts prepared by the Office, and pointed out that appellant was a cigarette smoker before his implicated work exposure, that he did not work as a welder, that no other workers were affected, and that there was no medical rationale supporting causal relation of appellant's pulmonary condition to the exposures to which appellant was subjected.

The employing establishment indicated that the Minuteman missile silo updating project ended January 20, 1980, that appellant was reassigned to another position that did not involve exposure to propellant and dust, and that he would be given a position as a quality assurance specialist at his previous pay pending the results of a fitness-for-duty examination scheduled for May 29, 1981.

The contractor which performed the Minuteman missile silo updating project submitted a copy of its personnel safety requirements, and copies of industrial hygiene engineering reports for the facilities at which appellant had worked. These reports included the results of air sampling results done in October 1975, January 1977, and April and May 1977. The one report which showed air sampling results for a quality assurance specialist stated that time-weighted average exposures without respirators were below the threshold limit value established by the Occupational Safety and Health Administration for lead, copper, iron oxide, cadmium oxide,and chromium.

A second Office medical adviser reviewed the record and stated that appellant's pulmonary functions improved after he stopped smoking, that his exposures were transient and minimal, and that the airborne contaminants were within prescribed guidelines.

By a compensation order dated July 24, 1981 the Office rejected appellant's claim on the ground that his pulmonary disease and disability were not causally related to his employment.

Appellant requested a hearing, and an Office hearing representative, after reviewing the record, remanded the case for further development including referral to a specialist in pulmonary disease for an opinion on causal relation.

A June 9, 1981 report from Dr. Michael E. Perry, Board-certified in pulmonary disease, stated that results of pulmonary function studies done on June 5, 1981 in connection with appellant's fitness-for-duty examination, showed small airways narrowing. An August 3, 1981 cardiovascular evaluation by Dr. Roy V. Ditchey, who is Board-certified in cardiovascular disease, included a finding of no infiltrates on a chest x-ray and an impression of mild restrictive lung disease.

An October 12, 1981 report from Dr. Dwayne Thomason, an osteopath, stated in its entirety "At the present time I believe [appellant] should continue to work under restricted environment that would not worsen pulmonary fibrosis."

In a March 25, 1982 letter appellant stated that he did not use a respirator while performing inspection work, and that in his work beginning January 1980 he was restricted from areas where he would be exposed to soldering, propellants, welding, and chemicals.

On April 21, 1982 the Office referred appellant, with the case record and a statement of accepted facts, to Dr. Lawrence H. Repsher, Board-certified in pulmonary disease. In a May 20, 1982 letter Dr. Repsher stated that he had examined appellant on July 29, 1981; the doctor submitted an August 14, 1981 report on this examination. In this report Dr. Repsher stated that appellant's chest x-ray was within normal limits and that pulmonary function tests showed "very mild COPD [chronic obstructive pulmonary disease] of the small airways, clinically insignificant, associated with a normal diffusing capacity, which suggests little or no emphysema or other parenchymal disease." Dr. Repsher stated that there was no evidence of pulmonary fibrosis or restrictive lung disease and that appellant's mild chronic obstructive pulmonary disease was "overwhelmingly most likely" due to his history of smoking one to one and a half packs of cigarettes per day from about 1950 to June 1977. Dr Repsher concluded:

> "In view of the fact that he has a negative chest x-ray, normal lung volumes, normal vital capacity, normal diffusing capacity, and only very mild COPD of the small airways and no evidence of intrinsic lung disease on pulmonary stress testing, I find no evidence of any pulmonary impairment or disability of any kind; specifically, I find no evidence of any pulmonary impairment or disability either caused by or aggravated by appellant's employment as a welding inspector for the federal government. . . Further, in view of the fact that [appellant] has no significant underlying pulmonary disease of any kind, it is my recommendation that he be released from any pulmonary restrictions with regard to his job as there is no contraindication to his being exposed to any chemicals or dusts or fumes, as long as these do not significantly exceed OSHA standards for prolonged periods of time."

In a May 27, 1982 report Dr. Repsher stated that it continued to be his opinion that appellant was not and probably had not suffered from any acute or chronic pulmonary impairment caused or aggravated by his employment, and recommended removal of all restrictions on his work activity.

By a June 26, 1982 compensation order the Office found that the weight of the medical evidence did not establish that appellant's claimed condition was causally related to his employment.

Appellant requested a hearing before an Office hearing representative, which was held on January 24, 1983. Appellant testified that at the end of the Minuteman missile silo upgrading project in January 1980 he was transferred and downgraded from a GS11 to a GS9 because his pulmonary condition prevented him from performing all the duties of his position, that he was promoted to a GS11 in November 1981 but still performed duties not requiring exposure to toxic fumes, and that from June 1977 to August 1978 he was assigned to inspection of electronics but still occasionally inspected welding.

At the hearing appellant submitted reports regarding a fitness-for-duty examination performed in November 1982. In a November 9, 1982 report Dr. J. Gilbert diagnosed mild obstructive lung disease and no evidence of restrictive lung disease, and stated that appellant's pulmonary status would not interfere with his present ability to perform his job. In a November 15, 1982 report Dr. Keith Wolfe stated that pulmonary function tests on that day suggested air trapping and were consistent with only an obstructive defect. Dr. Wolfe stated that the reduction in appellant's forced vital capacity, which had previously been interpreted as restrictive disease, was most likely due to an enlarged residual volume secondary to air trapping rather than to restriction.

By a decision dated and made final on April 14, 1983 an Office hearing representative affirmed the Office's July 26, 1982 compensation order denying appellant's claim.

The Board finds that the medical evidence does not establish that appellant has a permanent impairment of his lungs related to his employment.

An examination including pulmonary function tests on July 29, 1981 by Dr. Repsher, who is Board-certified in pulmonary disease, revealed no evidence of pulmonary fibrosis or of restriction lung disease. Dr. Repsher's finding of obstructive pulmonary disease as appellant's only pulmonary condition is consistent with the findings of Dr. Perry, Board-certified in pulmonary disease, in June 1981, and with the findings of Drs. Gilbert and Wolfe in November 1982.

This obstructive pulmonary disease has not been shown to be causally related to or permanently aggravated by appellant's exposure to airborne contaminants in his employment. The only support for such a relationship is Dr. Anderson's statement that appellant's obstructive pulmonary disease may be related to his occupational exposure as well as to smoking. This statement is equivocal and does not establish causal relation, especially in light of Dr. Repsher's statement that it was "overwhelmingly most likely" that appellant's chronic obstructive pulmonary disease was related to his history of smoking.

Regarding the issue of whether appellant's exposure to airborne contaminants at work caused periods of employment-related temporary disbility for work, the Board finds that further development of the evidence is necessary for a determination of this issue for the period from January 1980 to November 1981.

In general the term "disability" under the Federal Employees' Compensation Act means "Incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury." [1] Applying this definition to the present case, it is apparent that appellant was not disabled within the meaning of the Act before January 1980 or after November 1981 as he earned no less than he had before his injury.[2]

From January 1980 to November 1981, however, appellant worked for the employing establishment at a lower pay rate and at a lower grade than he had previously enjoyed. Appellant attributed this reduction in his pay rate during this period to his restriction by the employing establishment from performing all the duties of his position due to his pulmonary condition. If it is shown that his restriction was due to an employment-related condition, he would have an employment-related loss of wage-earning capacity during the period.[3]

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[1] *Thomas Olivarez, Jr.*, 32 ECAB 1019 at 1021.

[2] See *Rafael Rodriguez*, 16 ECAB 630; *Billy G. Sinor*, 35 ECAB 419.

The reason for his reduction in pay rate during this period is not revealed in the case record, although it does show that appellant was transferred in January 1980 due to the ending of the Minuteman missile silo upgrading project and that during this period he was restricted by the employing establishment, based on medical evidence available at that time, from working in areas where he would be exposed to certain airborne contaminants. On remand the Office should determine, through contact with the employing establishment, the reason for appellant's reduced pay rate during the period from January 1980 to November 1981.[4] After such further development as it deems necessary, the Office should issue a *de novo* decision on whether appellant had an employment-related loss of wage-earning capacity during the period in question.

The decision of the Office of Workers' Compensation Programs dated and made final on April 14, 1983 is hereby affirmed insofar as it determined that appellant does not have an employment-related permanent impairment of his lungs and insofar as it determined that appellant did not have an employment-related disabling pulmonary condition before January 1980 and after November 1981. Regarding the period from January 1980 to November 1981 the Office's decision is hereby set aside and the case remanded to the Office for further action in accordance with this decision of the Board.

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[3] See *Claude E. Pilgreen*, 33 ECAB 566.

[4] See *James I. Hearn*, 29 ECAB 278.

In the Matter of PATRICIA J. KELSESKY *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, Pa.

Docket No. 83-1985; Submitted on the Record;
Issued January 25, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issues are (1) whether appellant is barred from receiving continuation of pay by the time limitation provision of the Federal Employees' Compensation Act; and (2) whether the refusal of the Office of Workers' Compensation Programs, in a January 13, 1983 order, to reopen appellant's case for further consideration of the merits of his claim, constituted an abuse of discretion.

On January 21, 1982 appellant, a 34-year-old laboratory technician, sustained an injury to her left knee when "I was bending down to get reagents from the refrigerator and as I was doing so my left knee gave [way] and I fell into the refrigerator." She continued to work until February 1, 1982 when she stopped work. She received treatment from Dr. Carl L. Stanitski, a Board-certified orthopedic surgeon, on February 19, 1982, for "possible medial meniscal tear, left knee. Possible popliteal cyst, left leg."

Appellant returned to work on April 14, 1982.[1]

On February 24, 1982 appellant filed a form CA-1, notice of traumatic injury and claim for continuation of pay/compensation. She stated that her reason for not filing the claim within two working days was that she "did not think injury was serious."

By letter decision dated July 1, 1982, the Office of Workers' Compensation Programs determined that appellant was not entitled to continuation of pay for her absence from work beginning February 1, 1982 on the following ground:

> "Form CA-1, notice of traumatic injury was not filed within 30 days from the date of injury in accordance with Title 5 U.S.C. section 8118."

Appellant requested reconsideration and stated the following:

> "When I went to my doctor, he felt I had phlebitis due to my past history. It was because of this that I did not file a CA-1 within 30 days. After the necessary tests were performed it was discovered that it was not phlebitis but an injury due to my accident on the job. At that time I submitted the CA-1."

Appellant also submitted medical reports by her physicians to support her contention.

By compensation order dated January 13, 1983, which incorporated a memorandum summarizing the evidence, the Office denied appellant's application for review on the ground that "the evidence submitted in support of the application . . . is found to be insufficient to warrant modification of the prior decision." The Office's memorandum contained the following reasoning for recommending denial of appellant's application for review:

> "The FECA [Federal Employees' Compensation Act] allows for waiver of the time limitations only in cases where it is shown that failure to file was due to circumstances beyond the control of the claimant or if the claimant shows sufficient cause or reason in ex-

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[1] The employing establishment paid appellant continuation of pay for the period February 1, 1982 through March 17, 1982, and she used sick leave for the period March 18, 1982 through April 13, 1982. She later filed a claim for compensation for the period she utilized sick leave.

planation of the failure to timely file. This case does not meet the criteria for waiver as the claimant was aware or should have been aware that Notice of Injury must be filed within 30 days of the date of injury."

The Board finds that appellant's claim for continuation of pay is barred by the 30-day time limitation provision for filing under the Act.

Section 8118 of the Federal Employees' Compensation Act[2] provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title." [3] The latter section provides that written notice of injury shall be given "within 30 days." The context of section 8122 makes clear that this means within 30 days of the injury.[4]

Appellant filed form CA-1, notice of traumatic injury and claim for continuation of pay/compensation, on February 24, 1982. As this was more than 30 days after the January 21, 1982 injury, the claim for continuation of pay is barred by the applicable time limitation provision.

With respect to the second issue, the Board notes that the reopening of a case for reconsideration requires the submission of evidence not previously submitted of a substantive or probative nature.[5]

Appellant submitted a letter stating that she did not file form CA-1 within 30 days of the incident because it was not until after that time that her physician informed her that the difficulty with her left knee resulted from the January 21, 1982 employment incident and not due to her past history of phlebitis as she was previously told. In denying appellant's application for review, the Office stated that appellant's explanation for failure to file a claim for continuation of pay within 30 days of the injury did not meet the criteria for waiver of the 30 day period because appellant "was aware or should have been aware that Notice of Injury must be filed within 30 days of the date of injury."

The Board notes that the Office's reasoning for denial of appellant's application for review was erroneous although its conclusion was correct. In that regard, the Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a)[6] which sets forth the filing requirements for continuation of pay.[7] There is, therefore, no provision in the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury. The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag.*[8]

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[2] 5 U.S.C. section 8118.

[3] 5 U.S.C. section 8122(a)(2)

[4] See *George A. Harrell*, 29 ECAB 338.

[5] *Wallace R. Deering*, 28 ECAB 85; *Donald J. Miletta*, 34 ECAB 1822.

[6] 5 U.S.C. section 8118(a).

[7] 5 U.S.C. section 8122(d)(3).

The Board finds that since appellant filed form CA-1, notice of traumatic injury and claim for continuation of pay/compensation more than 30 days after the January 21, 1982 injury, her claim for continuation of pay is barred by the applicable time limitation provision. Therefore, the Office did not abuse its discretion in its refusal to reopen appellant's case for further consideration of the merits of the claim.

The decisions of the Office of Workers' Compensation Programs dated July 1, 1982 and January 13, 1983 are hereby affirmed.

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[8] 34 ECAB 815. See also *Michael Millar*, 34 ECAB 118.

In the Matter of KALMAN ABRAMOWITZ *and* U. S. POSTAL SERVICE, MAIN POST OFFICE, Brooklyn, N. Y.

Docket No. 83-1797; Submitted on the Record;
Issued January 25, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs acted properly in suspending appellant's right to compensation benefits because of his refusal to undergo a medical examination, including a CAT scan, as directed by the Office.

On December 9, 1975 appellant, then a 30-year-old ZMT operator, filed a claim alleging a head injury sustained on December 7, 1975 when he tripped and fell at the employing establishment. He was examined on January 5, 1976 for complaints of headache, dizziness, ataxia and insomnia by Dr. Sidney M. Cohen, a Board-certified neurologist, who diagnosed post-concussion syndrome and stated that appellant was totally disabled for work. Dr. Cohen submitted periodic progress reports to the Office of Workers' Compensation Programs in which he indicated that appellant's disability continued. Appellant's claim for compensation was accepted by the Office and he received compensation for temporary total disability commencing January 22, 1976.

On December 13, 1976 appellant was referred for treatment to Dr. Max Rottenstein, an internist, who confirmed Dr. Cohen's diagnosis and noted that appellant was also impaired by blurred vision.

On July 15, 1977 appellant was examined by Dr. John Schwarz, a general practitioner, who diagnosed post-concussion syndrome with a persistent severe anxiety neurosis. An examination on that date by Dr. Sol Pollach, a general practitioner, indicated that appellant's visual blurring impairment was such that he was legally blind. Appellant was referred by both physicians for examination to Dr. Richard J. Kossman, a Board-certified ophthalmologist, who stated in a report dated July 12, 1977, as follows:

> "This 32-year-old married man has been troubled by recurrent headaches, blurred vision, dizzy spells and incoordination since sustaining injuries on December 7, 1975. He was said to have been in his usual state of health until that date when he slipped on rubber bands while at work in the Brooklyn Post Office. He struck his head in the left frontal area. He was said to have been rendered unconscious for over a half an hour. He was removed by ambulance to the Cumberland Hospital in Brooklyn where he was examined and referred to his personal physician. He has been examined by his New York doctor and subsequently by other physicians. He has continued to be troubled by recurrent headaches which are diffuse and apparently vary widely in frequency and duration. They are compounded by blurred vision and unsteadiness while walking. Apparently the symptoms have been severe enough to have him been rendered totally and permanently disabled from his work.
>
> "He denies a family history of any significant diseases. There is no past history of significant illness. The systemic review is answered with a large number of positive responses to offered symptoms.
>
> "The pertinent findings on the examination are that he manifests vital signs in keeping with marked apprehension and anxiety. He has difficulty concentrating and responding to questions or commands. He is markedly indecisive, unable to answer questions requiring simple answers without hesitation and referral to papers he carries with him regarding the injury. There are no signs of increased intracranial pressure, meningeal irritation or focal or lateralizing neurological signs. His visual acuity is 20/30 in each eye with correction.
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> "In my opinion he manifests a marked anxiety neurosis. Since this is apparently a consequence of the head injury with concussion and post-concussion syndrome it would appear to be causally related to that.
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> "In view of the severity of the symptoms it would appear that he is in fact disabled. Treatment would appropriately consist of psychotherapy.
>
> "To exclude other less likely but potentially more serious possi-

> bilities, screening neurodiagnostic tests have been advised. Further diagnostic and therapeutic recommendations should be predicated on test results and his further course."

On February 27, 1980 an Office medical adviser reviewed the case record and recommended that appellant be referred for an evaluation by a neurologist noting that there was no medical documentation for over two years as to appellant's condition.

On February 28, 1980 the Office requested appellant to make an appointment for examination by Dr. Jay A. Rosenblum, a neurologist, for an updated medical opinion.

On March 4, 1980 appellant submitted a note from Dr. Schwarz which indicated appellant was still disabled due to this post-concussion syndrome.

By letter dated March 18, 1980 the Office advised appellant to make and keep an appointment with Dr. Rosenblum and advised him of the provisions of section 8123(d) of the Federal Employees Compensation Act.[1]

On May 27, 1980 appellant submitted a report from Dr. Cohen who repeated his diagnosis of post-concussion syndrome manifested by dizzy spells, severe headaches, and blurred vision.

Appellant was examined on June 3, 1980 by Dr. Rosenblum, who stated in a report of that date, as follows:

> "At the present time he complains of daily headaches which are worse in the morning and dull and throbbing in nature. Sometimes they do feel very sharp and on several occasions he had black out spells where he falls down and he can be unaware of his environment for at least one half hour. They are usually preceded by dizzy spells and occasional nausea. He suffers from upper back pain. He has since gone on federal disability and retired. He denies any prior history of serious illnesses or accidents.
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> "I had the opportunity of reviewing various medical records including Dr. Cohen's May 27, 1980 report which indicates the patient to have a post-concussion syndrome. Dr. Schwarz's March 4, 1980, indicates him to have a post-concussion syndrome. It is to be noted however that neither physician indicates any positive objective neurological findings. The patient indicates that he had normal tests, though he will not give me any further information."

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[1] 5 U.S.C. section 8123(d) states: "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

> "This patient's neurological examination is completely within normal limits. His affect is more in keeping with a psychiatric disorder.
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> "I referred him for an EEG [electroencephalogram] and echoencephalogram. The echo-encephalogram was normal. The EEG was reported as showing some mild left sided disorganization and slowing.
>
> "From a neurological point of view, he has no objective evidence of neurological disorder. Because of the abnormal EEG and his psychiatric problems, I do not feel him capable of returning to work at this time. I would respectfully suggest psychiatric clearance and CT scan before he be allowed to return to work. After these additional studies are done, I'd be happy to review the patient's condition again."

On August 7, 1980 the Office medical adviser reviewed Dr. Rosenblum's report noting that he did not indicate that appellant had any visual impairment or blindness as had been reported by Dr. Schwarz and recommended that he be referred for impartial ophthalmological and psychiatric evaluations and a CAT (computerized axial tomography) scan.

By letter dated October 23, 1980 appellant was advised to make appointments with Dr. William Florio, a Board-certified psychiatrist, and Dr. Abner Rosenberg, a Board-certified ophthalmologist and arrange for a CAT scan through Dr. Florio. The Office advised appellant that refusal to submit to or obstruction of an examination would result in the suspension of his right to compensation.

Dr. Rosenberg submitted a letter dated December 10, 1980 stating that appellant did not contact his office for an appointment.

By letter dated December 12, 1980 the Office again advised appellant to make an appointment with the physicians and to obtain a CAT scan and that the failure to do so could lead to the suspension of his compensation benefits.

Dr. Rosenberg submitted a report dated January 28, 1981 which indicated that appellant appeared for examination on January 20, 1981 after three prior cancellations. He stated, however, that after obtaining a history from the appellant, he refused to allow him to perform any diagnostic testing. The physician stated he had no opinion to offer as to appellant's ophthalmic condition because "he refused to allow completion of any examination."

On January 31, 1981 Dr. Florio submitted a report in which he stated he examined appellant on December 9, 1980. He reported his findings and concluded that appellant had a paranoid personality disorder "which predates the onset of his present disability [of December 7, 1975] and, of course, is not causally related to the injury of that date." Dr. Florio stated that an appointment for a CAT scan had been made; however, appellant refused to submit to the examination and cancelled it.

In an undated letter appellant indicated that he refused to undergo the CAT scan because he believed the procedure to be dangerous.

By letter dated February 6, 1981 the Office notified appellant that since he had obstructed Dr. Rosenberg's examination and refused to undergo a CAT scan through Dr. Florio his compensation benefits would be suspended effective January 29, 1981.

Appellant subsequently submitted a February 11, 1981 report from Dr. Cohen who stated that appellant remained disabled due to his post-concussion syndrome and that his treatment did not require a CAT scan.

By compensation order dated June 26, 1981 the Office denied payment of compensation after January 20, 1981 on the basis that appellant had obstructed medical examinations by the designated physicians.

On December 15, 1981 appellant submitted an application for review with the Board which was docketed as Number 82-463. By order entered June 9, 1982 the Board granted the motion of the Office that the case be remanded for further development on the issue of whether a CAT scan would be harmful to appellant's health.[2]

On September 15, 1982 a second Office medical adviser reviewed the case record and stated that a CAT scan would not be harmful to appellant's health. He noted that it was a noninvasive radiological procedure and that the procedure was necessary to determine whether appellant had an organic brain lesion.

By compensation order dated June 9, 1983 the Office suspended appellant's compensation for the period commencing January 20, 1981 because he obstructed the ophthalmological examination that date by Dr. Rosenberg and he thereafter refused to submit to a CAT scan which was required by the Office and Dr. Florio.

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary.[3] Subsection (d) of section 8123 provides that if an employee refuses to submit or obstructs an examination, his right to compensation is suspended until the refusal or obstruction stops.

The Board finds that the Office acted properly in requesting appellant to undergo examination by Drs. Rosenberg and Florio and to obtain a CAT scan to aid in the diagnosis and treatment of his condition. The medical evidence of record was insufficient to determine the extent of appellant's disability or its causal relationship with the December 7,

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[2] The Office restored appellant to the compensation rolls on the return of the case for the period commencing January 29, 1981.

[3] "(a) An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required."

1975 employment injury. Therefore the Office referral of appellant to the medical specialist was appropriate.

Appellant was requested on several occasions to undergo examination by Dr. Rosenberg, a Board-certified ophthalmologist, to determine the extent of his vision impairment, if any, so the physician could provide an opinion on whether the condition was causally related to his employment. Upon appellant's refusal to let Dr. Rosenberg examine him, the Office acted reasonably by invoking the provisions of 5 U.S.C. section 8123 and in suspending appellant's entitlement to compensation benefits until he ceased obstructing the examination.

With regard to the CAT scan, appellant objected to the procedure as being dangerous and submitted a note from his attending physician, Dr. Cohen, who stated that appellant's treatment did not require a CAT scan. However, the Office medical adviser pointed out that the scan was necessary to assist in determining the nature of appellant's condition. The medical adviser added that the CAT scan diagnostic procedure is noninvasive. There is no medical evidence to support appellant's claim that the procedure would be detrimental to his health.

None of the reasons advanced by appellant for his refusal to undergo the required medical examination or diagnostic procedures are pursuasive enough to justify his refusal to undergo reasonable medical examination. The Office properly invoked the provisions of section 8123.

The decision of the Office of Workers' Compensation Programs dated June 9, 1983 is affirmed.

In the Matter of URSULA B. WIRTH, claiming as guardian of children of STANLEY G. TORKELSEN *and* DEPARTMENT OF THE NAVY, MILITARY SEA TRANSPORT SERVICE, Bremerhaven, Germany

Docket No. 83–1909; Submitted on the Record;
Issued January 26, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issues are whether there was an overpayment of compensation in the amount of $1,519.53, and, if so, whether appellant was without fault in the creation of such overpayment.

On May 24, 1971 appellant (the remarried widow of the deceased employee) filed a claim for death benefits on behalf of the two minor children of the deceased employee and appellant. The children were a daughter born on January 29, 1957, and a son born on February 28, 1958.

The Office of Workers' Compensation Programs determined that the deceased employee's death on June 23, 1970 occurred while in the performance of duty, and accordingly began paying the children compensation pursuant to section 8133 of the Federal Employees' Compensation Act[1] effective June 24, 1970. Pursuant to amendments to the Act which were effective September 7, 1974,[2] the children began to receive, on September 7, 1974, compensation at the rate of 55 percent of the deceased employee's monthly pay, divided equally between the children.[3] Appellant as legal guardian of the children, who were minors when compensation payments began, was paid compensation on behalf of the children.

By a January 20, 1976 letter appellant advised the Office that both children were full-time high school students.

By a January 21, 1976 letter the Office advised appellant that compensation for the son was scheduled to stop soon because he would income 18 years old, but that compensation could continue after he reached 18 years of age if he continued to be a "student." The Office's letter continued:

> "Compensation may be paid so long as he continues to pursue a full-time course of study or until he marries. In no event may compensation be paid beyond the end of the semester or enrollment period after he reaches the age of 23 or has completed four years of education beyond the high school level."

In response to Office requests, appellant submitted on February 13, 1978 information showing that the daughter was a full-time student at the University of Witwatersrand (in South Africa where appellant and the children had moved) beginning February 1978.

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[1] 5 U.S.C. section 8133.

[2] Act of September 7, 1974, 88 Stat. 1148.

[3] Section 8133 of the Act (5 U.S.C. section 8133), as amended, provides in pertinent part:

> "(a) If death results from an injury sustained in the performance of duty, the United States shall pay a monthly compensation equal to a percentage of the monthly pay of the deceased employee in accordance with the following schedule: * * * (3) To the children, if there is no widow or widower, 40 percent for one child and 15 percent additional for each additional child not to exceed a total of 75 percent, divided among the children share and share alike."
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> * * *
>
> "(b) The compensation payable under subsection (a) of this section is paid from the time of death until—* * * (2) a child . . . becomes 18 years of age . . ."
>
> * * *
>
> ". . . compensation payable to or for a child . . . that would otherwise end because the child . . . has reached 18 years of age shall continue if he is a student as defined by section 8101 of this title at the time he reaches 18 years of age for so long as he continues to be such a student . . ."

Section 8101 (17) provides, in pertinent part:

> " 'Student' means an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution * * * A student whose 23rd birthday occurs during a semester or other enrollment period is deemed a student until the end of semester or other enrollment period."

By a February 11, 1981 letter the Office advised appellant that all compensation benefits had been terminated effective January 31, 1981; the Office requested further information on the children's attendance in school.

By a letter and a response on an Office form, both dated June 25, 1981, appellant advised the Office that both children had completed their studies in December 1980 and that further school attendance was not intended. Appellant returned a check paid on behalf of the son for the period from January 1, 1981 to January 31, 1981.

By a September 27, 1982 letter, which indicated that it was not a final decision, the Office advised appellant that it had found an overpayment of $1,519.53 which occured because the daughter was not entitled to the compensation the Office had paid after January 29, 1980 when she turned 23. The Office also made a preliminary finding that appellant was at fault for the reason that she was advised by the Office's January 21, 1976 letter that dependents no longer qualified for compensation after the age of 23. The Office advised appellant that she could submit further evidence, in writing or at a hearing before an Office hearing representative, on the issue of the existence and amount of the overpayment, whether she was at fault in its creation, and whether the overpayment should be repaid.

By a December 10, 1982 letter appellant stated the daughter turned 23 while still a second-year full-time student at the Univesity of Witwatersrand, and that the daughter completed her education at the Control Data Institute from March 1980 to December 1980. Appellant pointed out that the Office's January 21, 1976 letter stated that compensation may not be paid after ". . . he reaches the age 23 *or* has completed four years of education beyond the high school level (emphasis supplied by appellant)."

Appellant submitted letters from the University of Witwatersrand stating that the daughter was a full-time student from February 1979 to December 1979, and stating that the academic year began in February and ended in November. Appellant also submitted a letter from Control Data Institute stating that the daughter completed courses there which commenced on March 3, 1980 and ended with graduation on December 19, 1980.

By a decision dated March 7, 1983 the Office found that there was an overpayment of compensation in the amount of $1,519.53 which occurred because the daughter was not due, but received, compensation after January 29, 1980 when she turned 23. The Office also determined that appellant was at fault in this matter for the reason that the Office's January 21, 1976 letter advised her, "in no event may compensation be paid beyond the end of the semester of enrollment period after he reaches the age of 23 or has completed four years of education beyond the high school level."

The Board finds that an overpayment in the amount of $1,519.53 exists in this case.

Under section 8101(17) of the Act (to which the death benefits provision, section 8133 refers to the definition of a student), the status of "student" is accorded only to those under 23 years of age. The daughter of appellant and the deceased employee became 23 years of age on January 29, 1980, after which she was no longer entitled to the "student" exemption from termination of death benefits upon becoming 18 years of age.[4] The Office continued to pay appellant compensation on behalf of the son and the daughter until December 1, 1980 at the rate of 55 percent of the deceased employee's montly pay, instead of the 40 percent to which the son was entitled from January 29, 1980 to December 1, 1980 pursuant to the section 8133 of the Act, set forth above. The Office's calculations show that the amount of the overpayment was correctly computed at $1,519.53.

Section 8129(b) of the Act[5] provides:

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

20 C.F.R. section 10.314(b) provides:

> "Where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his attention is called to the same, shall refund to the Office any amount so paid or upon failure to make such refund the Office may proceed to recover the same."

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show, among other things, that the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [6]

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[4] The evidence, submitted by appellant, from the schools the daughter attended shows that her 23rd birthday did not occur during a semester or other enrollment period, but rather that it occurred between such periods.

[5] 5 U.S.C. section 8129(b).

[6] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2-claims.

In the present case, the Office applied the third standard to appellant—acceptance of a payment which the payee either knew or should have been expected to know was incorrect—in finding appellant at fault in creating the overpayment.

The Board finds that appellant was not without fault in creating the overpayment.

The Office's January 21, 1976 letter to appellant stated "In no event may compensation be paid beyond the end of the semester or enrollment period after he reaches the age of 23 or has completed four years of education beyond the high school level." While this sentence, as pointed out by appellant, contains the disjunctive "or", the plain meaning of the sentence is that no compensation may be paid if either of the stated conditions occurs. The Board finds that appellant was aware, or reasonably should have been aware, that the daughter was not entitled to compensation after her 23rd birthday on January 29, 1980. Appellant therefore accepted a payment which she knew, or should have been expected to know, was incorrect and is not without fault in creating the overpayment.

The decision of the Office of Workers' Compensation Programs dated March 7, 1983 is hereby affirmed.

In the Matter of Raymond L. Dixon *and* U. S. Postal Service, Post Office, Columbus, Ohio

Docket No. 83–2054; Submitted on the Record;
Issued January 26, 1984

Before E. Gerald Lamboley, Willie T. C. Thomas, David S. Gerson

The issue is whether appellant had disability after September 21, 1981 causally related to an employment injury sustained on July 10, 1981.

Appellant, then a 39-year-old letter carrier, filed a claim on July 12, 1981 alleging that on July 10, 1981 he sustained an injury to his neck and back as a result of an automobile accident while in the performance his federal duties. He stopped work on July 12, 1981.

Appellant was examined at a local hospital on July 13, 1981 by a Dr. Robert who diagnosed a back sprain.

Appellant was next examined on July 16, 1981 by Dr. William L. Linder, an osteopath, who found: "Pain and tenderness to palpation of the entire spine. Slight decreased ranged of motion on forward bending with pain. No neurological deficits noted. Deep tendon reflexes; post-concussion syndrome." Dr. Linder diagnosed "Cervical-dorsal, lumbosacral strain with aggravation of preexisting low back injury; post-concussion syndrome." The doctor also indicated that appellant was totally disabled.

The employing establishment referred appellant Dr. Robert R. Kessler, a Board-certified surgeon, for examination and evaluation. In a report dated August 20, 1981, Dr. Kessler stated in part:

> "It is evident that this patient has made an excellent recovery from any injuries which he may have sustained in the July 14, 1981 accident. The only problem relating to his muscloskeletal system consists of the fact that he has very minimal atrophy of the quadriceps muscle group on the right, and mild, subpatellar crepitation on the right. It is unusual that when he had surgery on his right knee, he did seek the services of a competent M.D., an orthopedic surgeon in Columbus, Ohio. Now he is under the care of an osteopath at the Cleveland Avenue Medical Center, stating that he was referred there by a friend, making one strongly suspect that he may have obtained an attorney and that there may be some litigation involved regarding the accident. Many plaintiffs' attorneys know very well that the Cleveland Avenue Medical Center tends, generally, to way over-treat their patients, whether or not they have any organic pathology or not. It is certainly evident that this patient has no organic pathology relating to his musculoskeletal system other than that relating to his right knee as previously described, and that he is well able to engage in a full and unrestricted program of activities and exercises consistent with that expected of the average walking letter carrier. There is no indication of need for further treatment or therapy or medical care or follow-up. Prognosis for the future is excellent."

In a September 2, 1981 attending physician's report, Dr. John H. Guluzian, an osteopath and an associate of Dr. Linder, indicated that appellant continued to be totally disabled as a result of his July 10, 1981 employment injury.

On September 15, 1981, the Office or Workers' Compensation Programs informed appellant that he would be paid compensation for temporary total disability for the period August 28, 1981 through September 12, 1981.[1]

The employing establishment referred appellant to Dr. Joseph Schlonsky, a Board-certified orthopedic surgeon, for examination and evaluation. In a report dated September 21, 1981, Dr. Schlonsky stated in part:

> "It is my impression that Mr. Dixon sustained a sprain of his lower

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[1] The Board notes that appellant received continuation of pay for the period July 14, 1981 through August 27, 1981.

> back and neck in the accident of July 10, 1981. There is no objective evidence at this time of pathology in the lower back area. He says that his neck symptoms have resolved. I see no reason why he could not return to sedentary work and even to carrying the mail at this time."

In a note dated October 7, 1981, the Office informed appellant of the following: "We have recently reviewed medical evidence showing that you were fit for your regular work as of September 21, 1981. No payment of compensation will therefore be made after that date." The Office paid appellant compensation for temporary total disability through September 21, 1981.

In a report dated October 13, 1981, Dr. Linder indicated that appellant continued to be totally disabled as a result of the injuries he sustained on July 10, 1981. On October 15, 1981, Dr. Linder indicated that after examining appellant on that date, he felt the appellant could return to work "without restrictions" on October 19, 1981.

An Office medical adviser reviewed the medical evidence of record and on October 31, 1981 opined that appellant's employment-related cervical strain and lumbosacral strain had resolved by August 20, 1981, the date of Dr. Kessler's examination. The medical adviser stated that he agreed with the opinions of Drs. Kessler and Scholonsky that the residuals of appellant's employment-related injuries had resolved.

By compensation order dated January 24, 1982, the Office found the following:

> "1. The weight of the substantial probative medical evidence established that disability from the accepted injury ceased.
>
> "2. Disability claimed by the claimant subsequent to September 21, 1981 [is] not shown to be causally related to the accepted injury with factual medical evidence. Claimant failed to discharge his burden of proof."

On February 9, 1982, appellant, by his attorney, requested a hearing before an Office representative. A hearing was held on May 18, 1982.

In a decision dated August 1, 1983, and finalized on August 8, 1983, the Office hearing representative affirmed the Office's January 24, 1982 decision finding that "weight of the medical opinion evidence, represented by the reports of Dr. Schlonsky, Dr. Kessler and the Office medical consultant, establishes that the claimant was not disabled for work after September 21, 1981."

The Board finds that the case is not in posture for decision.

The Office hearing representative in his August 1, 1983 decision found that the weight of the medical evidence was represented by the reports of Drs. Kessler and Schlonsky.

Dr. Kessler in his August 20, 1981 report made comments regarding appellant's care by Dr. Linder that were inappropriate in determining whether appellant was disabled as a result of the July 10, 1981 employment incident. This caused his medical opinion regarding appellant's condition to be of diminished probative value.

Dr. Schlonsky in his September 21, 1981 report stated that there was no objective evidence of pathology in the lower back area and that appellant indicated that his neck symptoms had resolved. Dr. Schlonsky stated that "I see no reason why he could not return to sedentary work and even to carrying the mail at this time." The Office terminated appellant's compensation for temporary total disability effective September 21, 1981, the date of Dr. Schlonsky's report. However, Dr. Schlonsky's report is unclear with respect to whether appellant could return to duties of a letter carrier on September 21, 1981. Thus, the report of Dr. Schlonsky can be afforded little probative value.

In view of the foregoing, the Office should refer appellant, along with a statement of accepted facts and the case record, to a medical specialist not previously associated with the case for an opinion regarding the issue of whether appellant's disability subsequent to September 21, 1981 was causally related to the injuries he sustained in the employment-related automobile accident of July 10, 1981.

The decision of the Office of Workers' Compensation Programs hearing representative, dated August 1, 1983, and finalized on August 8, 1983, is hereby set aside and the case remanded to the Office for further proceedings as outlined above, to be followed by a *de novo* decision.

In the Matter of V. LAMAR SKELTON *and* U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, Tex.

Docket No. 83–1598; Submitted on the Record;
Issued January 26, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issues are (1) whether appellant has more than a 45 percent employment-related permanent loss of use of his right leg, for which he received a schedule award and (2) whether the Office of Workers' Compensation Programs under section 8103 of the Federal Employees' Compensation Act properly denied appellant's request for the purchase of an exercise bicycle.

This is the fourth appeal in this case. In the first appeal,[1] the Board on May 20, 1976 affirmed an Office decision which issued appellant a schedule award for a 64 percent permanent employment-related loss of use of his left lower extremity.[2] In the second appeal,[3] the Board on December 18, 1978 affirmed an Office decision which issued appellant a schedule award for a 38 percent permanent employment-related loss of use of his right lower extremity. In the third appeal,[4] the Board on September 3, 1981 dismissed appellant's application for review finding that it had no jurisdiction in the case in view of the fact that the Office had not issued a final decision.

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[1] 27 ECAB 475.

The facts presented in the Board's May 20, 1976 and December 18, 1978 decisions are hereby incorporated by reference into this decision.

On March 3, 1981, Dr. John E. McNeff, a Board-certified family practitioner and one of appellant's treating physicians, stated the following:

> "Mr. Skelton has had problems with chronic thrombophlebitis—almost continuously since early 1974. He has been extensively worked up by specialists here and at Southwestern Medical School in Dallas.
>
> "He is unable to walk for exercise but needs to exercise daily because of his circulatory problems.
>
> "He swims regularly at a local pool — but needs to exercise several times a day.
>
> "I recommend he get a Schwinn Airdyne (or its equivalent) Exercise Bicycle (approximate cost $495). This he can operate with his arms instead of his legs. He can also use his right leg on this equipment."

In a letter dated March 30, 1981, the Office requested Dr. McNeff to provide the following information:

> "You have recommended an Exercise Bicycle that can be operated with his arms instead of his legs. Since Mr. Skelton's accepted condition concerns his legs please explain how the use of such an appliance would be considered likely to cure, give relief, reduce the degree or the period of disability to his accepted condition."

In response to the Office's request for information, Dr. McNeff stated the following:

> "Mr. Skelton needs exercise for his cardiovascular system in general — exertion will improve his blood flow throughout his body.
>
> "With any exertion of his legs (except swimming) he has severe leg pain.
>
> "This is the only means he has to exercise that he can do on a continuing basis.

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[2] The Office subsequently issued appellant a schedule award for a 100 percent permanent loss of use of his left lower extremity. (See 30 ECAB 283.)

[3] 30 ECAB 281.

[4] Docket No. 81-1358.

> "He has worsening angina partly because of his decline in exercise — I feel his leg and heart circulation will improve with this bike."

On March 26, 1982, Dr. William J. Fry, a Board-certified general surgeon of professorial rank, stated:

> "I have recently seen Mr. Lamar Skelton who has a primary diagnosis of chronic relapsing thrombophlebitis and high degree of venous insufficiency of both lower extremities. This gentleman continues to have severe difficulty with ambulation. He is unable to stand for more than a short time because of the attendant venous congestion despite adequate external elastic support. His overall disability is virtually complete unless he could participate in an occupation in which he could be in a position where his feet and legs are constantly elevated.
>
> "He has severe paresthesias and pain in both lower extremities secondary to the chronic venous occlusive disease. Because of the pain and swelling I believe the intercurrent episodes of acute thrombophlebitis relegate Mr. Skelton to the 100% (Class III) disability on a physical basis."

On April 1, 1982, Dr. Fry stated:

> "I would like to add an addendum to my letter to you of March 26, 1982 regarding Mr. Lamar Skelton. Mr. Skelton's disability is 100% to both the right and left lower extremity due to his chronic venous occlusive disease and intercurrent episodes of acute thrombophlebitis.
>
> "I believe that Mr. Skelton may benefit from the use of a hand operated bicycle (Schwinn Airdyne). This would furnish a form of exercise for this gentleman, though limited, would be helpful in making him partially functional, at least for the usual bodily functions."

On April 21, 1982, the Office requested Dr. Fry to respond to the following:

> "You have recommended an exercise bicycle (Schwinn Airdyne) that can be operated with his arms instead of his legs. Since Mr. Skelton's accepted work-related condition concerns his legs, please explain how the use of such an appliance would be considered likely to cure, give relief, reduce the degree or the period of disability to his accepted condition."

In response to the Office's request for information, Dr. Fry on May 3, 1982 stated:

> "This is an addendum to my letter of March 26, 1982 regarding the above named patient. I believe that Mr. Lamar Skelton falls into

> Class 3 impairment with severe vascular damage secondary to chronic venous insufficiency. This is combined with recurrent thrombophlebitis. Because of his stasis, though not on an arterial basis, limits his ability to walk as little as 25 yards as a maximum. In addition, because of his chronic recurrent thrombophlebitis despite continuous heparin therapy, Mr. Skelton has continual pain whether at rest or walking. I believe that this places him in your Category 3 disability range and hope that the above will be of some value to you."

* * *

> "NOTE: The Schwinn Airdyne hand operated bicycle would offer Mr. Skelton a form of exercise which I feel would contribute to his physical well being and might ultimately be helpful to his ambulation."

In addition to his report, Dr. Fry submitted a copy of the portion of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* relating to classes of vascular diseases affecting the extremities in which the doctor indicated that appellant had a Class 3 impairment, that is a 24-45 percent impairment of the whole man.

An Office medical adviser on May 24, 1982 opined that appellant now had a 45 percent loss of use of his right lower extremity based on Dr. Fry's statement that appellant had a Class 3 vascular impairment. The medical adviser also stated:

> "Claimant has advanced in the right lower extremity to Class III impairment and I feel justifies the maximum rating for this class: 45%. After review of the entire case I feel medical reports are objective and accurately reflect the claimant's unfortunate state. The hand operated bicycle Dr. Fry refers to would be appropriate."

On June 3, 1982, the Office requested the medical adviser to "explain how the use of such an appliance would be considered likely to cure, give relief, reduce the degree or the disability to his accepted condition."

In response to the Office's request for information, the Office medical adviser on June 12, 1982 stated:

> "The Schwinn Airdyne is designed to exercise both [the] legs and arms simultaneously or individually. The resistance is created by wind vans rather than a crank screw. As a result the user is cooled and increased resistance is created only by increasing the speed. While claimant cannot walk far, exercise for the legs is important and muscle contraction will decrese venous stasis. It is also helpful to overall conditioning of his cardiovascular system. One hopes that daily use of this stationary in home device will gradually build up his endurance to permit a greater activity level."

In a letter decision dated June 30, 1982, the Office issued a schedule award for an additional seven percent permanent loss of use of his right lower extremity in addition to the schedule award he previously received for a 38 percent permanent loss of use of the right lower extremity. In a compensation order also dated June 30, 1982, the Office found that "[t]he purchase of a Schwinn Airdyne [exercise bicycle] is not considered a medical appliance under section 8103 of the Federal Employees' Compensation Act."

With respect to the Office's issuance of the schedule award to appellant for a 45 percent permanent loss of use of his right lower extremity, the Board finds that the case is not in posture for decision.

The Board notes that in the previous decision of December 18, 1978 it affirmed an Office decision to award appellant a schedule award for a 38 percent permanent loss of use of his right lower extremity. The Board stated:

> "As to the degree of the employment-related right leg condition, the Office medical adviser relied on, and agreed with, the report of Dr. Fry, who stated that appellant's right knee impairment constituted a 15 percent impairment of the whole man. Under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, which are used by the Office in making evaluation for schedule awards purposes, a leg condition causing a 15 percent permanent impairment of the whole man equates to a 38 percent permanent loss of use of the leg . . ." [5]

In the instant case, the Office medical adviser relied on, and agreed with, Dr. Fry's May 3, 1982 report that appellant fell into a Class 3 impairment of vascular diseases affecting the extremities, that is, a 24-25 percent impairment of the whole man. The medical adviser then opined appellant now had a 45 percent permanent loss of the use of his right lower extremity. However, the medical adviser erred in coming to this conclusion. As clearly indicated in the American Medical Association's *Guides*, a Class 3 impairment of vascular diseases affecting the extremities relates to a "whole man" impairment and not to the permanent impairment of one lower extremity.[6] According to the AMA's *Guides*, a 45 percent impairment of the whole man equates to a 100 percent permanent loss of a lower extremity.

The Board further notes that the case record does not contain any rationalized medical evidence relating to appellant's present permanent impairment of his right lower extremity. Dr. Fry did state in his April 1, 1982 report that "Mr. Skelton's disability is 100% to both the right and left lower extremity due to his chronic venous occlusive disease and intercurrent episodes of acute thrombophlebitis." The Board, however, questions whether Dr. Fry is discussing appellant's 100 percent impairment with respect to the whole man or to each lower extremity.

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[5] 30 ECAB at 284.

[6] See "Table 3-Classes of Vascular Diseases Affecting the Extremities," on page 84 of the *Guides*.

In view of the foregoing, the Office should request Dr. Fry to submit a rationalized medical opinion relating to appellant's permanent impairment of his right lower extremity.

With respect to appellant's request for purchase of an exercise bicycle, the Board finds that under section 8103(a) of the Federal Employees' Compensation Act the Office improperly denied appellant's request.

Section 8103(a) of the Act provides for furnishing to an injured employee "the services, appliances, and supplies prescribed by a qualified physician" which the Office, under authority delegated by the Secretary of Labor, "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."

There is medical evidence in the form of reports from Dr. McNeff and Dr. Fry supporting appellant's contention that an exercise bicycle would give him some relief from his extensive employment-related vascular disease. Specifically, Dr. McNeff stated that the bicycle would improve his leg and heart circulation. Dr. Fry stated on April 1, 1982 that the exercise bicycle "would furnish a form of exercise for this gentleman, though limited, would be helpful in making him partially functional, at least for the usual bodily functions." Dr. Fry stated May 3, 1982 that "[t]he Schwinn Airdyne hand operated bicycle would offer Mr. Skelton a form of exercise which I feel would contribute to his physical well being and might ultimately be helpful to his ambulation." An Office medical adviser on May 24, 1982 described the exercise bicycle as being "appropriate." On June 12, 1982, the medical adviser again supported the purchase of the exercise bicycle by stating that the appliance in question would provide appellant needed exercise for his legs, overall conditioning of his cardiovascular system, and hopefully greater endurance to permit a greater activity level. There is no medical evidence disputing appellant's contention that the exercise bicycle will provide relief from the employment-related vascular condition.

On remand, the Office should authorize the exercise bicycle for appellant as described by Dr. McNeff, Dr. Fry and the Office medical adviser.

The decisions of the Office of Workers' Compensation Programs, dated June 30, 1982, are hereby set aside and the case remanded to the Office for proceedings as set forth above, to be followed by a *de novo* decision regarding the schedule award issue.

In the Matter of THOMAS J. BOLAND *and* U.S. POSTAL SERVICE, POST OFFICE, Miami, Fla.

Docket No. 83-2047; Submitted on the Record;
Issued January 27, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that prior to March 8, 1983 appellant did not "seek suitable work" pursuant to 5 U.S.C. section 8106(c)(1) and therefore was not entitled to compensation prior to that date.

This is the second appeal in this case.[1] The prior decision sets forth the background and history of the case. In that decision, the Board set aside the decisions of the Office of Workers' Compensation Programs dated September 19, 1980 and December 18, 1981 and remanded the case for a determination of whether appellant was capable after January 9, 1979, the date his disability retirement became effective, of performing the duties of his previous position of manager of station or branch operations. The Board directed, that if it were to be determined he was not so capable, the Office make a loss of wage-earning capacity determination by selecting a position which fairly and reasonably represented his wage-earning capacity.

By letter dated June 18, 1982, appellant, along with the case record and a statement of accepted facts, was referred to Dr. Robert A. Bronfman,[2] a Board-certified orthopedic surgeon, for an opinion on whether appellant, in view of his employment-related knee condition, could perform the following physical requirements of his job on January 19, 1979:

> "1. Standing and/or walking one hour per day, five days a week while training supervisors in street management, surveying new construction and investigating complaints and on-the-job injuries:
>
> "2. Standing and/or walking and/or sitting five hours per day, five days a week supervising distribution, with the claimant determining the amount of sitting/standing."

Dr. Bronfman stated in a July 24, 1982 letter that appellant could perform these duties, but he elaborated further as follows in an August 31, 1982 report:

> "I saw [appellant] for reevaluation on 8/18/82. Examination of his knee at that time was basically unchanged from previous examination done in January of 1980. X-rays showed continued degenerative changes of the left knee which eventually will require total knee arthroplasty, which the patient is a candidate for at this time.
>
> "I feel it is necessary to further clarify my letter of July 24, 1982.

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[1] The previous decision was issued May 10, 1982, Docket No. 82-579.

[2] Dr. Bronfman, previously served as an impartial medical specialist and initially examined appellant on January 5, 1980.

> If your question is, 'can [appellant] fulfill the requirements of [his] job on January 9, 1979?' If both #1 and 2 apply to this patient, I do not feel that he could work. If only #1 applied, that is standing or walking only one hour a day, then I felt that he could do the job, however, I felt that if he must do both #1 and 2 he would not be able to fulfill those requirements."

An Office medical adviser reviewed Dr. Bronfman's reports, and stated in a September 8, 1982 report that Dr. Bronfman's August 31, 1982 report "makes it clear that [appellant] was not able to fulfill the requirements of his job on January 9, 1979." The same medical adviser stated in a March 23, 1983 report that appellant's disability on January 8, 1979 was partial, and that the medical evidence of record indicated that such partial disability was continuing.

By letter to appellant dated March 3, 1983, the Office stated:

> "The Office has accepted that the residual job-related impairment to your left knee prevented you from performing the job you held with the United States Postal Service. Thus you are entitled to compensation on the basis of your loss of wage-earning capacity for periods January 9, 1979 through January 24, 1980, and from July 15, 1980 on,[3] as ordered by the Employees' Compensation Appeals Board on May 10, 1982.
>
> "In order to determine your loss of wage-earning capacity we must consider several factors as outlined in 5 U.S.C. 8128.[4]
>
> "First, you must seek and not refuse suitable employment to be eligible for compensation. Please provide your statement, and any documentation you have of the attempts you have made since January 9, 1979. These reports should be sent each 60 days in the future, of course if you do not choose to seek work you may continue on your Civil Service Annuity; your compensation medical benefits will continue."

Appellant stated the following in a March 8, 1983 letter:

> "This is in response to your letter of March 3, 1983. I have not worked at any time since I was forced to retire on disability on January 8, 1979. The idea of seeking further employment was never considered. The pain I was suffering and the prognosis of different orthopedic surgeons made this impossible. I have been postponing recommended surgery for a total knee replacement for the past several years and have been avoiding all possible stress to my left knee . . .
>
> "If I must seek suitable employment, as your letter states, I shall

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[3] Appellant previously had been paid a schedule award, running from January 25 to a portion of July 4, 1980.

[4] The Office evidently was referring to the factors set forth in 5 U.S.C. section 8106.

> certainly do so and I will provide your office with periodic reports as requested. After 32 years of federal service, I feel totally untrained for other employment and with my severe physical limitations I am at a complete loss of where to apply. As a 63-year-old man limping around on a cane, I just cannot imagine an employment interviewer showing much interest in adding me to their payroll. This area is loaded with qualified, healthy applicants seeking employment but I intend to investigate all possibilities and I will keep you advised."

Appellant notified the Office by letter dated May 8, 1983 that he had contacted the Florida State Employment Service on March 23 and April 13, 1983.

An Office claims examiner responded as follows in a May 31, 1983 letter:

> "I have reviewed your May 8, 1983 response to my March 3, 1983 inquiry. Inasmuch as you have been partially disabled from January 19, 1979 and have not sought work you are not eligible for compensation, in lieu of your retirement, from January 9, 1979 through January 24, 1980, and from July 4, 1980 to March 8, 1983. (You received a schedule award for compensation from January 25, 1980 through July 4, 1980.)
>
> "However, on March 9, 1983 you indicated that you are going to seek employment and provide periodic reports. Therefore a loss of wage-earning capacity will be determined as of March 8, 1983, and an election of benefits offered.
>
> "Please advise with which Office of the Florida State Employment Service you have registered and the positions for which you applied . . ."

In a June 7, 1983 letter, appellant responded with the address of the employment service office at which he registered and stated, "I have applied for any part-time desk type position for which I might qualify." He also supplied the name of the employment counselor with whom he had registered.

By compensation order dated August 23, 1983, the Office rejected appellant's claim for compensation prior to March 8, 1983, finding that he "did not seek suitable work from January 9, 1979 through March 8, 1983."

The Board finds that the Office improperly determined that appellant did not "seek suitable work" pursuant to 5 U.S.C. section 8106.

Section 8106(c) states, in pertinent part:

> "A partially disabled employee who (1) refuses to seek suitable work . . . is not entitled to compensation."

Under the circumstances of this case, it cannot be found that appellant refused "to seek suitable work."

Following the Board's previous remand, the Office referred appellant to Dr. Bronfman, a Board-certified orthopedic surgeon, for an opinion on whether appellant was disabled for his job on January 9, 1979 due to his employment-related knee condition. Based on Dr. Bronfman's report and an Office medical adviser's September 8, 1982 recommendation, the Office determined appellant could not perform the duties of that job and began a loss of wage-earning capacity determination.

The Office then notified appellant on March 3, 1983 that, in order to receive compensation for a loss of wage-earning capacity, he was required to "seek and not refuse suitable employment." He replied in his March 8, 1983 letter that the "idea of seeking further employment was never considered" after he retired on disability on January 8, 1979, but that he would attempt to do so from then on. His further correspondence showed that he was making regular contacts with the state employment service to obtain employment.

The Office's March 3, 1983 letter was the first notification appellant received that he would be required to seek suitable employment in order to qualify for compensation for a loss of wage-earning capacity. At no time did appellant refuse to seek suitable employment. His prior inaction was during a period when the issue of disability was still being adjudicated and such inaction during such period cannot be interpreted as a refusal within the scope of section 8106.

The decision of the Office of Workers' Compensation Programs dated August 23, 1983 is hereby reversed and the case remanded for a determination of appellant's loss of wage-earning capacity commencing January 9, 1979.

In the Matter of PHILLIP D. QUEEN *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Bellevue, Nebr.

Docket No. 83–2144; Submitted on the Record;
Issued January 27, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issues are whether the Office of Worker's Compensation Programs properly determined the amount of an overpayment of compensation and whether it properly determined appellant was not without fault with respect to the overpayment.

Appellant, an air traffic controller, last worked on November 2, 1979. He filed a claim for compensation for temporary total disability beginning November 3, 1979, alleging that he had an emotional condition and gastrointestinal problems resulting from his employment.

On September 2, 1980, the Office informed appellant that his "claim has been approved for 'temporary condition of anxiety neurosis.' " It added that it was requesting the employing establishment to provide additional pay rate information "so that we can provide you with gross dollar amount of compensation payable each month."

After receiving this information from the employing establishment, the Office, on November 24, 1980, informed appellant that he would soon receive a check in the amount of $14,074.97, which represented compensation for the period November 3, 1979 through November 5, 1980.[1] In an attached letter of the same date, the Office instructed appellant to report all employment and earnings, including self-employment, during the past tweleve months. It stated that if self-employed, appellant must report "as 'rate of pay' what it would have cost you to have hired someone else to do the same work."

On November 30, 1980, appellant responded, on the Office form received by the Office on December 3, 1980, that during 1980 he had been self-employed as a truck driver from April 20 to May 7, May 19 to May 27, and July 31 to November 5. Where the form requested the "Rate of Pay," he wrote $150 per week. While employed, he stated, he worked from 30 to 70 hours per week, averaging about 48 hours. The remainder of the year he was unemployed.

In a December 17, 1980 letter, the Office informed appellant that he would receive compensation under conditions set forth in the letter.[2] It stated that his fist payment would be $14,074.97 for the period November 3, 1979 to November 5, 1980; thereafter he would receive $1,819.64 every four weeks. At the bottom of the letter, it stated:

> "In order to avoid overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you return to work."

On the reverse of this letter were instructions on seeking employment, which appellant was requested to sign and return to the Office. Appellant signed and returned this form on December 20, 1980.

On February 10, 1981, the Office wrote appellant, noting that his recent letter indicated that in 1980 he worked as a truck driver at $150 per week. It requested that he itemize all earnings from his employment other than at the employing establishment.

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[1] This figure took into consideration that appellant had used leave during part of this compensation period; also, deductions were made for health premiums and optional insurance.

[2] Appellant's compensation was subsequenlty terminated, effective October 31, 1981, by an April 5, 1982 compensation order on the ground that he had recovered from the employment-related emotional condition.

On March 1, 1981, appellant replied that he had reported the rate of pay of his truck driving as $150 per week because, in accordance with the instructions, this is what he would have had to pay someone else to do it. He added that he owned the truck and did not receive any money from it as it "did not make enough yet to pay for itself let alone me."

On October 5, 1981, in response to further questions from the Office, appellant stated that he drove the truck himself and nobody else drove it. For the 19 weeks he worked from April 20 to November 5, 1980, it would have cost him $2,850 at $150 per week to hire someone else to do the work, he said. He added that the gross income from the truck was $18,904.61, leaving a net income of $363.84. Lastly, he stated that he worked 33 days since November 5, 1980; at $150 per week it would have cost him $706.50 to hire someone else to do the work. During this period, the truck grossed $4,832.89. He enclosed a copy of his 1980 federal income tax return. This indicated a gross income of $18,904.61. The net income was reported as $612.84; however, the '612" was crossed out and in blue ink, over the photocopy, "$363" was substituted, making the figure for net income "$363.84."

An Office claims examiner wrote a memorandum to the file stating that there was an overpayment because appellant was intermittenly self-employed from April 20, 1980 through October 2, 1981 as a truck driver, during which time he received compensation. After reviewing the figures appellant supplied, she concluded:

> "Because he was self-employed I an using the amount he [appellant] indicated it would cost him to hire someone else to do the work as actual earnings . . ."

The claims examiner added the $2,850 cost of hiring an employee from April 20 to November 5, 1980 to the $706.50 it would have cost to hire an employee for the 33-day period after November 5, 1980; this, she concluded, represented his "actual earnings" of $3,556.50.

On November 17, 1981, the Office informed appellant that it had found an overpayment of compensation for $3,556.50 because he was intermittently self-employed while receiving compensation. It further made a preliminary finding that he was at fault in the creation of the overpayment because "You were aware that you should have reported your earnings." The Office added that this was not a formal decision and informed him that he could submit additional evidence or arguments and could request a hearing.

On January 7, 1982, appellant wrote the Office that he owned and operated his trucking business, hauling grain, with one truck. He added that he had yet to realize a profit from the business and had not taken out any money for himself. His business made about $400 in 1980 and he did not "see how I could pay myself for driving."

Appellant subsequently submitted his 1981 federal income tax return which showed a net loss of $6,351.12 for that year.

On July 13, 1983, the Office again informed appellant that it had found a $3,556.50 overpayment because he was intermittently self-employed as a truck driver while he received compensation. It made a preliminary finding that he was at fault because "You were aware that you should have reported your earnings." After informing him that this was not a final decision and explaining his rights and the applicable statutory provisions, it stated that if appellant failed to respond within 30 days, a final decision would be issued.

Appellant failed to respond within the time allotted. On August 28, 1983, the Office issued a final decision finding a $3,556.50 overpayment because he was intermittently self-employed as a truck driver while receiving compensation. It found he was at fault because he was informed by a December 17, 1980 letter that to avoid an overpayment he should return any compensation checks received after he returned to work.

The Board finds that the Office improperly computed the overpayment of compensation. The $150 the Office deducted from appellant's entitlement to compensation for each week he worked was an arbitrary figure. The fact that he was able to work intermittenly in his trucking business 30 to 70 hours per week indicates that he was not totally disabled. Accordingly, the Office, rather than using the arbitrary figure of $150 for each week worked, should have determined whether he had an employment-related loss of wage-earning capacity. This should be determined in accordance with the well-established principle that wage-earning capacity represents the employee's ability to earn, taking into consideration the effects of the employment-related impairment, his actual earnings, if any, his usual occupation, his age, extent of education, and all other relevant factors.[3] The Office should use this loss of wage-earning capacity detemination as the basis on which to compute any overpayment.

The Board further finds that appellant was without fault in the creation of the overpayment. The two grounds on which the Office based its finding of fault are without merit. The first ground was that he was aware he should have reported his earnings. However, appellant informed the Office of his intermittent self-employment in his November 30, 1980 response to an Office questionnaire. The second ground was that the Office's December 17, 1980 letter instructed him to return any compensation checks received after he returned to work. However, appellant, in his November 30, 1980 response, informed the Office of his self-employment prior to the Office's December 17, 1980 letter informing him of his entitlement to a specific amount of compensation. Under the circumstances, it was reasonable for appellant to have assumed that the Office took his November 30, 1980 letter into account when it informed him on December 17, 1980 of his entitlement to compensation. Accordingly, appellant was not on notice that the Office erred in computing his compensation entitlement in the December 17, 1980 letter.

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[3] 5 U.S.C. section 8115; *Elden H. Tietze*, 2 ECAB 38.

As appellant was without fault in the creation of an overpayment of compensation, the overpayment is subject to waiver.[4] The appropriate test for waiver of an overpayment is whether recovery would defeat the purposes of the Federal Employees' Compensation Act or would be against equity and good conscience.[5]

Accordingly, the August 28, 1983 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded to the Office to recompute the overpayment in accordance with the principles set out in this decision. If the Office finds that there is an overpayment, it should address the issue of waiver.

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[4] 5 U.S.C. section 8129(b).

[5] *Id.*

In the Matter of DAVID S. DIGERNESS *and* DEPARTMENT OF THE INTERIOR, GEOLOGICAL SURVEY, Denver, Colo.

Docket No. 83-268; Submitted on the Record;
Issued January 30, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH,
WILLIE T. C. THOMAS

The issues are: (1) whether it was proper for the Office of Workers' Compensation Programs to refuse reimbursement of appellant for medical treatment performed by a medical physician, a practitioner of "holistic medicine" during the period January 6, 1982 to March 12, 1982 and (2) whether it was proper for the Office to refuse reimbursement for services after March 12, 1982.

On August 23, 1980 appellant, a 46 year old cartographic technician, filed a notice of occupational disease claiming that he was contaminated by lead poisoning as a result of exposure to chemical dust in his work place.[1] A fire had occurred in a chemistry laboratory on the floor above that on which his office was located and resulted in contamination of his work area with a number of chemicals, including lead. Without authorization of the employing establishment on July 7, 1980 appellant came under the care of Dr. Clifton W. Arrington, M.D. a practitioner of "holistic" medicine and orthotherapy who utilizes vitamins and nutrition in his treatment of patients. In his July 7, 1980 report, Dr. Arrington diagnosed "anxiety neurosis; trace mineral imbalances; heavy metal toxicity (lead)." On September 4, 1980, Dr. Arrington submitted the following reports:

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[1] Appellant lost no time from work due to his claimed condition.

"Lab results: Elevated cholesterol
Low sodium
Low serum CO^{2}
Lead toxicity

"Diagnosis: Facial Alopoecia
Anxiety Neurosis
Lead Toxicity

"Treatment: Nutritional Counseling
Metabolic Therapy
Hypnosis
Chiropratic spinal manipulation and percussive therapy

"Lead toxicity is consistent with presenting complaints. Exposure to toxic levels of lead in occupation environment."

In response to an Office request to appellant, Dr. Arrington also submitted the following November 15, 1980 report on appellant's condition:

> "Anxiety neurosis is one of several diagnoses arrived at when Mr. Digerness was evaluated by the General Orthotherapy Clinic. The neurosis is a description of behavioral and thought peculiarities presumed to be psychological in origin. However, extensive blood, urine, saliva and hair analyses revealed sufficient evidence of biochemical imbalance due to the toxic effects of lead."

In response to another request for reports by Dr. Arrington, appellant submitted the following May 9, 1981 report by that doctor:

> "David Digerness had completed a very thorough physical examination which included blood, urine, and hair chemical analysis. His presenting complaints were increased nervousness, decline in energy and ability to concentrate, digestive problems, and loss of facial hair.
>
> "Blood chemistry analysis indicated abnormally high cholesterol and abnormally low serum sodium and carbon dioxide. There were

> other essential blood elements that were poorly balanced although not frankly abnormal. Urine and saliva testing showed poor endocrinological regulation of blood sugar level and inefficient elimination of toxic waste from the gastrointestinal tract and involved organs of elimination.
>
> "Spectrohpotometric analysis of hair specimen was remarkable for an abnormally high and toxic level of lead. Research of the medical literature reveals a syndrome associated with lead toxicity which includes impairment in memory, loss of mental concentration and anxiety.
>
> "A thorough psychological evaluation of Mr. Digerness did not indicate any previous mental trauma nor abnormal developmental antecedants to account for the severity of his mental complaints.
>
> "In conclusion, Mr. Digerness is suffering from heavy metal (lead) toxicity."

An Office of Workers' Compensation Programs medical adviser reviewed appellant's case file and concluded that the diagnosed condition of lead poisoning was causally related to his employment.

The case record shows that in an October 15, 1981 telephone call, an Office employee informed appellant's health insurance carrier that it had accepted the condition of lead poisoning and would "pay bills in that regard." By letter dated January 6, 1982 an Office claims examiner informed appellant that his "case was (on 7/27/81) accepted in regard to the condition of lead poisoning. We will be glad to pay medical bills which are proven to be related to that condition."

The record shows that appellant paid the expenses incurred for treatment under Dr. Arrington, both for office visits and for nutritional supplements prescribed by that doctor, and on numerous occasions requested that the Office reimburse him for this expense.

The same Office medical adviser again reviewed the case and concluded that "the entire treatment for the supposed treatment of lead intoxication by Dr. Arrington and the chiropractor in his establishment is (general orthotheraphy clinic) not acceptable treatment by medical standards."

By letter dated March 12, 1982 the Office informed Dr. Arrington that "This letter will serve to terminate your authority for treatment" and that he should submit his "bill for any unpaid services to date, with a final narrative report, so that your account with our office on David Digerness may be closed."[2] A copy of this letter was sent to appellant.

The Office then referred appellant and his case record to Dr. John C. Harris, a toxicologist, who reported that based on his April 12, 1982 examination appellant's "past medical therapy has been extremely unorthodox and inconsistent with acceptable medical practice" and that appellant had no residuals of lead poisoning.

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[2] This letter was returned to the Office by the postal service and marked as "not deliverable."

The Office medical adviser reviewed Dr. Harris' report and concurred with his opinion.

By compensation order dated July 28, 1982, the Office informed appellant that it would not pay past medical bills for the treatment of his accepted condition because that treatment was "inconsistent with acceptable medical practice" and that it would not pay future medical bills because "the weight of the medical evidence establishes [that he] has no residuals of injury on July 12, 1980."

Appellant appealed this decision to the Board which requested a legal memorandum from the Office on the issue of whether it was proper for the Office to decline reimbursement of appellant for expenses incurred in his treatment for lead poisoning by Dr. Arrington prior to March 12, 1982. Counsel for the Director responded that there was a *de facto* authorization given by the Office to appellant for treatment by Dr. Arrington for the period from January 6, 1982, when appellant was notified by the Office of the acceptance of his claim, until March 12, 1982 when appellant was notified by the Office that reimbursement for services provided by Dr. Arrington was no longer authorized. Appellant, who was served with a copy of the Director's response, replied that he believed he was entitled to reimbursement for all expenses incurred for Dr. Arrington's treatment.

The Board finds that appellant is entitled to reimbursement for services provided by Dr. Arrington from January 6, 1982, the date appellant was notified of acceptance of his claim, until March 12, 1982, the date on which the Office notified appellant that treatment by Dr. Arrington was no longer authorized.

Under section 8103(a) of the Federal Employees' Compensation Act "the employee may initially select a physician to provide medical services." [3] That section continues to state that "these expenses, when authorized or approved by the Secretary, shall be paid from the Employees' Compensation Fund."

Appellant initally chose Dr. Arrington, a holistic physician, to treat the symptoms of his lead poisoning. After development of the case record, including review of Dr. Arrington's reports by an Office medical adviser who found a causal relationship between Dr. Arrington's diagnosis of lead poisoning and factors of appellant's employment, the Office accepted that condition as employment related and informed appellant that it would "pay medical bills which are proven to be related to that condition." This letter of January 6, 1982 is to be treated as a *de facto* authorization for reimbursement of expenses for Dr. Arrington's treatment from that date. However, appellant is not entitled to reimbursement of medical expenses after March 12, 1982, because the services of Dr. Arrington were not authorized after that date. By March 12, 1982, the Office had determined that the medical services provided by Dr. Arrington were not generally accepted.

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[3] 5 U.S.C. section 8103.

The decision of the Office of Workers' Compensation Programs dated July 28, 1982 is set aside and the case remanded for reimbursement of medical expenses incurred for treatment of appellant's accepted condition during the period January 6, 1982 through March 12, 1982.

In the Matter of William H. Goff *and* U.S. Postal Service, Post Office, Charleston, W. Va.

Docket No. 83-2023; Submitted on the Record;
Issued January 27, 1984

Before E. Gerald Lamboley, Margaret Pallansch, David S. Gerson

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity.

Appellant, a 54-year-old mail handler, injured his lower back on April 7, 1975 when he twisted his back while pulling a mail sack. He worked approximately two hours after the injury, but was unable to continue due to pain in the lower back. His condition was subsequently diagnosed as an acute lumbosacral strain.

Appellant received continuation of pay from April 8, 1975 through May 22, 1975, and the Office of Workers' Compensation Programs paid compensation for temporary total disability thereafter. He retired on disability effective April 18, 1977.

By letter dated June 2, 1980, the Office requested appellant to submit an updated report on his medical condition. Dr. A. C. Velasquez, a neurosurgeon, submitted a report concerning appellant's hospitalization from June 14 to 25, 1980 for a lumbar laminectomy. The report stated in part:

> "The patient was scheduled for a lumbar laminectomy which was performed on 6/19/80 which showed a herniated disc of L-4 on the right. Postoperativley, the patient did well and remained afebrile during the rest of his hospital course. His condition did improve and he was discharged from the hospital on 6/25/80 . . ."

In an October 10, 1980 report, Dr. Velasquez stated that appellant's lumbar spine condition was permanent. He described appellant's condition as "pain at the lumbar area due to the injury that was sustained on 4/8/75." In an October 29, 1980 work restriction evaluation report, he stated appellant could work up to four hours a day, lift up to 10 pounds and engage in intermittent sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting, and standing. He estimated appellant would reach maximum improvement in six months.

An employing establishment physician gave appellant a fitness-for-duty examination on May 20, 1981 and concluded that appellant was not capable of performing the job of a part-time custodian, which the employing establishment indicated it planned to offer appellant. The physician was given the following description of the job's duties:

> "Performs manual laboring duties in connection with custody of an office or building. Removes trash from work areas, lobbies, and washrooms. Performs cleaning duties as assigned (e.g. dusting, sweeping, etc.). Will not be required to lift over 10 lbs., will work only 4 hours per day."

The employing establishment described the physical requirements of the position to the doctor as light lifting (under 10 pounds), light carrying (under 10 pounds), reaching above shoulder, use of fingers and intermittent walking and standing for four hours.

In an October 2, 1981 report, Dr. Velasquez stated that appellant had reached maximum recovery and that "he could do some kind of job, not lift more than 15 pounds."

At the request of the employing establishment, appellant was examined on May 6, 1982 by Dr. Wirt L. Davis, a Board-certified orthopedic surgeon. In a May 12, 1982 report, Dr. Davis recounted appellant's medical history, stated the results of his physical examination, and further stated:

> "This patient had marked arthritis of the lumbar and cervical spine. As far as I can tell from the record, the arthritis was prior to the April 8, 1975 injury. He had aggravation of preexisting condition.
>
> "This patient now is able to do limited duty and the prescribed duties of . . . Custodian . . . '1. performs manual laboring duties in connection with custody of an office or building; 2. removes trash from work areas, lobbys and washrooms; 3. performs cleaning duties as assigned (e.g. dusting, sweeping, etc.); 4. will not be required to lift over 10 pounds; 5. will work only 4 hours a day' are all reasonable for this man with degenerative arthritis of the cervical and lumbar spine. He is able to carry out these limited duties as listed above. He is able to work with these restrictions."

Another employing establishment physician reviewed Dr. Davis' report and stated she agreed that appellant could perform the duties of the custodian position. By letter dated June 25, 1982, the employing establishment offered appellant the custodian position, enclosing a copy of the description of the position's duties that were discussed in Dr. Davis' report. Appellent signed a statement that he rejected the offer of the position.

By letter dated July 25, 1982, the employing establishment requested the Office to "initiate a LWEC [loss of wage-earning capacity determination] for this case and advise [appellant] and this office of the new monthly amount of compensation." The Office notified appellant in an August 31, 1982 letter that "[a]s a result of the job offer for reemployment with the Postal Service as a custodian, working 4 hours per day, we are reducing your compensation based on your loss of wage-earning capacity." By letter decision dated September 8, 1982, the Office determined appellant's weekly pay rate and calculated his new compensation rate based on his capacity to earn the wages of the custodian position offered by the employing establishment.

The Board finds that appellant's wage-earning capacity was improperly determined.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his usual employment, his age and vocational qualifications, and the availabilty of suitable employment.[1] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[2]

The concept of wage-earning capacity should not be confused with a situation where compensation is terminated for refusal of an employee to accept suitable work offered to him; such a determination is governed by section 8106(c)[3] of the Federal Employees' Compensation Act[4] and the principles applicable to it.

In this case the Office did not follow the established procedures for determining appellant's employment-related loss of wage-earning capacity, confusing those procedures with the principles of section 8106(c).

In accordance with the concept of wage-earning capacity described above, when the Office makes a medical determination of partial disability and of the specific work restrictions, the claimant's case record should be referred to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of*

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[1] See Larson *Workmen's Compensation Law*, section 57.22; 5 U.S.C. section 8115(a).

[2] *Samuel J. Russo*, 28 ECAB 43.

[3] 5 U.S.C. section 8106(c). The Office should give consideration to the application of this section to the facts of this case.

[4] 5 U.S.C. section 8101 *et seq.*

Occupational Titles or otherwise available in the open labor market, which fits the employee's capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of prevailing wage rate and availablity in the open labor market should be made through contact with the state employment service. Finally, application of the principles set forth in the *Shadrick* decision[5] will result in the precentage of the employee's loss of wage-earning capacity.[6]

Since the Office determined appellant's loss of wage-earning capacity in a manner contrary to that set forth by the Board, the case shall be remanded for further action in accordance with the principles herein set forth.[7]

The decision of the Office of Workers' Compensation Programs dated September 8, 1982 is set aside and the case remanded for further action consistent with the principles enunciated herein and with the evidence of record, to be followed by a *de novo* decision.

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[5] *Albert C. Shadrick*, 5 ECAB 376.

[6] See, e.g., *Ralph J. Amentola*, 32 ECAB 7; *Donald J. Anderson*, 32 ECAB 466.

[7] See *David Smith*, 34 ECAB 409 and 35 ECAB 536.

In the Matter of JAMES L. LATTANZI *and* DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Morgantown, W.Va.

Docket No. 83-2133; Submitted on the Record
Issued January 31, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether the award to appellant in the amount of $350.00 for facial disfigurement was proper and equitable.

On September 22, 1980 appellant, a counselor, sustained a laceration to the left side of his face as a result of the following:

> "Detainees were rioting in G-Unit when one of the detainees threw a piece of decorative block tile from the roof of G-Unit striking the left side of this claimant's face."

He stopped work that day and was treated by Dr. Phillip B. Mathias, a Board-certified otolaryngologist, who closed the laceration on the left side of appellant's face. Dr. Mathias' diagnosis was "laceration of [left] face and parotid gland, permanent paralysis of medial division of facial nerve,"[1] and indicated that it resulted from the September 22, 1980 employment injury.

Dr. Mathias referred appellant to Dr. Enrico Paparozzi, an ophthalmologist, who conducted a comprehensive ophthalmoscopic evaluation and refraction of appellant on September 26, 1980. The doctor noted that appellant had edema and ecchymosis of the lids and also diagnosed "laceration, left side/face."

Appellant returned to work on September 29, 1980. The Office of Workers' Compensation Programs determined that appellant's laceration of the left side of his face resulted from the September 22, 1980 employment injury and authorized the employing establishment to pay appellant continuation of pay for the period September 23 to 28, 1980.

Appellant continued to work until April 27, 1981 when Dr. Mathias performed a revision of the facial nerve of the left cheek. The doctor diagnosed resolving laceration of the left face and parotid gland and indicated that the permanent effects of this injury consisted of paralysis of the medial division of the facial nerve.

Appellant returned to work on April 30, 1981 after utilizing annual leave. On February 25, 1982 he filed a claim for a schedule award for facial disfigurement.[2] In response to the question as to the reasons he believed his facial disfigurement would handicap him from securing or maintaining employment, appellant responded that he could not answer the question because he was presently employed and was not seeking employment.

In support of his claim appellant submitted two color photographs showing different views of his facial disfigurement. Appellant also submitted an attending physician's report by Dr. Mathias, dated June 9, 1982, who described appellant's facial disfigurement as "permanent scar (L) [left] side of face $^1/_2$ inch," and noted that appellant had sustained a permanent paralysis of the medial division of the facial nerve.

By letter dated April 11, 1983 the Office asked Dr. Mathias the following: to indicate when he anticipated that appellant's treatment would be completed; to submit an accurate description of appellant's disfigurement; and for an opinion as to whether the disfigurement would improve or be corrected by surgery or therapy.

In response to the Office's request, Dr. Mathias submitted the following report dated April 14, 1983:

> "Even though I said in my report [appellant] would need to be followed up for several years, this is just to follow the progress of

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[1] The Board notes that the doctor inadvertently reported that the laceration was on the right side of appellant's face. He later corrected this error.

[2] Appellant had originally filed a claim for compensation for the period April 28 through 30, 1981. However, by letter dated September 9, 1981 the Office informed appellant that there was a mandatory-three day waiting period whenever disability did not exceed 14 days beyond the continuation of pay period; that his disability lasted for three days; and that therefore he was not eligible to receive compensation for wage loss.

> his scar. He does have a permanent scar which is about 1 inch in length. This has somewhat jagged edges as it wasn't a clean, smooth cut; it was sort of a triangular shape cut on his face. So, he will definitely have some permanent scarring and disfigurement of the side of the face. However, this is not an extensive scar. It is very small and involves only a small portion of his cheek. The major problems he'll have are with shaving over this area. Other than that, I don't think that the disfigurement will cause him any great distress. But, I would suspect there will be problems shaving over this particular area the rest of his life."

An Office medical adviser reviewed the evidence of record and scheduled appellant for an examination to determine the extent of his facial disfigurement. The medical adviser examined appellant on August 18, 1983 and reported that he had a scar on the left cheek located at the level of the auricles of the left ear "about $^1/_4$ inch from ear's auricle and $1^1/_2$ inch[es] to the left of the naso-labial fold." He described the size of the scar as one and a half inches long. The medical adviser described the scar as follows:

> "Three linear scars: two in angle about $^1/_4$ inch length, each one followed by a third linear scar about 1 inch in length toward left ear auricle with $^1/_2$ millimeter depression in the apex of the angle."

The medical adviser stated that upon testing the area surrounding the scar he detected a slight sensory deficit, which was commonly seen around the area of healed scars; that after conducting sensory nerve tests, there was no evidence of facial nerve branch damage; and that upon examining the parotid gland, there was no evidence of parotid gland damage caused by the laceration on the left side of appellant's face. The medical adviser noted that Dr. Mathias reported "laceration of the left side of the face and parotid gland resolving"; however, he concluded that, based on his examination of appellant, there was no evidence of parotid gland damage.

After receiving the medical adviser's report, an assistant deputy commissioner of the Office personally interviewed appellant. He stated that the scar only involved "a small portion" of appellant's left cheek and was considered to be a minimal facial disfigurement. He therefore recommended a schedule award for disfigurement in the amount of $350.00

By an award of compensation dated August 31, 1983, the Office issued appellant a lump sum schedule award in the amount of $350.00.

In a case involving a disfigurement, the question before the Board is whether the amount awarded by the Office was based upon sound and considered judgment and was "proper and equitable" under the circumstances as provided by 5 U.S.C. section 8107(c)(21).[3] In determining what constitutes a "proper and equitable" award for disfigurement, sound and equitable evaluation must be exercised as to the likely economic effect of the claimant's disfigurement in securing and maintaining employment.[4]

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[3] *Antonio J. Cuccia*, 27 ECAB 190; *Roberta C. Johnson*, 29 ECAB 48.

The Board finds that the Office, in determining the amount of the schedule award for facial disfigurement in the present case at $350.00, did not abuse its discretion.

Because of their experience, Office deputy commissioners and assistant deputy commissioners have the status as experts in evaluating disfigurements for schedule award purposes as long as they personally viewed the disfigurement.[5]

The assistant deputy commissioner personally viewed appellant in the present case, and found no serious disfigurement. The case record shows that the assistant deputy commissioner took into consideration the proper factors and circumstances and made a sound and considered judgment which was "proper and equitable" under section 8107(c)(21) of the Federal Employees' Compensation Act.

The decision of the Office of Workers' Compensation Programs dated August 31, 1983 is hereby affirmed.

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[4] *Id.*

[5] *Antonio J. Cuccia, supra; Patrick N. McKenzie*, 31 ECAB 1639.

In the Matter of CHARLES H. MITCHELL *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84-65; Submitted on the Record;
Issued January 31, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant has a disabling employment-related pulmonary condition.

On July 13, 1981, appellant, 56 years of age, filed a notice of occupational disease asserting that his asbestosis was caused by his exposure to asbestos during his fifteen years as a pipefitter. The case record shows that he did not stop working. Information submitted by the employing establishment indicates that appellant was exposed to asbestos materials during his employment.

A March 25, 1981 report submitted by the employing establishment indicates that x-rays and pulmonary function tests performed on appellant that day were within normal limits. A March 4, 1982 employing establishment medical report indicates that "pertinent abnormalities [were] noted" on appellant's pulmonary function test that day.

On April 4, 1980, Dr. Reuben R. Merliss, a Board-certified internist, examined appellant and submitted the following September 16, 1980 report:

> "*PULMONARY FUNCTION STUDIES:* The pulmonary function test was done using the Collins modular pulmonary analyzer. This is regularly each week standardized both for time and volume. The normals are based on the Morris standard, for nonsmoking adults, in turn based on the patient's age and height. The test was performed by Mr. Robert McConnell, a registered cardiopulmonary technologist. The results are as follows:

Parameter	*Observed In Liters*	*Predicted In Liters*	*Per Cent Predicted Found*	*With Isuprel Observed In Liters*	*Percent Predicted Found*
VC	3.66	4.71	77%	3.69	78%
FEV-$^{1}/_{2}$	2.01	2.07	97%	2.44	117%
FEV-1	2.60	3.38	76%	2.84	83%
FEV-3	3.26	4.48	72%	3.18	71%
MBC	139L	145L	95%	132L	91%

Parameter	*Observed In Liters*	*Predicted In Liters*	*Per Cent Predicted Found*	*With Isuprel Observed In Liters*	*Per Cent Predicted Found*
MEFR	5.10	7.00	72%	6.16	87%
MMFR	2.12L	2.92L	72%	3.72L	127%
FRC	2.76	2.77	101%	____	____
TLC	5.68	6.55	86%	____	____
RV	2.01	1.83	110%	____	____

> "Time of vital capacity: 7 seconds Normal: less than 5 seconds . . .
>
> "RV/TCL Actual: 35% Predicted: 27% FEV-1/VC Actual: 71% Predicted: 71% Comment: This patient is showing a clear restrictive defect.
>
> "*DIFFUSION CAPACITY:* The single breath carbon monoxide

method was used. The patient's predicted diffusion capacity, calculated from his age and height, is 32.3. His actual diffusion capacity was only 17.2, or fifty-three percent of normal.

"*FINAL REPORT OF DR. SIZELER:* I received this on March 14th 1980, and he reports on his second study of the x-rays bilateral pleural thickening somewhat more extensive on the left than the right, and considers that this suggests bilateral pleural reaction to prior asbestos exposure.

"*MY OWN INTERPRETATION OF THE X-RAY:* I can see in the anterior-posterior view a pleural plaque with a nicely rounded margin on the left extending upwards about one and a half interspaces, and I can see a similar and corresponding plaque on the right. This is classical for asbestosis of the pleura. There are increased markings of the S variety, but these are probably 0/1. In the left oblique again I see the pleural plaquing. In the anterior-posterior view the particular position of the chest does not allow visualization of the plaque on the right. This picture is diagnostic of pleural asbestosis.

"*CONCLUSION:* Based on the patient's symptomatology, his disturbance in diffusion, the x-ray changes, I think this patient should be placed just about midway between class two and class three of the American Medical Association classification for pulmonary disabilities."

On July 16, 1982 the Office of Workers' Compensation Programs referred appellant, his case record and a statement of accepted facts to Dr. Jeffery Golden, a Board-certified internist of professioral rank specializing in pulmonary disease. Dr. Golden examined, x-rayed, and performed pulmonary function tests on appellant on November 2, 1982 and submitted the following January 5, 1983 report:

> "On physical examination, he was a healthy-appearing man with a blood pressure of 140/90 in the left arm. His funduscopic exam showed no AV nicking. His tympanic membranes and posterior nasal pharynx exams were all normal. His lung exam revealed normal breath sounds without adventitial sounds. His cardiac exam reveals a normal S1 and S2. His abdominal and peripheral exams were normal.
>
> "A chest x-ray taken November 2, 1982 shows a focal pleural density measuring five by 1.5 cm. which may represent a pleural plaque. There is no parenchymal lung disease *per se*, and there are no pleural effusions.
>
> "Pulmonary function tests obtained on November 2, 1982, show a vital capacity of 3.5 liters, which is 87% of predicted, with a residual volume of 2.4, which is entirely normal. The total lung

> capacity is 5.9, which is 92% of predicted. The patient's diffusing capacity is 37, which increased to 133% of predicted. The patient's FEV/1 is 3.1 liters, which is entirely normal. The flow volume curve is entirely normal. Blood gases showed a p02 of 81, a pCO2 of 30, and a pH of 7.43. There is no explanation in terms of these pulmonary function tests for the patient's complaint of shortness of breath.
>
> "To better delineate his pulmonary physiology, a bloodless exercise test was done on December 8, 1982. The patient reached an oxygen consumption which is 63% of his predicted maximal oxygen consumption. His ventilatory equivalent for oxygen is normal throughout all levels of exercise. His heart rate, which is 100 at rest, goes up very quickly, even with modest exercise and stress. His tidal volume more than doubles with the increased stress of exercise. His oxygen pulse, which is a way to evaluate his heart function, is in fact decreased at each exercise level. Whereas the oxygen pulse should increase with each increase in exercise level between levels of oxygen consumption (work stress) of 1.2 liters of oxygen per minute up to 1.5 liters of oxygen per minute, his oxygen pulse is virtually the same level, rather than increasing.
>
> "*ASSESSMENT:* The most likely reason that this man performs suboptimally in terms of exercise is because of either cardiac deconditioning or a mild cardiac disease.
>
> "I would recommend that he go on a strenuous exercise program to try and get better cardiac conditioning. In fact, I would be happy to study him six months from now if he can begin an exercise study that involves some type of walking or light jogging on a daily basis.
>
> "The other major issue relates to the left chest findings which is most certainly to my review, a pleural plaque. Although mesothelioma cannot be ruled out, with this one film, I must say that lack of plueral fluid goes far to minimize the chance that this is a mesothelioma. However, I feel in the next three months, he should have at least one chest x-ray taken to check the size of this pleural lesion, and that there is no intercurrent development of pleural fluid.
>
> "For now, there is no significant pulmonary impairment due to asbestos exposure. The pleural plaque in and of itself does not interfere with pulmonary physiology and does not in and of itself imply more inimical sequelae of asbestos exposure. For now, I can say he has no pulmonary impairment secondary to that asbestos exposure.

The Office referred the case to Dr. Judd Shellito, a Board-certified specialist in pulmonary disease and consultant, who reviewed the evidence of record and submitted the following April 4, 1983 evaluation:

> "Medical records are reviewed in the above-named claimant regarding asbestos related pulmonary disability. The claimant is a 58-year-old male who received asbestos exposure while employed at

the Hunter's Point Naval Shipyard and Mare Island Naval Shipyard from 1966 to the present as a pipefitter. There is also an approximate 14 pack year cigarette smoking history. Included in the records is an evaluation of the claimant by Dr. R. Merliss (internist), dated September 16, 1980. At that time pulmonary function tests showed restrictive spirometry with a normal total lung capacity and decreased diffusing capacity determination. The chest x-ray was said to show bilateral pleural plaques. The claimant has also received a more current and comprehensive evaluation from a pulmonary specialist, Dr. J. Golden, with a report dated January 5, 1983. Dyspnea is noted after walking up one flight of stairs. There is also a history of chronic productive cough. Physical examination showed no evidence of clubbing or abnormal pulmonary sounds. The chest x-ray showed a left-sided pleural plaque with normal lung markings. Pulmonary function testing showed normal spirometry. Specifically, the forced vital capacity ws 3.5 (87% of predicted), the FEV_1 3.1 and the FEV_1 to forced vital capacity ratio was 77%. Lung volumes were within normal limits as was a diffusing capacity determination. Arterial blood gases obtained at rest on room air were also normal. To further evaluate the claimant a noninvasive exercise pulmonary evaluation was performed. This showed no evidence of ventilatory limitation to exercise.

"1. According to the medical evidence available at this time, the condition of left-sided pleural plaque was caused in part by the accepted conditions of employment.

"2. The diagnosis is established as asbestosis exposure with evidence of a left-sided pleural plaque on chest x-ray. There is insufficient evidence to support a diagnosis of parenchymal asbestosis in the face of normal physical exam, normal lung markings on chest x-ray, normal spirometry, a normal total lung capacity, a well preserved diffusing capacity, and an exercise evaluation showing no ventilatory or gas exchange limitation. The decreased forced vital capacity ratio obtained through Dr. Merliss was likely on the basis of poor effort as it was not matched with corresponding changes in total lung capacity. The decreased diffusing capacity obtained through Dr. Merliss was likely either an error or due to a nonasbestos related condition, because asbestos related diffusion impairment would not be expected to resolve to normal values with time. In any comparison of serial pulmonary function test results obtained from different labs, priority must always go to the more current and normal values. The exercise evaluation obtained through Dr. Golden also speaks strongly against any underlying interstitial lung disease.

"3. The claimant is not disabled from his position due to disease resulting from exposure to asbestos while in federal employment.

> "4. The percentage of respiratory impairment utilizing AMA criteria and the more sensitive pulmonary evaluation is 0%."

By letter decision dated September 13, 1983 the Office rejected appellant's claim for compensation on the ground that his employment-related asbestos disease did not result in impairment or disability at that time.

The Board finds that the case is not posture for decision due to a conflict in the medical evidence.

Dr. Merliss, a Board-certified internist, concluded in his April 4, 1980 report, that appellant had asbestos related pulmonary disability "midway between class two and class three of the American Medical Association classification." He based this conclusion on his physical examination, appellant's history of asbestos exposure at work, the x-ray findings (bilateral pleural thickening more extensive on the left than on the right), and pulmonary function studies (which included a diffusing capacity finding of 53 percent of the predicted normal value). On the other hand, Dr. Golden, a Board-certified pulmonary specialist, concluded in his January 5, 1983 report that appellant has "no pulmonary impairment secondary to [his] asbestos exposure." Accordingly, there is a conflict in the medical evidence between Dr. Merliss and Dr. Golden on the extent of appellant's asbestos-related pulmonary impairment.

The report of Dr. Shellito, a Board-certified pulmonary specialist and an Office medical consultant, provides little clarification of the medical evidence concerning appellant's pulmonary condition. In any event, because he is a consulting specialist Dr. Shellito cannot serve as the impartial specialist selected to resolve the conflict between Dr. Golden and Dr. Merliss.[1]

On remand, the Office should refer appellant, a statement of accepted facts and the entire case record to an appropriate impartial Board-certified pulmonary specialist for a rationalized medical opinion on whether appellant has any pulmonary impairment or disability causally related to asbestos exposure in his federal employment. The specialist should be requested to perform a complete pulmonary evaluation, including the new x-rays and complete pulmonary function studies. The Office should provide the specialist with the x-rays relied upon by Dr. Merliss and Dr. Golden, and should request the specialist to have a serial reading of the three sets of x-rays made. After such further development as may be deemed necessary, a *de novo* decision should be issued.

The September 13, 1983 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded to the Office for further development consistent with this decision of the Board.

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[1] See *Eleanor Richards*, Docket No. 83-909, issued October 28, 1983; see also the Federal Procedure Manual, Chapter 3-400, for the procedures to be followed by the Office in selecting an impartial medical specialist pursuant to 5 U.S.C. section 8123(a).

In the Matter of CARL E. HENDRICKSON *and* DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Dallas, Tex.

Docket No. 83-2119; Submitted on the Record;
Issued February 6, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant has any disability causally related to exposure to toxic chemical fumes at work.

On November 5, 1981 appellant, then a 38-year-old criminal investigator, filed a claim for an allergic reaction to fumes from various chemicals which were brought into his office area after seizure from a clandestine laboratory. On the claim form, appellant described his symptoms as follows:

> "I am sensitive to various chemicals and fumes. I was unaware the items were in the building. I began having reactions—burning eyes, blurred vision, severe chest pains, headache, weakness in arms and chest, felt very dizzy. Headache, weakness and chest pain continued into next day."

Appellant submitted a number of medical reports from Dr. Williams J. Rea, a Board-certified surgeon and thoracic surgeon. In a December 16, 1981 report, Dr. Rea stated:

> "[Appellant] has been under my care since April 22, 1980, for the treatment of myopathy, rhinitis, and sinusitis.
>
> "The patient was seen on November 5, 1981 for the treatment of chest pain and swelling and loss of concentration due to exposure to chemicals and fumes seized in his line of work.
>
> "This is to verify that it is medically necessary for the patient to remain off of work for at least another two weeks, due to his acute condition."

In a December 4, 1981 letter, an Office of Workers' Compensation Programs claims examiner advised appellant that he had not sustained his burden of proving that his condition was causally related to his employment. The claims examiner stated:

> "You have not established by reasoned medical evidence from a medical specialist in the field of allergy that your condition was due to exposure to the chemicals confiscated from a clandestine labo-

> ratory. Your record shows you have a long history of sinusitis, rhinitis and myopathy."

In a December 18, 1981 report, Dr. Rea stated:

> "There has evolved a number of individuals who have developed hypersensitivities and acute overloads to various chemicals in our present day environment. In some cases, the patient is hypersensitive to all chemicals, as well as foods and inhalants. This is apparently due to a disturbance in the immune and vascular systems.
>
> "Materials known to be toxic in greater concentrations are capable of producing severe reactions in highly susceptible persons in much smaller amounts, alleged to be harmless.
>
> "Some persons develop individual susceptibility after a single massive exposure. In others, this will not develop until after prolonged repeated exposures. But once a person has become susceptible, such a person appears to be injured, often permanently, as cross reactions then tend to develop to related synthetically derived materials. Thus a person who has become susceptible either as a result of a massive exposure or more sustained, frequently repeated exposures tends to develop cross reactions to other materials of common origin. The mode of exposure may be either inhalation, ingestion, or contact.
>
> "The recognition of this clinical problem is difficult. The recognition is further impeded by the fact that many physicians fail utterly to recognize its incidence. There is a tendency to refer to individuals so involved as being neurotic, psychosomatic, and hysterical. Secondly, the problem tends to be treated by means of chemically derived synthetic drugs which commonly makes this type of patient worse.
>
> "Once a patient has become highly susceptible it is necessary to take great care to minimize incriminated environmental exposures. Avoidance is the most important aspect in the treatment of a case of a patient who has already been made susceptible.
>
> "The problem involved here is not primarily the toxicity of various chemical formulations, but the tendency for given persons to become susceptible to multiple chemicals once susceptibility has been induced.
>
> "Mr. Hendrickson was first seen by me on April 22, 1980, presenting with severe complaints of fatigue and sinusitis.
>
> "The patient was admitted to Brookhaven Medical Center on December 17, 1980, and was discharged on December 23, 1980, with a discharge diagnosis of myopathy, undescended testicles, rhinitis, and sinusitis.
>
> "The patient presented at the office on November 5, 1981, with severe complaints of chest pain and swelling.
>
> "Mr. Hendrickson related a history of exposure to toxic chemicals. Mr. Hendrickson came back to work and suffered severe symptoms

> of chest pain and swelling. The toxic chemicals were traced back to the lab which was above his office and the chemicals came through the ventilation system. It was noted that the office where the patient worked had suffered an ether spill while the patient was away and the ventilation system had carried the fumes throughout the office.
>
> "The chemical that the patient was exposed to was known to have contained phenol. While hospitalized in December of 1980, Mr. Hendrickson was challenged by the double-blind method and found entremely sensitive to many chemicals including phenol. His symptoms included eye and nose irritation, acne, watery eyes, chest pain, etc . . .
>
> "My recommendations were to stay off work to clear out, possible hospitalization, to go to the mountains to clear, to have lab work, and to take Vitamin C.
>
> "The patient was seen in follow-up on November 18, 1981. At that time, the patient's lungs were getting better. He still had some residual headaches. My recommendations were to stay off work for two more weeks.
>
> "On December 1, 1981, the patient related that he went to the airport and the fumes made him ill. He was experiencing a little swelling, sore throat, and ear infections. My recommendations were to use oxygen. The patient was allowed to return to work only if he could tolerate it.
>
> "When last seen on December 16, 1981, the patient related that he had gone to work the previous week and experienced burning in the abdomen and eyes, weakness, and burning sensation in the chest. My recommendations were to stay off of work for two more weeks.
>
> "It is my professional opinion that in Mr. Hendrickson's case, his disability was in all medical probability related to his employment and that this is established."

Dr. Rea also submitted a January 5, 1981 discharge summary of a December 17 to 23, 1980 hospitalization of appellant. In the discharge summary, Dr. Rea stated:

> "History of present illness: The patient's main problem is fatigue which may be accompanied by nausea, weakness, and blurring vision. This becomes worse when driving in rush-hour traffic and is also often bad at work. His office is located off of an expressway, and has a chemical laboratory one floor above the office. Entering a new building, or shopping mall, will often bring this on. Antigens for pollens, dusts, molds and chemicals seemed to help in the beginning, but the patient does not feel that he is improving at this point. B-12 injections were begun one-and-a-half years ago which do seem to help. These are taken every two weeks. At home (patient

lives in the country) he feels well and has no problems. He feels that he has some memory loss. He also has night blindness which has worsened in the past six months. He has tried an elimination diet on his own, but has not found anything that contributes to his problem. He may have numbness in the fingers and also headaches. He also notes muscle weakness.

"Pertinent findings on physical examination: Head, Eyes, Ears, Nose, and Throat: Rhinitis is noted. Genitalia: Undescended testicles. Healed surgical incisions. Bones, Joints, and Muscles: Increased muscle bulk in quadriceps.

"Medications taken within the last six months: Injectible Vitamin B-12, Feosol, and Stresstabs with iron.

"Laboratory date information: See attached laboratory data summary sheet. Radiological information: December 17, 1980, he had a chest x-ray that was negative. Electrocardiogram was within normal limits.

"Hospital course: The patient was placed in an environmentally controlled room in Brookhaven Medical Center constructed of aluminum and plaster, and fasted for a total of five days. The patient's symptoms did clear after the fast. Detoxification symptoms included headaches and depression. Water tolerated was Spa. The patient was found to be tolerable to sodium bicarbonate, potassium bicarbonate, and calcium carbonate. The patient was then challenged with the less chemically contaminated foods. Symptom-free foods included apple, orange, potato, wheat, chicken, and salmon. During the hospital course, treatment was arranged for newsprint by the intradermal method. Chemical exposure was done in a steel and glass airtight booth by double-blind method. Symptoms were reproduced by alcohol, insecticide, phenol, and formaldehyde. Symptom-free chemicals included chlorine and natural gas.

"Degree of chemical sensitivity: Is 5+ which states that he can stay in a town in a very safe setting.

"Drugs and remedies found to be safely used by this patient to relieve his symptoms: Oxygen.

"Degree of food sensitivity: Of the organic foods tested, he had six negative foods.

"Discharge diagnoses: Myopathy; Undescended testicles; Rhinities; Sinusitis.

"Discharge recommendations: He is to follow a rotation diet of less chemically contaminated foods and spring water. He is to keep a daily diary and remove all incitant chemicals from his home. He should contact either Dr. Stroud or Dr. Rea in approximately two weeks for a reevaluation and further recommendations.

"Medications prescribed at the time of discharge: Oxygen.

> "Followup treatment plan: He is to use antigens for pollens, dusts, and molds, and foods every four days, and chemicals as needed.
>
> "Prognosis at the time of discharge: Good, if he follows recommendations."

By compensation order dated March 31, 1982, the Office rejected appellant's claim on the ground that he "has not met his burden of proof to establish that his condition on 11/4/81 is causally related to factors of his federal employment."

Appellant requested reconsideration and in support of his request submitted an April 30, 1980 report from Dr. Rea, who concluded:

> "Failure by DEA [the employing establishment] to provide information of any environment study has resulted in a lengthy process of elimination to determine Mr. Hendrickson's exposure to toxic chemicals fumes. In the home environment, where Mr. Hendrickson has never experienced any ill effects, an elaborate filtration system was installed. His vehicle also has been altered with additional filters and any reaction to foods also has been ruled out.
>
> "With the elimination of all other factors of Mr. Hendrickson's daily environmental exposure, it is my conclusion that Mr. Hendrickson's illness is due to lengthy and massive exposure to toxic chemical fumes at the DEA regional office at Dallas, Texas. At the present time, Mr. Hendrickson is totally disabled and he must rely on a portable oxygen container for his daily existence. The prognosis at the time is undetermined and cannot be made until such time that the toxic chemicals to which Mr. Hendrickson is reactive are identified."

Appellant also submitted his own May 7, 1982 statement in which he described the gradual onset of his symptoms after 1978, when the employing establishment moved into a new building. He indicated that the ventilation system in the building would blow fumes from the laboratory (on the floor above his office) into his office, and noted that other employees used oscillating fans to expel chemical fumes from their offices. He also submitted pictures of the containers of chemicals (seized from a clandestine laboratory) to which he was exposed on November 4, 1981.

By compensation order dated June 23, 1982, the Office denied appellant's request for reconsideration without reviewing the case on its merits. In an accompanying memorandum, an Office deputy commissioner stated:

> "Insofar at this case alleges a traumatic incident of November 4, 1981, and as such is not acceptable, it is noted that the claimant has expanded his claim to an occupational disease claim by his letter of May 20, 1982. We should open a case for occupational disease claim,

> using the CA-2 that the claimant signed February 15, 1982, and proceed to adjudicate that claim. The new claim should be doubled into this one."

The Office proceeded to develop the case with reference to appellant's claim for an occupational disease, and requested a statement from appellant's supervisor. In a September 9, 1982 statement, the supervisor noted that "chemicals seized as evidence in criminal investigations have been stored in the DEA facility for extended periods of time prior to disposal"; that there was a "history of inadequate ventilation throughout the DEA facility"; that there was a history of "faulty vacuum exhaust and filtering systems in the facility's testing and analysis laboratory wherein toxic chemical fumes are reentering office space through air intake/returns of the heating and air conditioning system"; that inventories of seized chemicals were routinely conducted within the office, exposing all employees to toxic fumes; and that "all statements submitted by the employee concerning his condition and cause thereof are correct to the best of my knowledge." Appellant's supervisor also noted that of the 167 days appellant was absent due to illness or for medical treatment from the date his condition was diagnosed until his disability retirement (effective June 4, 1982) "134 days of sick leave were taken from the date of his overexposure to toxic chemicals on November 4, 1981 until his separation date."

On September 15, 1982 an Office claims examiner requested an Office medical adviser to review the case record, who replied:

> "The medical opinion and treatment options put forward by Dr. Rea of the Environment Health Center are very controversial and not part of the fund of knowledge that is accepted as mainstream medicine. Treatment with injectible Vitamin B-12 and allergins as presented here have not been accepted by the American medical community and can be considered at best avant-garde.
>
> "Please refer claimant for IME [independent medical examination] by a Board-certified allergist before the condition is accepted as causally related or any disability is recognized."

The Office requested further information from the employing establishment, including copies of appellant's medical records. In a November 10, 1982 letter, the administrative officer of the employing establishment submitted a number of reports, including a May 21, 1982 letter to Dr. Rea from Marvin S. Fink, safety manager of the Health Services Division, who stated:

> "We wish to express our deep concern regarding the health problems Agent Hendrickson has been experiencing, and assure you that we share your desire to find the cause for his difficulties. Although your letter suggests that chemical exposure in our Dallas laboratory and

offices are the cause for Mr. Hendrickson's difficulties, the facts that we have been able to gather do not appear to be consistent with this premise.

"On May 12, 1982, we spoke with Mr. Robert Simmons and Dr. Del Krehbiel of the Occupational Safety and Health Administration, Department of Labor, regarding their 1979 and 1982 reports of our Dallas facility. A copy of the 1982 report is enclosed. We specifically asked them about chemicals and narcotic residues being found throughout the facility in 1979, as you mention in your letter. Mr. Simmons said, and we quote, 'That's not so.' In fact, the 1979 report only documents some minor deficiencies that were found, such as lack of eyewash fountain solution in the laboratory, a problem with an electrical outlet, and inadequate cooling of an instrument room. They also found that general ventilation was adequate for the facility. You will also note that the 1982 report does not point out any deficiencies that result in the distribution of chemicals or narcotic residues throughout the offices. On the contrary, Dr. Krehbiel said he found the laboratory and offices to be clean and well maintained.

"Our laboratory is stocked with many chemicals that are used in analysis of narcotic drugs and our vaults contain many samples of chemicals that are seized in clandestine laboratory raids and held as evidence. Some of these chemicals, such as phenylacetic acid, hydrochloric acid, sulfuric acid, monomethlylamine, *et al.*, have odors associated with them, but are not harmful at the extremely low concentrations or short times of exposure that may occur.

"Mr. Hendrickson's job function is in intelligence and requires little or no handling or contact with any chemicals, but he does have contact with other employees who are more involved in clandestine laboratory operations. They could be in the process of 'logging in' such chemicals prior to storage in our vault. We understand, for example, that a container of outdated cough syrup, containing codeine, once spilled on a rug in the office area which appears to be the extent to which the chemicals you refer to . . .'soaked into the carpeting.'

"Although there is no doubt that massive overloads of chemicals can cause or precipitate many types of dysfunctions in the human body, the OSHA findings simply do not indicate how this could have occurred for Mr. Hendrickson. With these findings as a basis, it no longer appears correct to conclude that a lengthy and massive exposure to toxic chemical fumes at our laboratory in Dallas is the cause for Mr. Hendrickson's illness.

"There is, of course, a possibility that Mr. Hendrickson may have an extreme hypersensitivity to chemical substances. You are undoubtedly familiar with many cases of this type via your personal experience and those reported in the occupational safety and health

> literature. Such individuals may adversely react to chemicals significantly below the permissible exposure levels (PEL) prescribed by OSHA. Ordinarily, management, sensitive to the needs of their employees, will transfer such individuals to other functions or other facilities, and this, of course, can be explored for Mr. Hendrickson if he is able to return to work.
>
> "We wish we could be more helpful in assisting you to identify the toxic chemicals that Mr. Hendrickson could be reacting to. Hopefully, Dr. Krehbiel's listing of chemicals will be of assistance to you. Dr. Krehbiel also advises us that it would take the full resources of the National Institute of Safety and Health, with their epidemiologists, toxicologists, medical doctors, etc., to perform a 'Health Hazard Evaluation.' Although this can be requested, if advisable, Dr. Krehbiel and Mr. Simmons appear doubtful of the outcome, other than to further indicate that Mr. Hendrickson has a hypersensitivity to extremely low concentrations of chemical substances. Additionally, Mr. Hendrickson is the only employee experiencing difficulties, while other employees significantly involved in clandestine laboratory operations experience no difficulty.
>
> "If, when reviewing the facts associated with this case, you judge that further environmental data is needed, we will request NIOSH's assistance."

The Office then prepared a statement of accepted facts which noted that appellant "stated he has been exposed to fumes from phenylacetone, methamphetamine and sodium chloride," but that exposure to other chemicals could not be substantiated. The statement of facts indicated that the Office "does accept that the claimant was exposed to chemicals and the fumes of chemicals that are capable of causing irritation or aggravation in those people who are susceptible."

The Office referred appellant and the statement of accepted facts to Dr. Thomas L. Kurt, a Board-certified specialist in toxicology and preventive medicine, who hospitalized appellant for diagnostic testing from January 5 to 8, 1983. Electromyographic testing performed on appellant by Dr. Robert N. Muckleroy, a Board-certified specialist in preventive medicine, on January 6, 1983 was reported to be normal. Appellant was also evaluated by Dr. Leon Menzer, a Board-certified neurologist, who stated in a January 6, 1983 report that there was "no evidence of objective neurological disease at this time." He continued:

> "DISCUSSION: The patient has some decreased sensation to pain and cold over the dorsum of the left foot in a perineal nerve distribution and a positive Tinel's sign over the left perineal nerve, but there is no evidence of muscle weakness. No atrophy of the extensor digitorum brevis muscle on the left. If this represents a perineal neuropathy on the left side it is quite mild, and the age of it cannot

> be determined. There is nothing else on his examination to suggest disease of the peripheral nerve or muscle. I would suggest that we obtain some muscle enzymes. When he was 12 years old he had surgery performed for undescended testes, and it is possible that that surgery, being close to the left femoral nerve, might be responsible for the mild abnormalities noted on his muscle biopsy."

Appellant was also examined by Dr. William R. Lumry, a Board-certified internist. In a January 10, 1983 report, he indicated that his diagnostic impressions were "alleged chemical sensitivity secondary to acute and chronic chemical exposure" and "no apparent IgE [immunoglobulin E] mediated disease by history or at present."

In a January 19, 1983 discharge summary, after noting the hospital course, including the results of chemical patch testing and Laboratory testing, Dr. Kurt concluded:

> "DIAGNOSES: 1. Hepatitis A with chronic liver dysfunction with no evidence of cirrhosis at this point (bilirubin normal). The possible causes for his hepatitis A include: (1) iatrogenic by risk of the cryoprecipitate infusions given by Dr. Kahn, of questionable value, for his chemical sensitivities as diagnosed by Dr. Rea; (2) his occupational exposure to drug users and junkies at his work as a DEA agent; (3) exposure to people in the general population with infectious hepatitis. Exact determination of whether this is work related or not is not clear. However, the above factors should be considered.
>
> "2. No evidence of immune system dysfunction or immunodeficiency is present at this time.
>
> "3. There is no evidence of a peripheral neuropathy, with the reason of his outside biopsy and nerve conduction test showing the abnormalities likely being related to his prior surgery performed in a more proximal location of the nerve tracts involved.
>
> "4. He has an acquired behavioral syndrome related to his exposure to chemicals at work, producing symptoms of a behavior pattern. This has been reinforced by his training from Dr. Rea and might be again used at the present time in a manipulative fashion to obtain early retirement. Behavioral modification and clinically acceptable laboratory associated with the Medical School might be productive in being able to reverse the syndrome.
>
> "While it is not advised at the present time for this person to return to his work, as a DEA agent, in an office exposed to various seized drugs and chemicals, this is not on the basis of any organic disease, but on the basis of a mental syndrome, mentioned in #4, which can be averted with proper behavioral modification. He could be returned to work in an administrative office, where these exposures do not occur at the present time, with the proper training taking place and progress which might eventually allow him to re-

> turn to drug and chemical exposures without any mental aversion effects. His chronic hepatitis A should be followed by a gastroenterologist, but is not of sufficient severity to prevent him from doing ordinary desk work at the present time. This followup is necessary to ascertain as to whether or not it clears. Cirrhosis of a related nature might be produced in the future. Sometimes placement on low-dose cortical steriods will reverse the syndrome, but such decisions should be made by a Board-certified gastroenterologist."

In a February 3, 1983 letter, Dr. Kurt stated:

> "Mr. Hendrickson has chronic hepatitis A (infectious) with mild liver dysfunction, but not cirrhosis. The dysfunction may reverse in time, or it may proceed on to cirrhosis as the years pass. It is not clear whether this is work related or nonwork related. It is most likely related to the many cryoprecipitate transfusions given to him by Dr. Kahn at Wadley at Dr. Rea's recommendations, these transfusions having no known scientific benefit for a chemical sensitivity syndrome that he did not have, and not being approved by the FDA for such purpose. It is also possible that he may have acquired hepatitis in his contacts with drug dealers. He may also have acquired it from nonoccupational contacts. He should be followed up for this problem with a Board-certified gastroenterologist, such as Dr. Allen Rubin. This does not prevent him from returning to regular office work, but strenuous laborious work as a ditch digger, for instance, is not advised.
>
> "He has learned to develop physical symptoms whenever he has a whiff of chemical exposures. These symptoms have no organic basis in disease. Rather, he has learned to do this in a semi-Pavlovian way. He appeared to be willing to undergo biofeedback training to modify this behavior. While he is likely to develop symptoms if returned to work at his previous job if chemicals are around, these have no organic basis. Therefore, it would be best for him to start a biofeedback program, while initially doing strictly deskwork in a nonchemically evidence involved area. While, in my opinion, he could safely return to exactly his same job, he is likely to use his learned syndrome in a manipulative way, if that is done initially."

Upon Dr. Kurt's recommendations, the Office referred appellant to Dr. Allen W. Rubin, a Board-certified gastroenterologist, and Dr. Myron F. Weiner, a Board-certified psychiatrist of professorial rank, for evaluation. In an April 22, 1983 report, Dr. Rubin stated:

> "With regard to question number one, the 'nature and extent of current diagnostic studies concerning chronic hepatitis A (infectious),' one would have to say that by definition, hepatitis A does not become a chronic infection and the presence of the antibody

confirms the fact that the body has experienced infection and has responded in an appropriate fashion.

"His laboratory date would also support the fact that he was exposed to hepatitis B and also completely cleared this from his system. In the absence of the ability to obtain any marker that would identify non-A, non-B hepatitis, we would have to assume that this is the case. If one reviews his charts, we find that his liver functions were within normal limits before receiving cryoprecipitate as part of an experimental protocol to improve his opsonins. This unconventional therapy may well have resulted in the acquisition of non-A, non-B hepatitis, a frequent finding in patients that are given multiple transfusions.

"In regards to question number two, non-A, non-B hepatitis is usually an asymptomatic illness, but can result in serious progressive liver damage. His current laboratory data (April 21, 1983) indicates only minimal elevations. His SGOT is 65, and SGPT is 95. This is in contradistinction to what was seen during his January [1983] hospitalization. It is not unusual for non-A, non-B hepatitis to give varied enzyme evaluations without any symptoms. These cases are usually picked up as a matter of routine, when liver functions are repeated. From the laboratory studies available, I would again say that this was probably acquired while he was receiving his cryoprecipitate. The sequence of the liver injury with known multiple exposure to blood products would indicate it is not proximately related to his work. It should be mentioned that he apparently signed a release with an understanding that the therapy he was about to receive for his laboratory abnormally may cause hepatitis. This therapy is outside the customary treatments given to patients.

"With regard to prognosis, patients usually remain asymptomatic with some percentage of patients developing chronic hepatitis. There is no evidence that any therapy can be used to change the natural course of the illness, but in general patients are not incapacitated by the problem.

"It is suggested that if marked fatigue or other signs that would be compatible with chronic hepatitis subsequently developed, his enzymes should be rechecked. This is to be sure that he does not have an acute exacerbation of his liver disease. It should be noted that at the current time, he is fatigued, but active inflammation is not evident from the liver functions available.

"From a liver standpoint, assessment of employability would not result in any limitations."

In an April 22, 1983 report, Dr. Weiner concluded:

"My diagnosis is (300.11) conversion disorder, manifested by nu-

> merous somatic complaints, but including extreme fatigue, aching muscles, blurred vision, and excessive sleepiness. I think Mr. Hendrickson is severely impaired for any type of work.
>
> "There were no obvious precipitating emotional factors in Mr. Hendrickson's employment. He positively denied work stress. However, that type of denial is common with conversion disorder. It is possible that the toxic compounds to which he was exposed were more of a psychological stress than a physical stress, and that his reaction to all inhalants has now magnified to the point that it is self-reinforcing. Mr. Hendrickson claims to feel best when he is away from all environmental pollutants, and plans to live in a rural setting on a lake in Northern Michigan.
>
> "It is impossible for me to determine if this man's symptoms are self-engendered. He reports they are not related to job dissatisfaction or personality conflict.
>
> "Mr. Hendrickson's premorbid personality adjustment appears to have been good, but his coping abilities are now greatly impaired and he deals poorly with the demands of daily life, living essentially as an invalid. He reports that he is very unhappy about his present condition and almost never has a day when he is physically comfortable.
>
> "While Mr. Hendrickson's symptoms are emotional in origin, I do not believe that he will respond to psychological or drug treatment. His symptoms were heavily reinforced by his earlier treatment with Dr. Rea, and have continued to multiply. In the face of such massive symptomatology and Mr. Hendrickson's well-established plans to isolate himself, vigorous attempts at treatment would be ill-advised. I feel that he is totally and permanently disabled for any form of continued employment."

The same Office medical adviser reviewed the case record. In a May 10, 1983 report, he stated:

> "1. The SOF [statement of facts] establishes that claimant alleges exposure to chemicals are the basis of his problem. The overwhelming weight of Board-certified opinion in this case points to factors other than work related as the basis of his present condition.
>
> "Claimant has objective evidence of having had hepatitis A & B and probably non-A non-B hepatitis. He has completely resolved with no permanent functional limitations. These are caused by infectious viruses and not by chemicals. Therefore the allegation of a chemical exposure is disproved.
>
> "Claimant underwent treatments by Dr. Rea that are experiental in nature and of no therapeutic value. These have worsened his condition in the opinion of impartial examiners and were never medically indicated. It should be noted that Dr. Rea has had his cre-

dentials in the community severely restricted because of problems and is at best a 'controversial' figure. These treatments are not FDA approved either.

"2. Claimant is disabled from all work because of a psychiatric condition: severe conversion reaction. This psychiatric condition is unrelated to his federal employment.

"There were (according to IME) no precipitating emotional factors in claimant's employment. Any feeling that the work environment to which he was exposed was psychologically stressful is speculative."

By compensation order dated July 6, 1983, the Office rejected appellant's claim on the ground that "the weight of medical evidence does not establish that [appellant's] allergic condition is causally related to factors of federal employment."

The Board finds that the weight of the medical evidence fails to establish that appellant had any disability causally related to exposure to toxic chemical fumes at work.

The weight of the medical evidence is represented by the well-rationalized reports of Dr. Kurt, a Board-certified specialist in toxicology and preventive medicine, Dr. Rubin, a Board-certified gastroenterologist, and Dr. Weiner, a Board-certified psychiatrist of professorial rank, with whom the Office medical adviser concurred. These doctors concluded that appellant's only organically based condition was hepatitis, which they felt was probably contracted by appellant through the experimental blood transfusions he received under the direction of Dr. Rea. In his reports, Dr. Kurt concluded that the extensive testing he performed revealed "no evidence of immune system dysfunction or immunodeficiency," and indicated that the physical symptoms appellant exhibits whenever he has a whiff of chemical exposures "have no organic basis in disease." Dr. Weiner concluded that appellant had a "conversion disorder, manifested by numerous somatic complaints, but including extreme fatigue, aching muscles, blurred vision, and excessive sleepiness," indicated that "there were no obvious precipitating emotional factors in Mr. Hendrickson's employment," and noted that appellant "positively denied work stress." The Office medical adviser concurred, noting that appellant's severe conversion reaction was not related to his employment.

Only Dr. Rea concluded that appellant's symptoms were caused by exposure to toxic fumes at work. In his April 30, 1980 report, he concluded that appellant's "illness is due to lengthy and massive exposure to toxic chemical fumes" at the employing establishment. However, his opinion was based on a history of "massive exposure" given to him by appellant, which history was not substantiated by the employing establishment's investigation (as indicated in the May 21, 1982 letter from safety manager Marvin Fink). Furthermore, although Dr. Rea is a Board-certified specialist, his specialties (surgery and thoracic surgery) do not render him particulary qualified to render an opinion on the issue at hand. His report accordingly has less probative value than the report of Dr. Kurt, a Board-certified specialist in toxicology and preventive medicine, with whom the Office medical adviser concurred.

The July 6, 1983 decision of the Office of Worker's Compensation Programs is affirmed.

In the Matter of WILLIAM J. MURRAY *and* UNITED STATES GOVERNMENT

Docket No. 84-278; Submitted on the Record;
Issued February 6, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant has established that his multiple sclerosis is causally related to factors of his employment.

On September 19, 1979 appellant, then 57 years old, filed a claim for multiple sclerosis. In a statement dated September 17, 1979 he attributed the contraction of this disease to his overseas assignments from 1954 to 1966, particularly to lowered resistance due to poor health conditions, a work week of 60 to 70 hours, and recurrent episodes of dysentery.

Appellant retired on disability effective September 20, 1979.

The Office of Workers' Compensation Programs rejected appellant's claim by a compensation order dated December 10, 1981 on the ground that the evidence did not establish a causal relationship between appellant's multiple sclerosis and factors of his employment. Appellant requested reconsideration, and the Office, by an April 14, 1983 compensation order, found additional evidence he submitted not to be of probative value; the Office denied modification of its prior decision.

The Board finds that appellant has not established that his multiple sclerosis is causally related to factors of his employment.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the condition for which he seeks compensation is causally related to his employment.[1] As part of this burden he must present rationalized medical opinion evidence supporting an employment relationship.[2] An award of compensation may not be based on surmise, conjecture, or speculation.[3] Neither the fact that the condition became apparent during a period of employment, nor the belief of the employee that the condition was caused, precipitated, or aggravated by factors of his employment, is sufficient to establish causal relation.[4] The fact that the etiology of a disease is unknown or obscure does not shift the burden of proof to the Office so as to require it to disprove an employment relation. Neither does the absence of a known etiology for his multiple sclerotic condition relieve appellant of the burden of establishing a causal relation by the weight of the evidence, which includes affirmative medical opinion based on the material facts with supporting rationale. Causal relation between the disabling disease and the employment must be established in each case by affirmative evidence.[5] So long as the Office properly determines that the evidence fails to establish the requisite causal relation, its obligation under the Federal Employees' Compensation Act has been met.[6]

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[1] *Richard C. Morrill*, 29 ECAB 274.

The reports from Dr. Octavio Polanco, a Board-certified neurosurgeon, and from Dr. John C. LoZito, a Board-certified neurologist, did not contain an opinion on the possible causal relationship between appellant's multiple sclerosis and his employment.

Dr. Jorge C. Kattah, a Board-certified neurologist, indicated in an October 8, 1979 report that appellant's multiple sclerosis "could be related indirectly" to his employment. In an October 9, 1979 report Dr. Kattah stated that the cause of multiple sclerosis was unknown, that the course of an individual patient was unpredictable, and that "factors related with stress, poor hygiene and in general nonadequate health environment may result in exacerbation of the disease."

Upon the Office medical director's reasoned disagreement the Office referred appellant and prior medical records to Dr. Miguel R. Rivera, a neurologist. In an April 24, 1981 report, the doctor stated that the cause of multiple sclerosis was unknown, that the most important "precipitating factors" were trauma, infection and pregnancy, that "it is the general consensus that poor hygiene and in general a nonadequate health environment may result in lowering the organism's defenses and acting as a 'precipitating factor' in a predisposed individual," and that "Literature is suggestive of all of the above but firm evidence is still lacking." He added that the most commonly accepted criteria of the disease were those stated by the Office medical director.

Dr. Francis C. Mayle, a Board-certified neurologist, stated in an August 10, 1982 report, that "... impairment of the immunologic system is one of the problems that exist as a basic fundamental cause of multiple sclerosis. The exposure to various disease entities certainly could precipitate some impairments of the immunological system."

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[2] *Kenneth Irving Paulley*, 27 ECAB 689.

[3] *Robert M. Sanford*, 27 ECAB 115.

[4] *Paul M. Azzopardi*, 28 ECAB 457.

[5] *Thomas R. Davenport*, 28 ECAB 679.

[6] *Ophelia Jones*, 30 ECAB 1168.

The reports of Drs. Kattah, Rivera, and Mayle are not sufficient to establish that appellant's multiple sclerosis is causally related to his employment, as the opinions of all three doctors on causal relation are speculative in nature.[7] In addition, these doctors' opinions regarding the causative, precipitative, or exacerbative factors of multiple sclerosis are of general application rather then being addressed to the particular circumstances of appellant's claim.

The Office's medical director negated causal relation, stating that the cause of multiple sclerosis was unknown, and that stress and environmental factors had no relation to the onset of the disease and were not aggravating factors.

The decision of the Office of Workers' Compensation Programs dated April 14, 1983 is hereby affirmed.

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[7] See *Donald Frysinger*, 31 ECAB 1821; *Charles A. Massenzo*, 30 ECAB 844.

In the Matter of MARK R. OXLEY *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Iowa City, Iowa

Docket No. 83-2045; Submitted on the Record;
Issued February 7, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to compensation after September 21, 1981 because he refused an offer of suitable employment.

On April 30, 1981, appellant, then a 29-year-old psychiatric nursing assistant, injured his right thumb while restraining a patient who was assaulting a nursing staff member. X-rays revealed an old avulsion fracture at the base of the proximal phalanx on the medial surface, and a cast was put on his thumb until June 11, 1981. Appellant did not miss any work due to this injury.

On June 15, 1981, he injured his left index finger and reinjured his right thumb when he was attacked from behind by a patient. He was examined by Dr. Joseph A. Buckwalter, a Board-certified orthopedic surgeon, who diagnosed an ulnar collateral ligament injury in the right thumb. In a series of attending physician's reports from July 28, 1981 through October 1, 1981, Dr. Buckwalter indicated that appellant continued to have instability in the right thumb due to the injury.

Appellant received continuation of pay for his absence from work from June 16 through July 30, 1981 and then went on leave without pay. On September 15, 1981, the Office of Workers' Compensation Programs accepted his claim for temporary total disability from July 31 through August 28, 1981, and on September 25, 1981, the Office approved payment of compensation from August 29 through September 1, 1981.[1]

According to a January 28, 1982 letter subsequently submitted by the employing establishment, appellant requested light duty as an alternative to returning to his ward, as he was concerned he might reinjure his thumb if he returned to the psychiatric ward. The employing establishment stated that since it had no light duty positions, "after consultation with the employee health physician, a position on a medical/surgical ward was offered [appellant]." In a September 22, 1981 letter to the employing establishment, appellant resigned, stating:

> "I do not feel comfortable with the medical/surgical floor that has been offered me. I believe this duty goes beyond the bounds of limited duty recommended by my orthopedic physician. This leaves me no alternative but to resign."

On September 28, 1981, appellant began working as clinical technician I at the University of Iowa Hospital.

By letter dated October 22, 1981, the Office asked Dr. Buckwalter for an opinion on whether appellant was capable of performing the duties of a nursing assistant, and if not, what work restrictions were applicable.[2] In a work restriction evaluation form report dated November 9, 1981, Dr. Buckwalter indicated that appellant had hand restrictions limiting his ability to engage in pushing and pulling and fine manipulation, but that there were no other work restrictions. In a November 10, 1981 report, Dr. Buckwalter stated:

> ". . . Mr. Oxley has an ulnar collateral ligament injury to his right thumb that makes the thumb unstable at the metacarpal phalangeal joint. This type of instability is most noticeable in pinch grip when the index finger pushes against the ulnar side of the thumb. On his last visit on 10/1/81, Mr. Oxley indicated that he had found a job which he could perform without difficulty.
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> "In looking over the form you sent me, the only limitations that

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[1] The case record indicates appellant was in a leave status from September 2 to 4, 1981 and from September 7 to 17, 1981.

[2] The Board notes that the Office sent Dr. Buckwalter a blank restriction evaluation form report, but it did not send him a copy of the position description for the nursing assistant position.

> I can think of at this time concerning Mr. Oxley's employment are those that involve his right hand. Because of the instability of his thumb metacarpal phalangeal joint, he will be somewhat limited in pinch grasp and thus in the fine movements of using the fingers against the thumb."

By decision dated June 7, 1982, the Office issued appellant a schedule award for a 14 percent permanent impairment of the right thumb, with the award running from November 10, 1981 through a portion of January 22, 1982. After appellant submitted additional medical evidence the award was increased to reflect a 20 percent impairment, with the award running from October 1, 1981 through January 13, 1982.

Dr. Karl Wolf, an Office medical consultant, reviewed position descriptions for the positions of nursing assistant and clinical technician I and stated the following in a July 6, 1982 report:

> "In the opinion of the [Office medical consultant], this claimant was capable of filling the position of Nursing Assistant on the Medical Surgical Ward. This opinion is based on a comparison of the duties required in the position of a clinical technician Grade I which the claimant now has and the duties of nursing assistant in the Medical Surgical Ward.
>
> "From a study of these two positions, it appears that if the claimant is capable of fulfilling the position of clinical technician Grade I which he at present is doing, he should have been capable of also fulfilling the duties of a nursing assistant in the Medical Surgical Ward. No contrary medical evidence is noted in the claimant's file."

By compensation order dated June 22, 1983, the Office determined that appellant was not entitled to compensation for a loss of wage-earning capacity after September 21, 1981, finding that he refused an offer of "suitable work" within the meaning of section 8106(c)(2)[3] of the Federal Employees' Compensation Act.[4]

The Board finds that the case is not in posture for decision and must be remanded to the Office for further development.

The Office found appellant was not entitled to compensation on the ground that he refused an offer of "suitable work." However, to justify such a finding, the Office must show that the work offered was "suitable" within the meaning of section 8106(c)(2). The Office failed to make that showing here.

The Board notes that the position descriptions for the nursing assistant position offered appellant and the clinical technician I position he currently holds do not contain adequate descriptions of the physical requirements of the positions. Dr. Wolf, the medical consultant, therefore did not have sufficient information upon which to base his opinion that appellant was capable of performing the duties of the nursing assistant.[5] Furthermore, the Board notes that Dr. Wolf indicated in his July 6, 1982 report that he based his opinion that appellant could perform the duties of a nursing assistant upon a comparison of the position descriptions of that position and of the clincial technician I position appellant is currently holding. The only reference to medical evidence of appellant's physical capabilities is the statement: "No contrary medical evidence is noted in the claimant's file."

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[3] 5 U.S.C. section 8106(c)(2).

[4] 5 U.S.C. section 8101 *et seq.*

On remand, the Office should obtain from the employing establishment a description of the physical requirements of the position offered appellant. The Office should also verify that the position is still available and offered to appellant. Following such further development as is deemed necessary,[6] the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated June 22, 1983 is hereby set aside and the case remanded for further proceedings consistent with this decision.

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[5] See *Liller Mark*, 33 ECAB 1656, 34 ECAB 144.

[6] The Board notes that FECA Bulletin no. 83-51, dated October 24, 1983, sets forth detailed procedures to be followed by the Office in suitable work cases. The Office may wish to consider the applicability of these procedures to the case at hand.

In the Matter of VERNON A. AMBEY *and* DEPARTMENT OF TRANSPORTATION, UNITED STATES COAST GUARD, Curtis Bay, Md.

Docket No. 84–63, Submitted on the Record;
Issued February 10, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs acted properly in terminating appellant's possible entitlement to compensation benefits because of his refusal to submit to a hearing examination which he was directed to undergo by the Office.

Appellant, now a 49-year-old, worked as a woodworker from August 9, 1965 until his retirement (for reasons unrelated to this claim) effective December 12, 1975, the date of last exposure. On February 28, 1978 appellant filed a claim for a hearing loss which he attributed to his exposure to hazardous noise during his period of federal employment.

In a January 14, 1981 letter to the Office, a representative of the employing establishment indicated that appellant's medical record containing his "yard audiogram" could not be located.

Appellant, in response to an Office questionnaire, stated that he did not have any hearing problem prior to his federal employment. He further stated that he first became aware of his hearing loss and its relation to his federal employment on August 24, 1976. An October 1, 1976 letter by Dr. Dole P. Baker, a Board-certified otolaryngologist, stated that he had "unsuccessfully attempted audiometry" on appellant on two separate occasions and was unable to document the severity of the "alleged hearing loss." Dr. Baker advised further evaluation at Johns Hopkins Hospital.

In support of his claim, appellant submitted a February 17, 1978 letter from Dr. James Gerlach, a Board-certified otolaryngologist, with the results of an audiogram and otologic evaluation. Dr. Gerlach concluded that appellant had a binaural impairment of 51.2 percent which was sensorineural in nature and attributable to the "cumulative combined effect of all of the noise exposure in his lifetime."

On May 19, 1981 the Office referred appellant to the Johns Hopkins University School of Medicine for additional audiologic otologic evaluations. He was evaluated by two separate examinations and audiograms on July 13, 1981 and July 29, 1981, respectively. Two reports dated July 22, 1981 and July 29, 1981, respectively, and two audiograms dated July 13, 1981 and July 29, 1981, respectively, were submitted. These reports included results of pure tone and speech reception threshold testing. In his July 22, 1981 report, Dr. Russell Wright, concluded:

> "The patient has some degree of bilateral sensori-neural hearing loss but at this point it is difficult to say exactly what the nature of that is. His audiogram today is inconsistent with previous audiograms and the SRT [speech reception threshold] of today was incompatible with the pure tone average . . . "

Dr. Wright reported that appellant was informed of the inconsistencies in the test results and therefore, the inability to make a definitive diagnosis and recommended repeat audiological evaluation.

After the second evaluation on January 29, 1981, Dr. David W. Kennedy, a Board-certified otolaryngologist, submitted his report. Based on the results of this reexamination, Dr. Kennedy concluded:

> "[The appellant's] responses remain inconsistent. It is not clear to me whether he is deliberately petting [padding] the loss or whether he honestly has some difficulty in responding during the pure tone audiogram. I believe that the latter is certainly a possibility."

Dr. Kennedy stated that appellant did appear to have some bilateral high frequency senosorineural loss which was consistent with his history of exposure to noise. However, he indicated that because of the inconsistencies of audiometric responses, an accurate pure tone map of appellant's hearing in the lower frequencies could not be obtained.

An Office medical adviser reviewed the medical evidence and noted that:

> "Current ENT report of 7/13/81 and 7/29/81 reveals inconsistent PTA [pure tone averages] /SRT [speech reception threshold] response. BSER confirms presence of a h.f.h.l. [high frequency hearing loss] and suggest better low frequency hearing than indicated by PTA . . . "

The medical adviser concluded that another referral to include tests for nonorganicity was necessary.

In a December 11, 1981 letter, the Office informed appellant of the inconclusiveness of the July 29, 1981 test results and requested him to schedule an appointment with Dr. Sidney I. Jaffee, a Board-certified otolaryngologist, to determine the extent and degree of his disability. On September 25, 1982 a second request was sent rereferring appellant to Dr. Jaffee and advising appellant that a refusal to comply with an examination would result in the suspension of his right to compensation. An Office telephone call to Dr. Jaffee on June 20, 1983 ascertained that appellant had not made an appointment for a reexamination.

By compensation order dated June 29, 1983 the Office rejected appellant's claim for compensation benefits on the basis that appellant had failed to meet his burden of proof by submitting to the requested audiological evaluation.

Section 8123(d) of the Federal Employees' Compensation Act states:

> "(d) If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

This section does not provide a basis for the rejection of a claim for compensation; rather it suspends the right of an employee to compensation during the period he refuses to submit to an examination. The Board therefore finds that the Office improperly rejected appellant's claim for compensation under this section. However, the Board further finds that the Office acted properly in referring appellant for examination by Dr. Jaffee.

Appellant was tested for hearing loss on five different occasions. The results of four of these examinations were considered inconsistent. In one evaluation described in a February 17, 1978 letter, Dr. Gerlach concluded that appellant had a sensorineural hearing loss. Dr. Gerlach's letter, however, does not contain specific reference to pure-tone air conduction threshold, impedance audiometry, speech reception threshold or monaural discrimination scores nor did it contain a physician's rationalized medical opinion regarding the relation of the hearing loss to employment-related noise exposure, a statement of appellant's last exposure to loud noise, a certification indicating instrument calibration and the environment in which the tests were conducted, or a statement commenting on the reliability of the tests.[1] Dr. Gerlach's report lacks the probative value required of medical evidence. Consequently, the Office, in view of the lack of probative medical evidence, properly referred appellant to another appropriate specialist, Dr. Jaffee, for an opinion.

After the appellant failed to undergo an examination with Dr. Jaffee in accordance with the Office's request, a second request was sent to appellant which warned appellant of the consequences of failing to comply with such an examination. Appellant again failed to undergo the examination. It would therefore be proper for the Office pursuant to seciton 8123(d) to suspend his possible entitlement to compensation during the period he obstructed such examination.[2]

The June 29, 1983 decision of the Office of Workers' Compensation Programs is reversed; the case is remanded for further action and a *de novo* decision consistent with the Board's decision.

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[1] Federal (FECA) Procedure Manual, Chapter 2-806, part 2-claims; Exhibit 5, Inst. CA-1087, May 1982.

[2] *William H. Hudson*, 32 ECAB 1611.

In the Matter of CHARLES G. WILLIAMS *and* DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Cincinnati, Ohio

Docket No. 83-1844; Submitted on the Record;
Issued February 9, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant's condition of polyneuropathy is causally related to factors of his federal employment.

On September 21, 1979 appellant, a 39-year-old special agent, filed a claim alleging that he had developed a neurological condition as a result of his exposure to hazardous levels of lead when using an indoor firing range at work from 1972 to 1978. He did not stop work. In an attachment to his claim form appellant stated that he had had lead poisoning when he was nine months old from which he recovered under the care of his mother, a registered nurse.

By letter decision dated April 23, 1980 the Office of Workers' Compensation Programs found that appellant failed to establish "fact of injury in the performance of duty."

By letter dated May 13, 1980 appellant requested reconsideration of the Office's decision and in support thereof submitted information about the working conditions he contended caused his neurological condition, as well as medical evidence in support of such contention.

In a November 15, 1977 letter the chief of the Accident and Fire Prevention Branch of the General Services Administration (GSA) stated that air environmental samples taken at the indoor firing range on November 9, 1977 revealed that "the shooters are currently exposed to an abnormally high airborne (breathing zone) lead contaminant." The chief offered five suggestions to improve the air flow in the shooting range which could be implemented immediately and eight suggestions involving long range improvements (projected to be completed in 1985) to reduce the lead content in the range. As the samples did not meet Occupational Safety and Health Administration (OSHA) standards regarding safe levels of lead in the air the range was officially closed by the GSA. The range was apparently opened for limited use in December 1977 with the five interim improvements in place.[1] Results from further testing on December 8, 1977 "indicated a need for major range improvements — this even with temporary modifications in place."

On December 3, 1981 there was another series of lead air contaminant tests performed in the indoor firing range which revealed hazardous levels of lead in the air according to OSHA standards.[2]

Appellant used the indoor firing range for training purposes 20 times from November 13, 1972 to March 24, 1978. For 17 of those times he used the range for 15 to 30 minutes and three times for 20 to 40 minutes. The only precautions he took was to use ear protectors and eye goggles.

Appellant was hospitalized from August 19 to August 24, 1979 under the care of Dr. Luis Pagani, a Board-certified neurologist. In an August 20, 1979 report Dr. Pagani stated that appellant had "severe peripheral neuritis, more likely on the basis of diabetes." Dr. Pagani ordered blood lead level tests. Two specimens taken on August 20, 1979 revealed 60 micrograms per m.l. and 48 micrograms per m.l. Dr. Pagani's discharge diagnosis was "polineuritis, high lead blood level."

Upon a referral from Dr. Pagani, Dr. Sidney I. Lerner, Board-certified in preventive medicine, performed blood and urine lead and heavy metal screening tests upon appellant on September 30, 1979, all of which were within normal limits. In an October 26, 1979 report Dr. Lerner concluded as follows:

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[1] The Assistant Regional Administrator of the General Services Administration stated that the range opened for limited use in October 1978. However, this account is contradicted by a December 15, 1977 letter from the GSA's chief of Accident and Fire Prevention Branch and from the records of appellant's use of the firing range indicating that he used it on four occasions from December 1977 to October 1978.

[2] Appellant also used the outdoor firing range at work but there is no indication in the record that he was exposed to any hazardous levels of lead in the air at that range.

> "I cannot imagine that the apparent problem that he had in 1940 is now manifesting itself in adulthood without more recent significant exposure which he did not identify. He has used firearms in training but if there were a lead problem from this I would certainly have expected it to be reflected in some of the tests that were performed.
>
> "In summary, from the information available, there does not seem to be a probable likelihood that he has a problem with lead, but if he would ever want to proceed with the mobilization test to further confirm this I would be happy to do so."

In a March 26, 1980 report Dr. Pagani stated as follows:

> "When I examined you [appellant] at the Providence Hospital in August 1979, you had signs and symptoms of a severe peripheral neuritis. At that time we found that you had elevated lead blood levels. At that time your disability was in the range of 50%. This disability is perhaps temporary. If this problem is related to lead exposure which was my impression at the time, this with more time may clear up completely. However this is unsure at this time."

In a July 15, 1980 report Dr. Kurt G. Schmidt, a Board-certified internist, stated that he first saw appellant in December 1974 for a complaint of bilateral foot and leg numbness which he then attributed to "a neuritis, probably of diabetic origin." However, the results of a glucose tolerance test taken at the time were normal. In 1977, according to Dr. Schmidt, appellant had symptoms of partial impotence and an absence of reflexes in his legs. Dr. Schmidt, referring to the above-mentioned blood lead level test performed in August 1979, concluded that "further pursuance revealed an elevated lead level which probably is the etiology of his complaints."

In a July 23, 1980 report Dr. James D. Robinette, a podiatrist, stated that on June 3, 1977 he treated appellant for "1. tingling of toes, 2. foot and leg pains, 3. usual callous lesions." Dr. Robinette concluded that "since lead poisoning is a slow process of nerve deterioration, it is possible and probable that some of [appellant's] symptoms were contributed to this condition and were in an early stage of development when I first saw him and since then have progressed to his present state."

In a September 2, 1980 report Dr. Pagani diagnosed "polyneuritis secondary to lead intoxication gradually improving." Dr. Pagani concluded as follows in a report dated September 8, 1980:

> "On September 2, 1980 I reexamined (appellant). He continues to

> have symptoms and findings of polyneuritis secondary to lead intoxication. He is feeling better and has recovered from some of his numbness. However he still has weakness in the upper extremities and more in the lower extremities and his disability at the present time remains about the same in the 50% range."

Upon reviewing the record an Office medical adviser, in a May 14, 1981 report, recommended that appellant be evaluated by a specialist. By letter dated July 30, 1981 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Dennis D. Lucy, a Board-certified neurologist of professorial rank, for an evaluation as whether appellant had any neurological condition causally related to factors of his employment.

In a September 23, 1981 report Dr. Lucy, who examined appellant on August 28, 1981, concluded as follows:

> "My impression is that [appellant] has a polyneuropathy which has markedly improved since 1979. The motor nerve conduction velocities and terminal latencies which I obtained on him do not confirm this diagnosis. However, he has decreased pain sensation in a stocking distribution in his lower extremities and absent ankle jerks bilaterally. On the basis of my examination, I cannot be certain of an etiology for his polyneuropathy. He was exposed to lead at the time of the onset of his symptoms in 1973 [appellant stated that he experienced soreness in his legs and feet at work in September 1973 for which he was later treated by Dr. Schmidt] and elevated blood levels were reported in 1979. A lead peripheral neuropathy usually presents in a characteristic manner that includes maximum involvement in the upper extremities. [Appellant's] symptoms and signs do not fit this characteristic pattern. However, I cannot rule out a lead etiology for his symptoms. He has had an extensive etiological evaluation and no alternative etiology has been found. The probability of finding an etiology by additional testing at this time is very small. Therefore, I do not recommend additional etiological evaluation. The only relationship between the patient's condition and employment factors is that he was exposed to lead by history in his employment and lead can be an etiology for a polyneuropathy as he had. However, as stated above it usually presents a characteristic distribution which differs from his. He has improved since 1979 which is consistent with the fact that he has not been exposed to the lead toxicity since March, 1978. I cannot recommend any form of therapy at the present time. The most recent lead determinations are reported to be within normal limits. Therefore, no form of therapy for lead toxicity would be indicated."

In a September 23, 1981 work tolerance limitations form Dr. Lucy reported no physical limitations on appellant's ability to work.

Upon reviewing the record a second Office medical adviser, in a November 1, 1981 report, concurred with Dr. Lucy's conclusion and stated as follows:

> "There is only circumstantial evidence relating [appellant's] lead exposure (which seems extremely minimal . . .) and his past history of lead poisoning. However, with the elevated [lead] level in claimant's blood . . . you are probably forced to accept responsibility. It is possible that he had permanent lead poisoning as a child and that minimal temporary exposure aggravated his condition which has now completely resolved objectively upon removal from contaminated atmosphere. I am not qualified to answer this."

In a July 21, 1982 report a third Office medical adviser concluded that "a lead intoxication etiology for the polyneuropathy has not been established by the medical evidence of record."

By letter decision dated October 4, 1982 the Office found that "it has not been established by reliable, probative and substantial evidence that your condition is related to factors of employment either by causation, precipitation, acceleration or aggravation."

By letter dated October 22, 1982 appellant requested a hearing before an Office hearing representative and submitted new evidence and resubmitted evidence both indicating that the level of lead in the air of the indoor firing range was greater than that permitted by OSHA's standards. Appellant also submitted an April 2, 1981 report from Dr. Pagani who concluded as follows:

> "I believe that there are residual sensory changes secondary to lead intoxication which seems to have been stable for the past six months.
>
> "It is my feeling that these changes are likely to remain and this will make his disability state as of now at a permanent partial disability involving 33% of the left leg, 33% of the left foot, 33% of the right leg, and 33% of the right foot. These changes as stated are likely to be permanent."

A hearing was held on March 18, 1983. Appellant submitted as exhibits to the hearing medical evidence and evidence concerning appellant's working conditions, both of which had previously been submitted as well as federal government reports on the effects of occupational exposure to lead in various indoor firing ranges.

By decision dated July 14, 1983, made final on July 18, 1983, the Office hearing representative found that appellant did not meet his burden of proving that his neurological condition was causally related to factors of his federal employment.

The Board finds that the evidence of record establishes that appellant's condition of polyneuropathy was causally related to his exposure to lead during the course of his federal employment.

The environmental samples of the indoor firing range taken by the General Services Administration revealed that, according to standards set by OSHA, appellant was exposed to hazardous levels of lead when he used the range on 20 different occasions from November 13, 1972 to March 24, 1978.

Appellant stated that he had lead poisoning as a nine-month-old infant. However, this condition did not require medical treatment by a physician and there was no indication that he had any neurological disorder until September 1973, less than a year after he began using the indoor firing range.

The medical evidence of record supports appellant's claim that his polyneuropathy condition was causally related to his exposure to lead at work.

Dr. Pagani, a Board-certified neurologist, concluded in several reports that appellant's polyneuritis was causally related to his exposure to lead at work.[3] Dr. Schmidt, a Board-certified internist stated, in a report dated July 15, 1980, that appellant's neurological condition was causally related to such exposure.

In a September 23, 1981 report Dr. Lucy, a Board-certified neurologist who examined appellant on August 28, 1981 and reviewed the case record and a statement of accepted facts, stated that he could not conclusively establish the etiology of appellant's polyneuropathy and that appellant's symptoms did not fit the characteristic pattern of a lead peripheral neuropathy. However, Dr. Lucy pointed out that appellant was exposed to lead at the time he became symptomatic in 1973 and that elevated blood levels were reported in 1979. He also stated that the improvement in appellant's condition since 1979 is consisitent with his not being exposed to lead toxicity since March 1978, a statement supportive of the conclusion that appellant's condition was related to his lead exposure. Dr. Lucy concluded that lead can be an etiology for a polyneuropathy, that he could not rule out such an etiology and that no alternative etiology was found. He was of the opinion that additional testing for the purpose of conclusively finding an etiology was futile.

The Board points out the following well-established principle concerning the interpretation of medical evidence:

> ". . . a compensation award may not be based upon speculation, surmise or conjecture; or stated differently, the award must be based upon evidence, and where an inference, deduction or conclu-

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[3] In his August 20, 1979 report Dr. Pagani, a Baord-certified neurologist, noted that appellant's peripheral neuritis was likely the result of diabetes. However, Dr. Pagani offered this tentative conclusion before the August 20, 1979 results of the blood lead level test that he ordered were available. Those tests indicated that appellant had a high blood lead level. Also negating the conclusion that diabetes was the cause of appellant's neurological condition were the normal results of glucose tolerance tests administered to appellant in 1974. Although Dr. Lerner, who is Board-certified in preventive medicine, noted normal blood lead levels in testing performed on September 30, 1979, he also stated that he could not imagine appellant's 1940 lead poisoning condition manifesting itself without a more recent significant exposure.

> sion is drawn, there must be evidence to support such inference, deduction or conclusion. The evidence required, however, is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical. It is not necessary that the evidence be so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist."[4]

In light of the evidence of appellant's exposure to hazardous levels of lead at work and the medical evidence supporting his claim of causal relationship together with Dr. Lucy's recommendation as to the futility of any further referral of the case on that issue, the Board finds that appellant has met his burden of proving causal relationship consistent with the above-mentioned principle.

The July 14, 1983 decision of the Office of Workers' Compensation Programs made final on July 18, 1983 is hereby reversed and the case remanded for appropriate action.

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[4] *Elizabeth Maypother*, 5 ECAB 604 at 607; *Diana E. Ward*, 8 ECAB 469; *Sherwood R. McCartney*, 9 ECAB 129; *Laura Garcia*, 32 ECAB 1336.

In the Matter of DENNIS L. O'NEILL *and* DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 84-22; Submitted on the Record;
Issued February 13, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity for the period from November 3, 1973 to January 20, 1976.

This case has previously been before the Board on several occasions. The Board's most recent decision and order, issued on August 6, 1981,[1] sets forth the facts and history of the case prior to that date. By that decision the Board remanded the case to the Office for redetermination of appellant's loss of wage-earning capacity. The Board stated:

> "As appellant obtained other federal employment beginning January 20, 1976 the Office should use his actual earnings after that date as the basis of his wage-earning capacity, unless the Office shows that such actual wages did not fairly and reasonably represent his wage-

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[1] 32 ECAB 1797.

> earning capacity. Because the evidence reveals no essential change in appellant's condition from November 2, 1973, the date of his retirement, until January 20, 1976, when he obtained another position, the actual earnings in the new position could properly be used as the basis of his wage-earning capacity beginning November 3, 1973 (footnotes omitted)."[2]

On remand, the Office obtained information on appellant's actual earnings in federal employment as an eletronics technician and an eletronics measurement equipment mechanic. Such employment commenced on January 20, 1976. The Office also obtained information on the pay rate for the same periods of the position appellant held at the employing establishment at the time of his resignation on November 3, 1973.

The Office's comparison of appellant's actual earnings beginning January 20, 1976 with the pay rate effective January 20, 1976 of the position appellant held when injured resulted in an 87 percent wage-earning capacity, or 13 percent loss of wage-earning capacity. By a decision dated June 3, 1982 the Office determined that appellant was entitled to compensation for a 13 percent loss of wage-earning capacity from November 3, 1973 to December 3, 1979. The Office found that appellant's earnings beginning December 3, 1979 exceeded the pay rate of the job he held when injured, and that he had no loss of wage-earning capacity after December 2, 1979.

Appellant requested reconsideration, contending that his chances of promotion and for training were adversely affected by his employment-related hearing loss which restricted his travel and his work on board ships. Appellant also contended that he was totally disabled from November 3, 1973 to January 20, 1976.

By a decision dated July 7, 1983 the Office found that appellant had no loss of wage-earning capacity after December 3, 1978, that he was only partially disabled beginning November 3, 1973, and that his actual earnings beginning January 20, 1976 represented his wage-earning capacity beginning November 3, 1973.

On appeal appellant contends that he was totally disabled during the period from November 3, 1973 to January 20, 1976.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity for the period from November 3, 1973 to January 20, 1976.

While the evidence establishes that appellant was disabled for his position of electronics mechanic because of his employment-related hearing loss, there is no evidence that he was totally disabled during the period from November 3, 1973 to January 20, 1976.

The Office properly determined that appellant's actual wages beginning January 20, 1976 were a proper measure of his wage-earning capacity, as there is no evidence that these earnings did not fairly and reasonably represent his wage-earning capacity.[3] Because the evidence (discussed in the Board's prior decision) shows there was no essential change in appellant's medical condition between November 3, 1973 and January 20, 1976, it was proper for the Office to use appellant's actual wages beginning January 20, 1976 as the basis of his wage-earning capacity from November 3, 1973 to January 20, 1976.[4]

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[2] 32 ECAB 1797 at 1799.

The decision of the Office of Workers' Compensation Programs dated July 7, 1983 is hereby affirmed insofar as it determined appellant's loss of wage-earning capacity for the period from November 3, 1973 to January 20, 1976.

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[3] See *Clyde Price*, 32 ECAB 1932; *Lee R. Sires*, 23 ECAB 12.

[4] See *Josie E. Simms*, 11 ECAB 145.

In the Matter of WILLIAM S. JOHNSON *and* U.S. POSTAL SERVICE, POST OFFICE, South Charleston, W. Va.

Docket No. 83-1595; Submitted on the Record;
Issued February 16, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs acted properly in suspending appellant's compensation benefits from June 10, 1982 to December 7, 1982 on the basis that he refused to submit to a medical examination during this period.

On January 30, 1980 the Office advised appellant that his hernia and lumbosacral strain had been accepted as work related, that it had not received a medical report since 1977, that reports from his attending physicians were needed, and that arrangements were being made for examinations by Board-certified specialists. At that time appellant was receiving compensation for temporary total disability as a result of a back injury sustained on March 27, 1961 and a ventral hernia sustained on May 14, 1971.

On August 8, 1980 the Office referred appellant, with a statement of accepted facts and copies of pertinent medical reports, to Dr. Robert T. Linger, a Board-certified surgeon, for an evaluation of the residuals of his May 14, 1971 hernia. Dr. Linger apparently examined appellant on October 27, 1980. However, the Office was unable to obtain a report from Dr. Linger, despite numerous requests.

On April 15, 1982 the Office referred appellant, with a statement of accepted facts and copies of pertinent medical reports, to Dr. Wirt L. Davis, Board-certified in surgery and in orthopedic surgery, for an evaluation of his disability related to his hernia and orthopedic problems. The Office advised appellant that this examination was made "in order to clarify the cause and extent of your injury-related impairment," and that he should contact Dr. Davis' office to confirm his appointment scheduled for June 10, 1982.

By a September 7, 1982 letter the Office advised appellant that it found an overpayment of $4428.05 which had occurred because his compensation had been suspended due to his failure to keep the June 10, 1982 appointment with Dr. Davis. By a September 10, 1982 compensation order the Office suspended appellant's compensation benefits effective June 10, 1982 on the ground that he had refused to submit to a medical examination. In an accompanying memorandum the Office advised appellant that section 8123(d) of the Federal Employees' Compensation Act [1] provides "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." The overpayment found by the Office arose because the Office suspended appellant's right to compensation effective June 10, 1982 but in fact continued to pay compensation for temporary total disability from that date until September 8, 1982.

In a letter dated October 6, 1982 appellant stated that the reasons he did not keep the June 10, 1982 appointment were that on April 12, 1982 and May 18, 1982 his attending physicians advised total rest, and that he was "drained emotionally" due to his medical problems and had not intentionally missed the June 10, 1982 appointment. Appellant requested the Office to reschedule an appointment with Dr. Davis.

On December 7, 1982 appellant was examined by Dr. Davis, who submitted a medical report dated December 21, 1982. The Office reinstated appellant's compensation for temporary total disability effective December 7, 1982.

The Board finds that the Office acted improperly in suspending appellant's compensation benefits beginning June 10, 1982.

The Office's Federal (FECA) Procedure Manual provides, in Chapter 3-400, Examinations, Treatment, and Related Services, in paragraph 1: "It is the responsibility of the Branch of Claims to invoke the provision requiring the suspension of compensation [2] but, before doing so, the injured employee must be advised of the provisions of this section of the Code and given an opportunity to present, in writing, his/her reasons for the refusal or obstruction."

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[1] 5 U.S.C. section 8123(d).

[2] The provision referred to is section 8123(d) of the Act, which states:

> "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

In this case the Office did not follow its established procedures for suspending compensation under section 8123(d) of the Act. Specifically the Office did not advise appellant of the provisions of section 8123(d) of the Act until its September 7, 1982 letter, which also advised him that his compensation benefits had been suspended retroactive to June 10, 1982. The Office thus did not comply with its established procedures before September 7, 1982 and its suspension of appellant's compensation benefits prior to that date was improper.

The decision of the Office of Workers' Compensation Programs dated September 10, 1982 is set aside insofar as it suspended appellant's compensation benefits from June 10, 1982 to September 7, 1982.[3] The case is remanded to the Office for a *de novo* decision whether appellant refused to submit to or obstructed a medical examination during the period from September 8, 1982 to December 7, 1982.

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[3] The overpayment found by the Office due to payment of compensation during this period does not exist.

In the Matter of EDWARD T. CAMPBELL *and* DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Washington, D.C.

Docket No. 83-1941; Submitted on the Record;
Issued February 23, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellant had an employment-related loss of wage-earning capacity subsequent to September 9, 1982.

On February 4, 1975 appellant, then a 30-year-old special agent trainee, sprained his right knee while boxing in a training program.

Appellant returned to see Robert G. Kindred, a Board-certified orthopedic surgeon who had previously treated appellant for an employment-related injury to the same knee on October 2, 1973. At that time Dr. Kindred diagnosed severe rupture, medial supporting ligaments of the right knee; probable tear of the medial meniscus; and hemarthrosis. At that time, he hospitalized appellant in order to perform an arthrotomy to the right knee, wherein he repaired the medial rupture of the supporting structures. Dr. Kindred continued treating appellant until December 5, 1974 when he noted that appellant's knee was "acceptably mobile" and range of motion was "comfortable."

Dr. Kindred saw appellant on February 7, 1975 regarding the February 4, 1975 injury. He noted that appellant was "boxing, took a step back and had a twisting injury to the right knee again, with swelling, discomfort and more pain on extension." He diagnosed "medial capsular strain, sub acute."

On March 13, 1975 Dr. Robert L. Dow, a Board-certified orthopedic surgeon, reported that a March 10 arthrogram was normal. He noted that appellant had changed to a job involving considerably less physical activity.[1] He suggested that appellant work on his exercise program and avoid twisting.

On July 25, 1975 Dr. Kindred reported that physical examination of appellant's right knee showed a satisfactory range of motion but mild instability. He opined that appellant had a 15 percent permanent disability of the right knee.

On November 15, 1975 an Office of Workers' Compensation Programs medical adviser reviewed the medical evidence and opined that appellant had reached maximum medical improvement on July 25, 1975, the date of Dr. Kindred's report. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*,[2] he assigned a 12 percent loss due to extension of the right knee joint being limited to 25 degrees and a three percent loss due to mild instability. He combined these to give appellant a total of 15 percent permanent impairment to the right leg.

In a decision dated May 21, 1976 the Office granted appellant a schedule award for 15 percent permanent loss of use of the right leg, covering the period July 25, 1975 to May 22, 1976.

On April 29, 1976 appellant transferred to the Department of Agriculture, Personnel Operations Division.

The record indicates that at the time of injury, on February 4, 1975, appellant was a GS-11, step 1 and received premium pay equivalent to 25 percent of his base salary. The premium pay was not classified as overtime. As a result of his transfer effective March 15, 1975 he lost the 25 percent premium pay because he could not perform the duties of a special agent.

Accordingly, in a decision dated August 25, 1976 the Office determined that effective May 23, 1976 appellant was entitled to benefits for 19 percent loss of wage-earning capacity because of the loss of his premium pay.

The Office referred appellant for an additional opinion with reference to the right knee, to Dr. Charles A. Engh, a Board-certified orthopedic surgeon, who examined appellant on November 19, 1976, and reported as follows:

> "The positive physical findings include in excess of 1" R. [right]

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[1] The record indicates that on March 15, 1975 appellant was reclassified from criminal investigator to general investigator (non-criminal) due to his knee condition.

[2] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 1971.

> thigh atrophy. There is medial collateral ligament laxity to the R. knee demonstrable with the knee both in flexion and in extension. There is also a positive anterior Drawer's sign and evidence of anterior medial rotatory instability indicating the presence of some capsular stretch and anterior cruciate stretch or tear.
>
> "IMPRESSION: Based on the presence of the following: (1) Muscle atrophy, R. thigh, (2) Anterior knee instability, (3) Medial ligamentous instability. I would estimate the patient's permanent physical impairment to the R. lower extremity to be 25%.
>
> "He has reached maximum benefit from treatment. He underwent an excellent repair and certainly has good if not a better than average results from the surgical repair carried out by Dr. Kindred. It is possible, but unlikely, that physical impairment will increase in the future.
>
> "DUTY STATUS: He is permanently incapable of carrying out his former employment as a special agent with the Department of Justice. He is capable of carrying out desk and administrative type work (as he is now doing with the Department of Agriculture). His injury, therefore, did significantly impair his wage-earning capacity. As I understand, there is a 20-25% increase in pay for civil service employees working in programs such as investigators of drug misuse, CIA agents, FBI agents, etc."

A different Office medical adviser reviewed the case record on December 21, 1976 and concluded that appellant had a 25 percent permanent impairment of the right lower extremity based on Dr. Engh's report. He opined it was reasonable to accept the 10 percent increase over the previous 15 percent rating.

Accordingly, on May 5, 1977 the Office awarded appellant compensation for "10 percent additional permanent partial loss of use of the right leg."

On October 1, 1980 appellant, while at a conference in West Virginia, was participating in an employees' soft ball game, and suffered a twisting injury to his right knee. Dr. Kindred's October 2, 1980 examination revealed restricted range of motion due to discomfort, obvious interarticular fluid accumulation, and tenderness along the medial border; however, the knee was stable in extension and slight flexion. He diagnosed "medial collateral ligament rupture, partial" and "hemarthrosis." Approximately six weeks disability was anticipated.

Appellant was hospitalized on October 6, 1980. On October 7, 1980 he underwent an anterior ligament reconstruction with advancement of the medial collateral ligament and advancement of the posterior medial capsule. He was discharged on October 30, 1980.

Appellant was released to return to his regular employment duties on February 2, 1981.

On July 28, 1981 appellant's current employer, the U.S. Small Business Administration, submitted a letter in response to inquiries from the Office concerning appellant's position and pay rate. The employer stated that appellant was hired on April 23, 1978 as a general investigator, GS-11 step 5. Appellant at that time was a GS-12 step 4 earning a salary of $29,645. The attached position description indicated that it was a sedentary-type job with no strenuous physical requirements.

In a memorandum dated September 8, 1982 the Office determined that the current pay rate for a GS-11 step 1, the pay rate for the job appellant was performing when injured, plus 25 percent premium pay was $29,457.50. The current pay rate for a GS-12 step 4, appellant's current rate, was $31,071.00.

By compensation order dated September 20, 1982 the Office rejected appellant's claim for loss of wage-earning capacity subsequent to September 9, 1982 on the basis that his present pay rate was greater than the present pay rate for the job he was performing when injured.

The Board finds that the evidence does not establish that appellant sustained a loss of wage-earning capacity after September 9, 1982 due to the permanent effects of the employment injuries.

The Office properly based appellant's wage-earning capacity on the position he has been holding since April 23, 1978. The record shows that his actual earnings in that position were greater than the current wages of the position he was holding when injured. He therefore has no loss of wage-earning capacity.[3]

Appellant argues that he has suffered a significant loss in career earnings potential as a result of the injuries to his right knee. He stated that the injuries prevented him from continuing in a job that offered a 20-year law enforcement retirement and the payment of a 25 percent pay allowance. He further stated that his former colleagues have surpassed him in overall earnings potential. The Board has long held the fact that an injury might prevent an employee from obtaining promotions or increased earnings does not establish a loss of wage-earning capacity.[4]

The September 20, 1982 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[3] *Daniel T. Morisky*, 30 ECAB 350 and cases therein cited.

[4] *Daniel T. Morisky*, *supra*; *Margaret E. Grigsby*, 27 ECAB 138.

In the Matter of JAMES LEWIS *and* DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Atlanta, Ga.

Docket No. 84–62; Submitted on the Record;
Issued February 23, 1984

Before George E. Rivers, Michele von Kelsch,
Willie T. C. Thomas

The issue is whether appellant has more than a 98 percent binaural loss of hearing for which he received a schedule award.

On August 2, 1977 appellant, then a 36-year-old garage foreman, filed a claim alleging that he had sustained burns on July 21, 1977 in an employment-related explosion. He stopped work on July 22, 1977 and returned to work on July 26, 1977.

On March 14, 1978 the Office of Workers' Compensation Programs determined that appellant had sustained first degree burns on his face and authorized the payment of compensation for medical benefits and continuation of pay.

On May 14, 1979 appellant was hospitalized by Dr. Guler L. Karcioglu, a Board-certified internist, with complaints of anxiety and chest discomfort. Dr. Karcioglu noted that this was appellant's third admission through the emergency room for these conditions and referred him for consultation to Drs. Harold S. Ramos, a Board-certified internist of professorial rank, Robert W. Gilbert, Jr., a Board-certified neurologist, William C. Spencer III, a Board-certified diagnostic radiologist, Albert A. Clairmont, Jr., a Board-certified otolaryngologist of professorial rank, and Jay L. Hollman, a Board-certified internist. Appellant was discharged on May 19, 1979 with a diagnosis by Dr. Karcioglu of chest pain, systemic arterial hypertension, chronic anxiety with hyperventilation and tinnitus. He was referred to Dr. Clairmont for further evaluation of his tinnitus.[1]

In a May 2, 1980 report Dr. Thomas L. Wright, a Board-certified neurologist of professorial rank, stated:

> "[Appellant] has had a problem with his head, ringing in his ears since December 7 and 8, 1979. It would come and go at will and now is becoming more constant and getting worse. He describes the headache as a tight feeling inside the head. It would stay one to two days but there would be no nausea or migraine phenomenon."
>
> * * *
>
> "Impression is that of ringing in the ears."[2]

On February 19, 1982 Dr. Wyman P. Sloan III, a Board-certified internist, referred appellant to Drs. Cyrus M. Cioffi, a Board-certified radiologist, and William S. Biboff, a neurologist, for their evaluations of his condition. Both physicians reported normal findings in their examinations.

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[1] On May 25, 1979 appellant was given an audiometric evaluation by Dr. Clairmont, who repeated his earlier diagnosis of tinnitus.

[2] An electroencephalogram was performed on April 30, 1980 by Dr. Mark A. Kozinn, a Board-certified neurologist, on referral from Dr. Wright. The results were normal.

On March 11, 1982 appellant claimed a recurrence of disability on December 7, 1979 due to the July 21, 1977 employment injury. He stated:

> "On December 7, 1978 I started hearing sounds in my head. At the beginning the sounds would come and go away. They were frightening and nerve-wracking. As time passed the sounds stopped going away, now they (three different types of sounds) are constant."

On January 25, 1983 an Office medical adviser reviewed the medical evidence and suggested that appellant be referred to a specialist for an evaluation of his ear condition. In a letter dated February 7, 1983 appellant was referred to Dr. Donald W. Alexander, a Board-certified otolaryngologist, for otologic evaluation and audiometric testing.

In a March 23, 1983 report of a March 16, 1983 examination, with an attached audiogram of the same date, Dr. Alexander diagnosed a high frequency sensorineural hearing loss causally related to employment-related noise exposure. On May 5, the same Office medical adviser reviewed Dr. Alexander's report and concluded that appellant had sustained a 98 percent binaural loss of hearing.

On July 28, 1983 the Office granted appellant a schedule award for a 98 percent binaural loss of hearing. The award was made retroactive to March 16, 1983 (the date of maximum improvement as found by Dr. Alexander) and extended through December 16, 1986, for a total of 196 weeks of compensation. Compensation was computed at a pay rate of $427.75 per week and the date of injury was found to be July 21, 1977.

On appeal, appellant contends that the amount of the award is inadequate. He states that the Office ignored his request to repurchase sick leave used seeking medical treatment. Appellant also claims that his hearing loss represents "only a small part of the damage that was done to me which is permanent, [namely] tension, mental depression, pain, and discomfort."

The schedule awards provision of the Federal Employees' Compensation Act [3] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act specifies the amount of compensation to be paid for particular impairments; the award for total (100 percent) loss of binaural hearing is 200 weeks of compensation. Less than total loss is compensated at a proportionate rate, so that for a 98 percent binaural hearing loss, the award is 196 weeks, or 98 percent of 200 weeks. The Act requires the compensation to be based on an employees' "monthly pay" [4] which, in a case such as this, is "the monthly pay at the time of injury."[5] The period of the award is to commence with the date of maximum improvement.[6]

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[3] 5 U.S.C. section 8107.

[4] As defined in 5 U.S.C. section 8101(4).

In setting the amount of a schedule award, the Office first determines the extent of an employee's hearing loss.

The Office evaluates industrial hearing loss in accordance with the standards of the National Institute for Occupational Safety and Health, using the frequencies of 1,000, 2,000, and 3,000 cycles per second. These standards are found in Chapter 6 of *Occupational Exposure to Noise.*[7] Using these and other standards adopted by the Office and approved by the Board,[8] the hearing loss in either ear must exceed an average at these frequencies of 25 decibels when the audiogram is based on an ISO-ANSI calibration, as was the case here, in order for there to be a compensable loss under the Federal Employees' Compensation Act. The first 25 decibels are discounted as having no significance with respect to the ability to hear everyday speech under everyday conditions.

The publication *Occupational Exposure to Noise* does not provide a method for calculating the percentage of binaural hearing loss. Therefore, the Office makes this calculation by using the formula for computing binaural hearing impairment of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, after the percentage loss of hearing in each ear has been determined at 1,000, 2,000, and 3,000 cycles per second.[9]

The Board finds that the Office properly applied the approved procedures to the audiogram submitted by Dr. Alexander. The evidence establishes that under these procedures, appellant has no more than a 98 percent binaural hearing loss. Accordingly, he is entitled to no more than 196 weeks, or 98 percent of the 200 weeks of compensation specified in the schedule award provision of the Act.[10]

The schedule award commences on the "date of maximum improvement" or the point at which the injury has stabilized and will not improve further.[11] That determination is based on the medical evidence,[12] and the date is usually the date of the medical examination which determined the extent of the hearing loss.[13]

The Board finds that the Office was correct in choosing March 16,

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[5] *Lyle S. Lane*, 30 ECAB 80.

[6] *Jasper Witherspoon*, 26 ECAB 344.

[7] *Occupational Exposure to Noise*, published in 1972 by the U.S. Department of Health, Education and Welfare, Health Service and Mental Health Administration, National Institute for Occupational Safety and Health. The National Institute was established by section 7(a) of the Occupational Safety and Health Act, 84 Stat. 1597.

[8] See *Richard Beggs*, 28 ECAB 387.

[9] *James C. Bavely*, 31 ECAB 933.

[10] *Franklin L. Armfield*, 28 ECAB 445.

[11] *Marie J. Born*, 27 ECAB 623.

[12] *Ibid.*

[13] *Ibid.*

1983, the date of Dr. Alexander's examination, as the date of maximum improvement.

The final necessary determination before granting an award is the rate of compensation at which the weekly award should be set. The weekly compensation in a case such as this is determined by the employee's monthly rate of pay on the date of injury.[14] Here the record shows that the injury was sustained in the July 21, 1977 explosion. Appellant's weekly compensation under the award was based on his rate of pay on that date. The Board finds that the evidence establishes that July 21, 1977 was the date of injury and that the Office was correct in setting appellant's rate of compensation under the award based on his salary on that date.

The remaining issues raised by appellant on appeal concern his claim for repurchase of sick leave and compensation for his alleged emotional condition. Since these issues were not raised below or decided by the Office, the Board cannot consider them on this appeal.[15]

The decision of the Office of Workers' Compensation Programs dated July 28, 1983 is hereby affirmed.

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[14] *Jasper Witherspoon, supra.*

[15] *James C. Bavely, supra.*

In the Matter of Peter Sammarco *and* U.S. Postal Service, Post Office, Flushing, N. Y.

Docket No. 83-2015; Submitted on the Record;
Issued February 24, 1984

Before E. Gerald Lamboley, Margaret Pallansch, David S. Gerson

The issue is whether appellant's emotional condition is causally related to factors of employment.

On October 30, 1981, appellant, a 54-year-old clerk, filed a claim alleging that he was disabled for work commencing April 21, 1981 due to his condition of anxiety reactive depression. Appellant's wife, who signed the claim form on his behalf, submitted a statement alleging that in 1979, he began to experience depression, confusion, an inability to make decisions, fatigue, "insomnia with nightmares and fears," tension, and discouragement. She alleged that these conditions were caused by several factors of employment, including noise, "work pressures," changes in shift times, and a fear of going to work at "unusual hours" because of having "a narrow escape from being mugged several times."

Dr. Martha Stephens, a Board-certified psychiatrist, stated in a June 9, 1981 report:

> "I examined [appellant] . . . on May 22, 1981. * * *
>
> "[He] told me that he has been suffering from the following symptoms which had their onset about two years ago. He has lost his appetite and has lost five pounds in the past ten months. He feels chronically tense and has episodes of shaking. He has problems falling asleep and then wakes up at 3:00 a.m., having nightmares of people knifing his throat. He awakes with thoughts about the post office. He has some diarrhea when he feels nervous. He is unable to concentrate on his work or on reading."
>
> * * *
>
> "[He] has no history in his family of mental illness, depression, alcoholism or psychiatric treatment. [He] has never had any previous episodes of mental or emotional disturbance.
>
> "He has worked for the post office for 11 years and was well-adjusted and asymptomatic until about two years ago. Automation, increased noise levels, over-illumination and constant changes in his work schedule from day hours to late evening seem to have coincided with the onset of his current nervous symptoms. These changes have apparently, according to the patient, affected the other personnel at the post office, with supervisors and clerks becoming increasingly tense and pressured. [His] anxiety increased to such a level that he found he could not bring himself to return to work after his last day on April 21, 1981.
>
> "In my mental status examination, I noted that [appellant] is a nice looking, grey haired man of 54 who was neatly dressed and groomed. He was tense, anxious and appeared to be trembling at times. His face was sad and emotion constricted and depressed. As noted, he has vegetative signs of depression, with changes in sleep, appetite loss and libido. He has rather marked anxiety.
>
> "Rate of flow of thought is normal with no evidence of loose association, flight of ideas or perseveration. He denies thought insertion, broadcasting or extraction, and hallucinations.
>
> "Sensorial functioning was intact. The diagnosis is: Generalized Anxiety Disorder: 300.02; and Adjustment Disorder with Depressed Mood: 309.[1]
>
> "It is my impression that he is incapable of performing his usual duties as a clerk. He does not feel motivated for psychotherapy because he feels his problems are being caused by changes in his job to which he simply cannot adjust. It would seem that his symp-

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[1] Numercial designations refer to categories in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed. 1980).

> tomatology is strongly job related and that if he did not have to contemplate returning to the post office, that the symptoms might well remit."

In a subsequent undated report, Dr. Stephens stated:

> "[Appellant] consulted me again on 8/31/81. Since his last visit, his mental state has deteriorated. His depression has deepened with loss of appetite, weight loss, loss of initiative and self confidence. He feels like crying much of the time. He continues to ruminate about his post office job and talks about it constantly. These thoughts about the post office job seem to precipitate feelings of anxiety and depression.
>
> "[His] wife confirmed these facts about her husband's behavior. At times she cannot get him to leave the house on errands or to go to the dentist for example. He cannot concentrate on anything and only wants to discuss the postal job.
>
> "In my recent examination I found [appellant] to be more depressed than previously. His thinking and motoric behavior were slowed down. His mood was sad and apathetic and he expressed no interest in any of the things about which he used to be enthusiastic. I have placed him on an antidepressant medication and will be seeing him on a regular basis.
>
> "Since [he] does not appear to be able to cope with changes, stressful situations, noise and pressures, I am recommending that he not return to work at the post office, even if the medication does help to lift the depression. If he were to return I believe there would be a recrudescence of his symptoms. At the very least he appears to be totally incapable of returning to his job as a clerk in the post office."

Dr. Elias Savitsky, a Board-certified psychiatrist, examined appellant on August 10, 1981 and stated the following in an October 13, 1981 report:

> "* * * The environment, nature and hours of [appellant's] work have increasingly affected him adversely. He has internalized a sense of hostility from his surroundings. He has been tense because he has had to travel to and from work at unusual hours. The problems were compounded by several 'close calls' in terms of almost being mugged going to and from work. Commencing approximately two years ago, increasing work pressures and persistent stress led to an intense and mounting anxiety. In April 1981, a more significant anxiety developed when a change in his work schedule increased his apprehension. His anxiety had reached the point where he was unable to return to his job. He stopped working on 4/21/81 and is now on sick leave. He has been under continued medical care since April but no

> significant changes are reported. Patient has not been prescribed any systematic medication. He has remained at home under observation since given date."
>
> * * *
>
> "Past History: No prior accident, severe illness, surgical intervention, nervous illness, mental disease. Patient was born in Italy, the second of three children. No family history of nervous or mental disease. Developed in good health, completed university studies. Taught in secondary school for about nine years. Previous work adjustment described as satisfactory. Patient came to U.S. in 1964 and then returned to Italy in 1965. Returned in 1967. Since 1970 has been employed in the post office. Work performance apparently satisfactory. The focus has been on his subjective sense of acute distress. Patient was married in 1964, after an introduction to his wife to be when she traveled in Italy. He came to U.S. and marriage was satisfactory in the earlier years. Since April he has become more detached, irritable at home . . ."
>
> * * *
>
> "Opinion: Patient has shown high vulnerability to anxiety in terms of the personality features outlined above. In interaction with the given environment and work stresses, there has been a mounting phobic anxiety which has led to the clinical problem described. Management would involve continued medical observation. He should be seen in periodic psychiatric observation. If the clinical course continues static for another three months, systematic psychiatric theraphy may be indicated.
>
> "DIAGNOSIS: Adjustment disorder with mixed emotional features. There is a causally related disability. Because of the vulnerability described above, his disability is of a permanent nature. Therefore, it is my opinion that he is totally incapacitated to perform duties as a clerk and will be unable to return to work."

On February 3, 1982, upon request from the Office of Workers' Compensation Programs, appellant's wife submitted further details on the factors of employment that allegedly caused appellant's condition. She stated that in November 1979, his 8:00 a.m. to 4:30 p.m. shift was abolished and he had to work from 12:30 p.m. to 9:00 p.m. On April 7, 1981, she stated, he was told his shift would be 2:30 p.m. to 11:00 p.m. She stated that each change was preceded by months of rumors about possible changes. "As a consequence of all this," she stated, "my husband has not been himself beginning with the *first rumor* that preceded the *first change* in 1979." She further stated that increased mechanization in the employing establishment in 1979, including a "fifth sorting machine" and "faster cancelling machines" added in early 1981, "increased the overall noise level in the work environment."

Another factor contributing to appellant's condition, according to his wife, was the "glare and brightness produced by the giant sized fluorescent bulbs together with the additional light from the additional mechanization . . . which resulted in a very difficult work environment." She also stated her husband became "very nervous and extremely anxious" because he was "constantly under great tension in always striving to work out as many feet of mail as possible." She stated that it was the cumulative effect of these factors "over the years" that caused his condition.

Dr. R. F. Procario, an Office medical consultant, reviewed the case record and noted in a March 3, 1982 report that none of the reports of Dr. Stephens and Dr. Savitsky considered "social, marital or other environmental stress of daily living in areas outside of employment." He indicated that Dr. Stephens' reports were speculative on the issue of causal relationship and that, like Dr. Savitsky's report, they focused on "subjective symptomatology" but did not establish "causality." He also stated, "If the patient's condition was due solely to environmental stress [at work] the condition would have been alleviated after he left that environment in April 1981."

The Office determined that the report of Dr. Procario created a conflict in the medical evidence and referred appellant, along with case record and a statement of accepted facts, to Dr. Matthew Brody, a Board-certified psychiatrist and neurologist and an impartial medical specialist, to resolve the conflict. In a May 11, 1982 report, Dr. Brody discussed the interviews he conducted with appellant and his wife, recounted appellant's medical history and the factors of employment that allegedly caused his emotional condition, and stated as follows:

> "[Appellant] is reluctant to leave the house, has continued to deteriorate and has to be told to put his napkin on his lap and that the plate of vegetables next to his plate is his, to be eaten. Formerly he was an outgoing, fun-loving man, and now [appellant's wife] finds herself not with a husband, but with three children to care for; the twins and a husband who has become infantile in his manner."
>
> * * *
>
> "He denied any trends, delusions or hallucinatory phenomena. His expression was dour. He complained that his memory now fails him—that he would read a newspaper 2-3 times and not know what it said, and that he was continuously depressed, that his mouth was quite dry and he had a sleep disturbance characterized by early morning awakening precipitated sometimes by a nightmare in which he is out to be killed and inability to fall back asleep.
>
> "He is now receiving 125 mg of Elavil daily and this has improved his sleep. His appetite has not returned and he still feels depressed and useless. He has thought of suicide and, were it not for the trauma it would produce in his children, he would have carried it out.
>
> "Since I spent almost three hours with the patient and his wife,

I have a considerable amount of information that I am not reporting but there is enough in what I have to come to a definite conclusion as to this man's problem.

"First, I regret to report that there is some conscious exaggeration of symptoms. Knee jerks don't behave the way his did and responses to test for position sense in the toes seem to be deliberately wrong each time. I think that there probably is some intellectual deterioration but I do not think his deterioration is as great as the tests show him to be . . .

"There is no question in my mind but that this man is suffering from a serious mental disorder, and that he is totally disabled. I think that both he and his wife genuinely believe that his problems stem from the work situation. I think that it is the other way around and that he had become progressively more unable to work because of the deterioration produced by his mental condition.

"Complaints about the noisy environment and increased illumination indicate to me a breakdown of the 'sensory barrier,' as a result of which, he had become increasingly more sensitive to noise and light. The breakdown of the sensory barrier is pathognomonic almost of schizophrenia.

"To live in a neighborhood that was getting progressively more deteriorated and more dangerous for 4-5 years without moving is, I think, due to mental disorder. There is very little in the literature about mental illness due to the need to move, but I think all experienced clinicians have seen it. What happens in these people is that, unconsciously, they confuse home for mother.

"Moving out then becomes a childbirth in which mother can be ripped apart. Moving, therefore, then becomes a mortal sin. It is quite siginificant to me that his mother died and that he finally had to move a few months later, following which he developed a mental condition which slowly deteriorated. I think his explanation of his mother's death which was somewhat bizarre, is an attempt to shift the blame from his own shoulders to the frigid air in winter. Now, confusing the apartment with mother and moving with childbirth, even though it is done unconsciously, is still schizophrenic. Moving is not a birth. Note that he was eight when his sister was born at home."

* * *

"It is my considered opinion that this man is suffering from a schizoaffective disorder precipitated by the deterioration of his South Bronx apartment and his finally being forced to move out. I think his difficulty with work stemmed from his mental illness rather than the other way around. He is totally disabled. With shock treatments the prognosis would be guarded. Without shock treatments this man will never get well. I think that there is some evidence of intellectual

> deterioration, but I do not believe that he is as deteriorated as the brief test that I gave him would seem to indicate.
>
> "I think that what precipitated his conscious exaggeration of his symptoms in my office, could well have been the fear that I would say he is well enough to work when, in reality, this man is afraid to work."
>
> * * *
>
> "With regard to the four questions:
>
> "1. The Claimant is totally disabled due to a schizoaffective disorder.
>
> "2. I think his illness was precipitated by the deterioration of his neighborhood and apartment and his being forced to move shortly after his mother died.
>
> "3. This man's inability to work is due to his mental condition and not the other way around.
>
> "4. He is totally disabled because he is mentally ill.
>
> "Diagnosis: Schizoaffective disorder. (I think that if he were in a State Hospital he would be diagnosed as an Involutional psychosis, Melancholia.)
>
> "I believe that his mental condition is due to deterioration of his neighborhood with which he was unable to cope and I cannot see any connected problems other than the fact that, as a result of his mental condition, he has lost his ability to function as a productive worker."

An Office medical adviser reviewed Dr. Brody's report and recommended in a May 24, 1982 report that Dr. Brody's report be accepted as conclusive of the fact that appellant's inability to work or to move from his deteriorating apartment was "due to his mental condition and not the other way around."

By compensation order dated May 27, 1982, the Office rejected appellant's claim for compensation, finding that "the preponderance of the evidence supports that [appellant] is suffering from a disabling condition which was not causally related to factors of his federal employment."

By letter received August 6, 1982, appellant's attorney requested a hearing before an Office hearing representative. This request was denied on November 22, 1982 as untimely, and by letter received December 10, 1982, his attorney requested reconsideration. She argued that the reports of Dr. Stephens and Dr. Savitsky constituted the weight of the medical evidence because those doctors were more familiar with appellant than was Dr. Brody, and because their reports were consistent with each other.

In support of the request for reconsideration, appellant's attorney submitted an August 25, 1982 report of Dr. Stephens, which states in part:

"This is in response to the consultant's psychiatric report on [appellant] in which it is stated that [his] depression and mental state were due to the need to move from a deteriorating neighborhood, without moving because of unconsciously confusing home for mother, and moving becoming a childbirth in which mother is ripped apart, which is a mortal sin. His finally moving out was therefore felt to precipitate his mental disorder with subsequent difficulty with being able to work.

"Although there is little in the literature about mental illness due to the need to move, there is a wealth of material in the literature about the adverse effects of problems in the arena of work precipitating all kinds of mental disorder and disability.

"[Appellant] was born in Naples, Italy and lived there for the first 34 years of his life, when he moved to New York with his new wife. They went to live in the house where she had been raised and lived all of her life. He made this move without the development of any depression or illness. They were in New York for 3 years when they decided to return to Italy, because [he] had been unable to obtain a teaching job in New York State because of differences in educational and course requirements. They returned to Italy where he was able to return to teaching. After 2 years [his wife] found herself unable to adjust to Italy and also was concerned about her elderly father, so the couple again returned to New York to live in *his wife's family home*. Again, [appellant] found he was able to make the move without it causing mental illness or any disability. [He] was offered a job teaching in Ponce, Puerto Rico and was willing to go but his wife did not want to leave her ailing diabetic father, who finally died in 1972.

"[They] continued to live in the neighborhood but attempted at this time (1972) to find new housing as they needed more space for the two boys and themselves. They began looking in Queens where [appellant] worked but were unsuccesful in finding a place which was large and which was also affordable. They stopped looking between 1974-76 as they wanted the children to be able to finish in their parochial school through 7th grade. When it was near time to go to high school, they went to an agency and found a lovely large apartment which was five minutes away by bus from their neighborhood. They also found a private school for the boys to attend to which they could safely walk.

"[Appellant's] mother died in January 1979. He went through a short grief period, having last seen her in 1971. They moved in June 1979 to the new neighborhood and finally felt safe enough to be able to leave their new apartment without fear of it being broken into, and made a 6-week visit with the children to Italy for the summer for 1979. None of these moves were accompanied by mental illness, disability or depression. The visit to Italy to visit his sister and other relatives was a happy time.

"When [appellant] returned to his job in the post office in the fall of 1979, there were a number of important changes in his schedule and the operation of the branch in which he had worked for many years. This was the beginning of emotional stress which gradually led to his current condition.

"The following will summarize the work situation, its changes and how it affected a hard working, reliable postal worker.

"[Appellant] worked in the Flushing Queens branch of the post office from February 1970 to October 1979 as Special Air Mail Sorter. This gradually changed from being a relaxed manual operation to one where there was increased stress due to the use of sorting machines associated with fluorescent lights and noise.

"Many of the regular men refused to take the training for operating these machinces even though the pay was higher. In using a machine one had to quickly read a zip code under the fluorescent light and press the proper keys on a keyboard so that the letter would drop in the right section. These machines would replace one hundred workers. He became fearful of losing his particular job and felt sure that he could never learn the machine. He began to think that they might withdraw his bid, and then where would he go. He found himself becoming more anxious, worried and depressed. His wife noticed that he began to develop diarrhea at times when he returned from work.

"Finally, in November 1979, this really happened and he was told that he could no longer work from 8:00 [A. M.] to 4:30 P.M., which he had done all of those nine years. Then he was forced to take a job working from 12 noon to 9:00 P.M., which he started in 1980. He was traveling in the subway late at night and this began to escalate his fear and anxiety. There was an attempted mugging on the subway in January 1981 which further escalated his stress. He continued to work however, but also continued to worry about losing his bid with the impact of more machines. Finally this too happened and the only bid he was to obtain was working 2:00 P.M. to midnight in another branch. This was to have started on April 18th. His wife seeing how ill he had become, appealed to him to stop as he was losing weight, not sleeping, having bouts of diarrhea and generalized anxiety.

"In summary historically [appellant] has always been able to handle moves and losses of important people with a normal amount of feeling and response.

"It is very clear to me from the history that this very productive worker who had no problems in his job with doing a meticulous and fine job, was a victim of the machine age and the natural fear of

> losing work and being replaced by machines or younger men who are more geared toward high technology. I believe he deserves more consideration as there is no question in my mind but that the disability was fully related to his work."

The same Office medical adviser reviewed Dr. Stephens' August 25, 1982 report and stated in an April 25, 1983 report that Dr. Brody's report was "more probative." The adviser further stated:

> "Dr. Stephens' report omits or downplays obviously stressful non-job-related concerns which Dr. Brody considered precipitated [appellant's] serious mental disorder: e.g., deteriorating of So. Bronx apartment. He is unable to work and was unable to move from the deteriorating apt. *due to his mental condition* (schizoaffective disorder)—not the other way around."

In a memorandum dated August 9, 1983, an Office claims examiner indicated that the previous compensation order was based on the wrong issues, and he recommended that a new compensation order be issued denying appellant's claim. The memorandum stated in part:

> ". . . It was determined that in 1979 the postal service introduced new machines which also required additional lighting and created a higher noise level. In November 1979, his workshift was changed from 8:00 AM - 4:30 PM to 1:00 PM - 9:30 PM. He worked that tour but expressed fears for his safety in traveling during the evening. He also had fears that his position would be abolished but he was never notified by his employer and therefore any reaction to such rumors is not considered a factor of employment. Effective April 20, 1981, his shift was changed to 2:30 PM - 11:00 PM. He has not worked since . . ."
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> * * *
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> "After reviewing the case, and the August 25, 1982 report from Dr. Stephens, the treating physician, it appears that the case was incorrectly developed. The problem is in what may be considered a factor of employment and what may not. The file contains adequate documentation that the claimant was fearful of losing his job (being unable to cope with the machines and being separated) and afraid of being mugged while on public transportation. The anxiety from the new machines aggravated these feelings because he did not think he could work with these machines. The file however, does not show that he had to work with these machines or that he was going to be required to do so. It is apparent from the fact that he stopped work upon being told of the workshift which would become effective April 21, 1981 that it was these fears and not the mechanization of the Post Office that precipitated his condition. Since the factors

listed above cannot be considered factors of employment but rather self-generated fears, the condition is not compensable."

By compensation order dated August 17, 1983, the Office vacated the decision of May 27, 1982 and rejected appellant's claim for compensation on the ground that his "disability did not result from performance of duty but rather to the fears of traveling and the fears of losing his job, neither of which is considered a factor of employment." The compensation order contained the following findings of fact:

> ". . . [I]t was determined that in 1979 the postal service introduced new machines for mail sorting; that this resulted in higher noise and lighting levels at the worksite; that [appellant] expressed fears that these machines would result in a loss of his job, since he was convinced that he would not be able to learn to operate these machines; that his fear of loss of job is not considered to be a factor of employment but rather self-generated, as he had not been officially advised that his job was in jeopardy; that in November 1979, his workshift of 8:00 AM to 4:30 PM was abolished and he was reassigned to the 12:00 Noon to 9:30 PM shift; that he began to become fearful of traveling on the subway at night; that this is not a factor of employment; that his workshift was to be changed effective April 21, 1981; that he did not report to work on that date or any time thereafter; [that following the first compensation order and the request for reconsideration] the case file, including the additional medical evidence was reviewed and it was determined that the original decision was in error, as the question of disability was not a medical one but rather a question of whether the condition was related to factors of his employment; that upon review of evidence of record it is determined that it was unrelated to factors of employment."

The Board finds that the case is not in posture for decision.

Following the submission of the reports of Dr. Stephens and Dr. Savitsky, both Board-certifed psychiatrists, the case record was reviewed by Dr. Procario, an Office medical consultant, who indicated that a causal relationship had not been established between appellant's condition and factors of his employment. The Office determined that a conflict in the medical evidence existed and referred appellant to Dr. Brody, a Board-certified psychiatrist and neurologist, to resolve the conflict. Dr. Brody concluded that appellant's disability was caused by a schizoaffective disorder, "precipitated by the deterioration of his neighborhood and apartment and his being forced to move shortly after his mother died."

Following the first compensation order denying appellant's claim, Dr. Stephens submitted a report, dated August 25, 1982, which refuted the "not moving theory" propounded by Dr. Brody and supported appellant's claim that his emotional condition was caused by increased noise and brightness of lights at work, fear of losing his job through increased mechanization at work, and anxiety produced through changes in his work schedule.

An Office medical adviser reviewed Dr. Stephens' report and indicated that its probative value was lessened because it did not consider "obviously stressful nonjob-related concerns" such as appellant's deteriorating apartment. A claims examiner then determined that the case had been improperly developed and recommeded that a new compensation order be issued denying appellant's claim because it was not the anxiety produced from working with any new machines that caused appellant's emotional condition, but rather the fear of losing his job and of being mugged while commuting. The latter could not be considered factors of employment, the claims examiner stated.

The subsequent compensation order, dated August 17, 1983, stated that "the original decision was in error, as the question of disability was not a medical one but rather a question of whether the condition was related to factors of . . . employment . . ."

The Board notes that the Office based its August 17, 1983 compensation order upon an analysis of the principles set forth in the *Lillian Cutler* [2] case. As the Board stated in that decision:

> "Where an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment. This is true where the employee's disability resulted from his emotional reaction to his day-to-day duties. The same result is reached where the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work." [3]
>
> * * *
>
> "In contrast, the Board has held that 'a disabling condition resulting from an employee's feeling of job insecurity *per se* is not sufficient to constitute "a personal injury sustained while in the performance of duty" within the meaning of * * * the Federal Employees' Compensation Act.' Likewise, assuming that appellant was unhappy doing inside work, desired a different job, brooded over the failure to give him the kind of work he desired for which the establishment considered him unsuitable, and as a result of such brooding appellant became emotionally disturbed, causing an out-

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[2] 28 ECAB 125.

[3] *Id.* at 129-130 (footnote omitted).

> break of dermatitis; this does does not establish 'a personal injury sustained while in the performance of duty' within the meaning of * * * the Federal Employees' Compensation Act."
>
> "* * * Where the disability results from his emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction in force or his frustration from not being permitted to work in a particular environment or to hold a particular position.
>
> "The situation presently before the Board clearly falls within the second category. Where an employee becomes upset over not receiving a promotion, the resulting disability does not have such a relationship to the employee's assigned duties as to be regarded as arising from the employment. The emotional reaction in such circumstances can be truly described as self-generated and as not arising out of or in the course of the employment." [4]

The Board notes that some of the alleged causes of appellant's emotional condition are properly considered factors of employment under the *Lillian Cutler* analysis and some are not. Exposure to noise and bright lights at work is clearly a factor of employment under that analysis, as it involves conditions of employment encountered in the performance of day-to-day duties. The fear of losing one's job or being mugged while commuting is not a factor of employment under *Lillian Cutler*, as that is an emotional reaction that "can be truly described as self-generated and as not arising out of or in the course of employment."

The claims examiner's memorandum dated August 9, 1983, upon which the August 17, 1983 compensation order was based, appeared to accept Dr. Stephens' August 25, 1982 report as probative of certain factors it stated caused appellant's emotional condition, such as the fear of being terminated and the fear of being mugged while commuting. Both the memorandum and the compensation order also accepted that changes in appellant's work environment included an increase in noise and bright lights. Dr. Stephens stated there was "increased stress due to the use of sorting machines associated with fluorescent lights and noise." However, it was not clear from the second compensation order that the Office rejected causal relationship between appellant's emotional condition and the increase in noise and bright lights.[5]

The case will therefore be remanded for further development. Following remand, an Office medical adviser should review the case record, and after such further development as is needed, the Office should issue a *de novo* compensation order that determines whether there is a causal relationship between appellant's emotional condition and any of the alleged factors of employment, including the increase in noise and bright lights, specified by appellant or any of the psychiatrists treating him, and, if so, for how long a period. The Office's decision should also determine which, if any, of such causes of appellant's condition are properly considered factors of employment pursuant to the principles developed in *Lillian Cutler* and subsequent cases of the Board.[6]

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[4] *Id.* at 131 (footnote omitted).

[5] The Board notes that Dr. Procario, the medical consultant, stated in his report that if appellant's condition were related solely to stress at work, the condition "would have been alleviated" after he stopped working. This point, however, was not developed by the Office and the Board can make no finding on that issue based upon the case record as currently developed.

The decision of the Office of Workers' Compensation Programs dated August 17, 1983 is hereby set aside and the case remanded for further proceedings consistent with this decision of the Board.

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[6] See, e.g., *George I. Kaplan*, 32 ECAB 634; *Dorothy J. Williams*, 32 ECAB 665; *Jerry D. Campbell*, 32 ECAB 1969.

In the Matter of TONY J. FOSKO *and* DEPARTMENT OF THE NAVY, NAVAL AIR STATION MEMPHIS, Millington, Tenn.

Docket No. 83-2120; Submitted on the Record;
Issued February 27, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's loss of hearing is causally related to factors of his federal employment.

On May 25, 1979, appellant, then a 58-year-old water treatment plant operator, filed a claim dated May 21, 1979 alleging that he had sustained a hearing loss causally related to exposure at work to hazardous noise. Appellant was exposed to hazardous noise in federal employment from February 1972 through July 1979 in his positions of boiler plant operator and water treatment plant operator. He last worked on February 4, 1980.

In a May 21, 1979 statement submitted with his claim, appellant set forth his employment history as follows:

> "Prior to working at the Naval Air Station, I worked in 1936 as a boiler maker, welder and sheet metal worker for National Sheet Metal Workers for three-four years. I then worked as a welder for approximately one year. I served with the Air Force in a maintenance capacity and from 1945–1956 I worked intermittently as a Fireman with the Illinois Central Railroad. I then worked in con-

> struction work in sheet metal, welding and blow pipe operator until I started to work for the Naval Air Station in 1972. At the NAS I have been a boiler plant operator and have worked in boiler houses at buildings E–11, N–15 and S–75. The pumps were noisy but noisier when they were operating on oil. In S–75 our desk was approximately 18" from a 65 hp motor until the desk was relocated approximately one year ago."
>
> "In 1976 the boiler houses were checked for noise and we were issued ear plugs. Before that time I believe in 1974, my ears started ringing and now they ring constantly and my hearing has gone down. I have also had my ears checked at the Veterans Hospital, Memphis, Tennessee and I was told my hearing was bad."

The employing establishment submitted appellant's personnel records, a position description for water treatment plant operator which listed "loud noises" among the working conditions, and noise level surveys dating from October 1975 through January 1978 for two of the three buildings listed by appellant in his May 21, 1979 statement. Personnel records showed that appellant had been in the Army Air Force from July 30, 1942 through November 10, 1945, and that while employed at the employing establishment from February 7, 1972 until July 8, 1979 he had been exposed to hazardous noise "six hours per day, five days a week." The noise level surveys documented noise levels ranging from 72 to 118 decibels.

The employing establishment informed the Office of Workers' Compensation Programs on November 30, 1979 that ear plugs had been provided in 1976 and that prior to that date "ear muffs were used when turbining and blowing down boilers as well as [when working in] other extreme noisy areas." Appellant stated on December 3, 1979 that he "wore ear plugs at all times when there was hazardous noise," and that prior to 1976 when he was first issued ear plugs he "wore ear muffs when turbining steam lines and other hazardous noise work involved when boilers were changed over from gas to oil or vice versa."

The employing establishment submitted appellant's medical records for the period April 1975 through August 1979 including audiometric results reported on April 17, 1975 and audiograms dating from 1976 and 1978. An employing establishment physician on May 3, 1979 noted appellant's history of noise exposure in federal employment and diagnosed a "noise-induced sensorineural hearing loss secondary to acoustic trauma." The case record shows that appellant was removed by the employing establishment from hazardous noise areas in July 1979 due to his hearing loss and was advised by employing establishment doctors in August 1979 that he could return to work if the noise levels were low. The employing establishment, however, was unable to find appellant a suitable position.

The Veterans Administration submitted its outpatient records for the period December 14, 1978 through July 9, 1979. Records dated June 7 and July 9, 1979 noted that appellant complained of ear problems. The case record also contains a November 15, 1979 report prepared in connection with a disability retirement application which presents audiometric results and states that appellant was limited in the performance of job duties due to a high frequency hearing loss in both ears.

An Office claims examiner prepared a statement of accepted facts dated January 3, 1980 which included the following:

> "Prior to his employment at the NAS, beginning in 1936 claimant worked in various jobs as a boiler maker, welder, sheet metal worker, construction worker and blow pipe operator. He also served in the United States Air Force 1945 through 1956 in a maintenance capacity.
>
> "Claimant denies any ear problems prior to his employment at the NAS, Memphis."

An Office medical adviser reviewed this statement of accepted facts and the case record on February 13, 1980 and stated as follows:

> "The claimant had audiometry, but [it] did not include the 3,000 frequency, also, we do not know what type of standard was used and whether or not the claimant was away from hazardous noise at least for 16 hours.[1] Also, it should be pointed out that the claimant's audiogram is not that typical of a sensorineural hearing loss due to acoustic trauma. This one has elements of a preexisting otosclerosis and/or a nonorganic or functional loss. Therefore, I suggest the claimant be sent to an impartial otologist, or at least one not associated with the Navy, to determine whether or not the claimant has a loss of hearing acuity, audiometrically, and whether or not that is causally related to the factors of employment as outlined in the SAF [statement of accepted facts]. Of course, all of our requirements have to be met, as far as standardization, etc."

The Office thereupon referred appellant with the statement of accepted facts and medical evidence of record to Dr. James L. Canale, a Board-certified otolaryngologist, for audiometric testing and otologic evaluation. Dr. Canale examined appellant on August 5, 1980 and reported the following on August 6, 1980:

> "Physical exam today was completely normal. Tympanic membranes are intact and normally mobile bilaterally. The audiologic exam revealed speech reception thresholds at 18 bilaterally with good discrimination. Responses to pure tones were initially poorer than speech reception thresholds; however, after reinstruction and sev-

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[1] The medical adviser did not specify the date of the audiogram to which he referred.

> eral attempts pure tone responses in the speech range were at the upper limits of normal. Pure tone responses in the high frequencies were suggestive of a moderate to severe high frequency hearing loss at 3,000, 4,000 and 8,000 Hz. These results are considerably better than those obtained by previous examinations at other clinics."

Dr. Canale submitted an August 5, 1980 audiogram which stated that the test reliability was "fair."

The Office medical adviser again reviewed the case record on August 19, 1980 and noted that Dr. Canale had not addressed whether appellant's hearing loss was causally related to his federal employment. In response to an October 2, 1980 Office request for a supplemental report concerning causal relationship, Dr. Canale stated as follows:

> ". . . Mr. Fosko's hearing loss is not related to his employment from 1972 to 1976. The environment that he was working in should have had absolutely no effect particularly if he was wearing ear muffs or ear plugs. I believe his previous employment, particularly as a boiler maker and sheet metal worker from 1972 back to 1936 could have had some effect on his hearing loss."

By letter dated October 23, 1980 to Dr. Canale, the Office noted that the doctor had incorrectly listed the period of appellant's federal employment as 1972 to 1976, advised him the correct dates were 1972 through 1979 and asked whether "the additional three years . . . would have any effect as to whether or not claimant's hearing loss *is* causally related to factors of his employment." Dr. Canale replied as follows on October 30, 1980:

> "I do not believe any of Mr. Fosko's hearing loss is causally related to his employment from 1972 to 1979. If it is noise exposure it should have been from 1972 back to 1936."

By letters dated October 23, 1980 and November 24, 1980, the Office requested the employing establishment to submit appellant's preemployment physical examination report and any hearing tests or medical reports for the period 1972 to 1975. The employing establishment thereupon submitted a March 28, 1972 preemployment physical examination report which it stated was "the only physical prior to 1975." The employing establishment stated that no additional audiograms were available. The March 28, 1972 report entitled "Health Qualification Placement Record" was signed by Dr. D. L. Johnson, an employing establishment physician, and stated that appellant had no limitations concerning his ability to be exposed to constant noise or concerning his ability to hear. The date of the examination was listed as February 14, 1972.

An Office claims examiner requested the Office medical adviser to review the case and address whether appellant's hearing loss had been caused or aggravated by his exposure to hazardous noise in federal employment. The claims examiner noted that the report of the February 14, 1972 preemployment physical had set forth no restrictions on appellant's noise exposure or ability to hear. The medical adviser reviewed the case record and stated the following:

> "Dr. Canale evaluated the claimant from an otological standpoint, reviewed the medical reports and SAF and came to the conclusion the claimant's loss of hearing acuity is not related to his employment from 1972 to 1976. He indicates that he felt that the claimant had a preexisting hearing loss and that his hearing loss was affected by his previous employment as a boiler maker, when he was not working for the federal government. Therefore, the claimant's loss of hearing acuity is not causally related."

By compensation order dated January 30, 1981, the Office rejected the claim on the ground that "[c]laimant's hearing loss is not causally related to factors of his federal employment."

Appellant, through his attorney, requested a hearing before an Office hearing representative. By letter dated September 18, 1981, however, the representative requested that the Office reconsider its decision based on the March 28, 1972 report by Dr. Johnson which the attorney asserted showed appellant "no hearing impairment and was certified as able to work in noisy environment at the time of his employment."

By compensation order dated August 20, 1982, the Office rejected the request for reconsideration on the grounds that "[t]he evidence submitted in support of the application for review is found to be lacking substantial probative value, and is not sufficient to warrant review of the prior decision."

Appellant appealed to the Board.[2] By decision dated March 2, 1983, the Board found that the Office's delay in acting on appellant's request for reconsideration had "prevented appellant from gaining review by the Board of the merits of his claim," and constituted an abuse of discretion. The Board set aside the Office's August 20, 1982 decision and directed the Office to review the case record and issue a *de novo* decision on the merits of the claim.

The Office subsequently issued a June 28, 1983 compensation order in which it rejected appellant's claim after a merit review on the ground that "the loss of hearing for which compensation is claimed is not related to factors of federal employment." In a June 7, 1983 Office memorandum incorporated into the decision, the Office made findings of fact that "Dr. Canale stated that the loss of hearing was due to the claimant's previous employment from 1936 through 1972."

The Board finds that the case is not in posture for decision.

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[2] Docket No. 83-238.

The statement of accepted facts which was provided to Dr. Canale contained inaccurate information concerning appellant's previous work history, particularly the dates of his military service (July 30, 1942 through November 10, 1945) and the absence of any mention of the work actually performed from 1945 to 1956. Dr. Canale reported that appellant's employment from 1936 to 1972 "could have had some effect on his hearing loss." The Office, however, incorrectly made findings of fact that "Dr. Canale stated that the loss of hearing was due to the claimant's previous employment from 1936 through 1972."

The Board notes that at the time Dr. Canale examined appellant and reviewed the case record, the March 28, 1972 report concerning the February 14, 1972 examination of appellant which indicated that he had no limitation on his ability to hear was not yet part of the case record. Although a claims examiner called this report to the attention of the Office medical adviser who reviewed the reports of Dr. Canale, the medical adviser failed to address the effect of such report on the findings of Dr. Canale. Also, it is not clear from Dr. Canale's reports that he believed appellant had a "preexisting hearing loss" as stated by the Office medical adviser on January 14, 1981. The medical adviser also incorrectly stated the period of appellant's federal employment in his discussion of Dr. Canale's reports.

The Board further notes that Dr. Canale relied in part on appellant's use of ear muffs or ear plugs in concluding that his hearing loss was not causally related to noise exposure in federal employment. However, the Board notes that in his December 3, 1979 statement, appellant stated that prior to 1976 he used ear muffs only when involved in the particularly noisy work of converting boilers from gas to oil or vice versa, including "blowing down boilers" which an October 1975 noise survey showed could produce noise levels ranging from 110 to 118 decibels for a fifteen minute period. There is no indication in the record that prior to 1976 appellant wore ear protection during exposure to lower levels of hazardous noise at work, nor any indication of the effectiveness of the ear protection used before and after 1976.

The case will be remanded for further development.

On remand, the Office should prepare a statement of accepted facts which accurately reflects appellant's previous employment and his noise exposure in federal employment. The Office should refer appellant with the statement of accepted facts and all the medical evidence of record, including the March 28, 1972 report, to a Board-certified otolaryngologist not previously connected with the case for complete otologic evaluation and audiometric testing. The specialist should address in a rationalized report whether any hearing loss found is causally related to or aggravated by noise exposure in federal employment. Following any additional development deemed necessary by the Office, it should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated June 28, 1983 is hereby set aside and the case remanded for further development.

In the Matter of WILLIAM J. KNIGHT, JR. *and* U.S. POSTAL SERVICE, POST OFFICE, Williamsport, Pa.

Docket No. 83-631; Hearing January 24, 1984;
Issued February 28, 1984

Appearances: *Charles J. McKelvey, Esq.* for appellant;
Brenda Stovall, Esq. for the Office of Workers'
Compensation Programs

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant has any disability subsequent to August 14, 1980 causally related to his December 22, 1975 and/or January 24, 1977 employment injuries.

On December 22, 1975 appellant, then a 43-year-old truck driver, was involved in an automobile accident at work, when the truck he was driving was struck in the rear. He stopped work the same day and sought medical care the next day. On December 23, 1975 he saw Dr. Charles J. Cipolla, a Board-certified surgeon.

X-rays of the cervical spine were taken on December 26, 1975. The vertebral bodies and intervertebral spaces were intact. Irregular foreign bodies previously described on April 11, 1975 were again noted; however, there was no significant abnormality of the cervical spine identified.

Appellant was hospitalized from January 7 through January 13, 1976. During that time electroencephalography was normal. X-rays of the skull and left shoulder showed no evidence of fracture dislocations, and x-rays of the cervical spine and of the chest were normal. Electromyographic studies on the upper extremity, shoulder, and cervical paraspinous areas were found to be normal. A brain scan was also normal. Dr. Robert G. Stevens, Board-certified in physical medicine and rehabilitation, diagnosed "post traumatic cervical myoligamentous strain with possible cervical disc extrusion, C-7, C-8."

Appellant returned to work on light-duty on February 2, 1976, having received continuation of pay during his absence. He alleged a recurrence of disability on February 17, 1976 and remained off work until February 23, 1976.

On January 24, 1977 appellant was again involved in a rear-end collision at work. He was immediately taken to the emergency room where his condition was diagnosed as "myoligamental strain, cervical."

Appellant received continuation of pay from January 24 through February 11, 1977. He returned to temporary light-duty work on February 14, 1977. He alleged a recurrence of disability on March 29, 1977, stopped work, and has not returned.

On February 2, 1977 an Office of Workers' Compensation Programs medical adviser reviewed the case record and suggested appellant be examined and evaluated by a Board-certified orthopedic surgeon for a definite diagnosis, recommendations, and medical opinion regarding disability.

The Office referred appellant to Dr. Fred R. Amsler, a Board-certified orthopedic surgeon, in March 1977. Dr. Amsler submitted reports dated April 6, 1977 and May 3, 1977. In spite of the normal cineradiography examination, appellant clinically showed symptoms of a derangement of the joints between the first and second cervical vertebrae. The doctor opined that appellant also had a significant functional overlay relating to his injuries. He recommended appellant be referred to the orthopedic and neurosurgical department at Temple University School of Medicine or the University of Pennsylvania.

In August 1977 the Office referred appellant to Dr. Paul Lotke, a Board-certified orthopedic surgeon at the University of Pennsylvania Hospital. Dr. Lotke submitted a September 22, 1977 report in which he diagnosed "hyperextension injury, cervical sprain, mild resolving with functional overlay." X-rays of the cervical spine were within normal limits and demonstrated no bony abnormalities. The doctor was unable to demonstrate any objective evidence of disability. He opined that appellant was disabled from driving a motor vehicle but not from engaging in sedentary type employment.

The same Office medical adviser reviewed the case record on October 5, 1977 and stated "hyperextension injury, cervical sprain, mild, resolving with functional overlay" as the established diagnosis. He related appellant's condition to the employment injuries on the basis that it was "probably precipitating acute symptoms, from preexistent undetermined condition, possibly arthritis." He opined that appellant was totally disabled from driving a motor vehicle; he could perform light, sedentary type work, increasing his activities, progressively as tolerated.

In a May 22, 1978 report, Dr. Amsler opined that appellant had a 40 percent permanent impairment of function of the cervical spine based on the limitation of motion and functional loss. He opined that it was a permanent problem.

Appellant retired on civil service disability effective August 12, 1978. However, he elected to receive workers' compensation benefits in lieu of disability retirement benefits.

In February 1980 the Office referred appellant, together with a statement of accepted facts and the medical evidence of record, to Dr. John A. Donovan, an orthopedic surgeon. Dr. Donovan saw appellant in his office on March 6, 1980, with a chief complaint of neck pain. Appellant brought with him a report from a Veterans Administration hospital where apparently x-rays were taken which showed that he has numerous pieces of shrapnel in his skull. When questioned about this appellant became "quite hostile and uncooperative." The doctor stated that when an attempt was made to do a physical examination, appellant became progressively more hostile; therefore, no information was gained. Dr. Donovan opined that appellant had a severe psychological problem and was in need of psychiatric care.

In March 1980 the Office referred appellant, together with a statement of accepted facts and the medical evidence of record, to Dr. John T. Williams, an orthopedic surgeon.

With respect to his April 3, 1980 examination, Dr. Williams reported:

> "*IMPRESSION:* 1. Acute cervical sprain/strain, by history, resolved. 2. Cervical syndrome, etiology undetermined.
>
> "*DISCUSSION:* On the basis of the history given by the patient, he states that a truck hit him; I feel that he incurred a sprain/strain of the cervical spine. I feel that this is a two to three-month resolution and should resolve within that period of time. In the absence of any positive objective findings, I feel that he has recovered from the injuries he incurred at the time the truck hit him. He has bizarre complaints and there is no correlation between his complaints and my physical examination.
>
> "I do not know why this patient is having these weird complaints, but I sincerely feel that he should be seen by a very good and competent psychiatrist and evaluated by same. His complaints by far exceed any physical problems I am able to find on my orthopedic examination. I strongly recommend that he be seen by a neurosurgeon and a neurologist to rule out any problems in the cranial vault. I strongly urge that he be seen by a mental expert. ***
>
> "With reference to this patient returning to work, on the basis of my orthopedic examination, I see no reason why he cannot return to doing anything he wants to do but again I strongly recommend that he be seen by a neurologist and a neurosurgeon and a competent psychiatrist."

On the basis of Dr. Williams' recommendation, the Office referred appellant, along with a statement of accepted facts and the medical evidence of record, to Dr. Perry A. Berman, a Board-certified psychiatrist.

With respect to his evaluation of appellant, Dr. Berman submitted a June 18, 1980 report which stated in pertinent part:

> "*Diagnosis:* No psychiatric diagnosis found. Although this patient

may have some hysterical symptoms, they are only marginal, and not strictly related to the trauma. The patient denies any significant emotional problems in his life, and his symptoms do not follow the rules of an hysterical conversion reaction. For example, syncopy related to a conversion hysteria would occur on every turning of his neck in a postal vehicle, something he does not experience. Headaches in hysterical reactions generally are not the type that are relieved by two aspirins. The remainder of his symptoms are not considered of any relevance to either emotional or physical problems, but rather exaggeration of problems. The exception is his myopia, which is certainly age related and unlikely the result of any injuries in his neck.

"*Recommendations:* Although other medical examiners believe that this patient is suffering from severe psychiatric disturbance, this examiner does not find any major psychiatric symptoms, nor is there any clear-cut evidence of an hysterical or other type conversion reaction. It is highly probable that the suspicion of excess alcohol intake is valid, given the description of him in some of the provided medical reports."

* * *

"At this time I find no significant disability of a psychiatric nature and can make no other medical recommendation. That is not equivalent to saying that he will not continue to back into other vehicles, but rather that I find no basis for it in a functional or psychiatric disturbance. Therefore I find no work limitations nor any need for psychiatric treatment."

A different Office medical adviser reviewed the case record on July 15, 1980 and concurred with the findings of Drs. Williams and Berman that appellant had recovered from his employment-related injuries and that he had no psychiatric disability.

By compensation order dated July 25, 1980 the Office denied appellant's claim for continuing compensation benefits beyond April 11, 1980 on the basis that the medical evidence failed to support any disability as being related to his employment injuries. However, since appellant was not previously advised that his employment-related disability had ceased, compensation was to continue through August 13, 1980.

At appellant's request, a hearing was held on November 18, 1980 before an Office hearing representative. Appellant testified that the 1975 and 1977 accidents had caused him to have fainting spells and that his face became swollen, his ears hurt, his eyes became glazed, and his hands and feet became numb. He stated that he is unable to drive or do heavy lifting. He submitted an October 31, 1980 report from Dr. Amsler and a November 11, 1980 report from Dr. Harry L. Manning, a neurologist.

Dr. Amsler reported that at the time of a physical examination in August 1980 appellant had 80 percent restriction of flexion and extension of the cervical spine associated with pain at the extremes of rotation right and left, also associated with pain at the extremes. He recommended that appellant see Dr. Manning.

Dr. Manning examined appellant on November 11, 1980 and found no basis for his fainting spells. The doctor therefore requested an electroencephalogram to determine whether the spells were due to seizure activity as a result of a head injury in the 1975 accident; this was performed on November 13, 1980 and revealed no abnormality.

In a decision dated January 29, 1981 the Office hearing representative found that the reports of Drs. Williams and Berman represented the weight of the medical evidence, and thereby affirmed the Office's prior decision.

Appellant requested reconsideration on February 5, 1981 but submitted no evidence in support of his request.

By compensation order dated March 2, 1981 the Office denied appellant's request, finding that the application was *prima facie* insufficient to warrant review of the prior decisions.

Appellant filed an appeal with the Employees' Compensation Appeals Board.[1]

On July 9, 1981 the Director of the Office filed a motion to remand the case, stating that a conflict in the medical evidence existed between Dr. Williams, who negated disability and opined that appellant could return to work, and Dr. Amsler, who opined that appellant remained disabled.

On August 13, 1981 the Board issued an order which set aside the January 29, 1981 and July 25, 1980 decisions of the Office. The case was remanded in order for the Office to refer appellant and the case record to an impartial medical specialist for a rationalized medical opinion as to whether appellant was still disabled as a result of his employment injuries.

The Office, on remand, referred appellant, together with a statement of accepted facts and the entire case record, to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon. With respect to his October 12, 1981 examination and evaluation, the doctor submitted an October 22, 1981 report which stated in pertinent part:

> "*OPINION:* I have no orthopedic explanation for this man's complaints. From the history and the medical records it sounds as if he sustained a cervical spine soft tissue strain in 1975 and another similar injury in 1977, but there is no residual physical evidence of such at this time.

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[1] Docket No. 81-653 (issued August 13, 1981).

> "There is nothing in the physical realm that should disable this man from performing whatever type of work he was to perform before the above-described accidents.
>
> "I believe that this man's complaints may be due to functional causes, an opinion that has been offered by several other orthopedic surgeons, in spite of one opinion by a neuropsychiatrist that this man does not have an emotional problem, and I would strongly suggest another psychiatric opinion."

Appellant submitted a February 25, 1981 report from Dr. Amsler and a February 26, 1981 report from Dr. Manning. Dr. Amsler related appellant's condition to cervical spondylosis. Dr. Manning reported that his neurological examination revealed no abnormalities. Although Dr. Manning could not offer a definite diagnosis, he ruled out his earlier theory of seizure disorder.

The first Office medical adviser reviewed the case record and concurred with Dr. Klinghoffer's opinion from an orthopedic point of view that appellant had no residual disability as a result of the 1975 and/or 1977 injuries. The medical adviser, however, opined that further psychiatric evaluation was not necessary, in light of Dr. Berman's opinion that there was no significant disability of a psychiatric nature.

By compensation order dated November 18, 1981 the Office denied appellant's claim for compensation benefits as of August 14, 1980 on the basis that the weight of the medical evidence indicated that there was no residual disability as related to factors of appellant's federal employment.

Appellant requested reconsideration and, in support thereof, submitted a December 15, 1981 report from Dr. Gary L. Wolfgang, a Board-certified orthopedic surgeon. The doctor's impression was chronic cervical sprain. He stated that the fainting spells remained an unknown entity. Dr. Wolfgang opined that appellant was capable of sedentary or light work which could be performed sitting at a bench not requiring heavy lifting, stooping and bending, or frequent change of position of the head.

By compensation order dated February 8, 1982 the Office found that the evidence submitted was not sufficient to warrant review of the prior decision.

At appellant's request a hearing was held on July 19, 1982 before an Office hearing representative. Appellant described the manner in which his injuries were sustained, the immediate and subsequent effects of the injuries, the medical treatment received for his injuries, and his efforts to return to work. Appellant further described his current symptoms which he believed to be caused by his injuries and to be the cause of his disability for work. Appellant also presented the testimony of his spouse in corroboration of his own testimony. At the hearing appellant submitted two medical reports, dated March 2, 1982 and June 28, 1982, from Dr. Amsler.

In the March 2, 1982 report Dr. Amsler stated that appellant's symptoms were unchanged and that he continued to have syncopal episodes, the etiology of which had not been established. In addition, appellant continued to have symptomatic spondylosis of the cervical spine.

In the June 28, 1982 report, Dr. Amsler reported his physical findings from a June 25, 1982 examination, which were essentially restrictions of motion in the cervical spine. The doctor further stated that appellant's symptoms continued as before.

In a July 27, 1982 report, Dr. Amsler stated the following:

> "Mr. William Knight has been examined in my office on many occasions since March of 1977 when he was examined for the first time. Mr. Knight has a problem with arthralgia of the cervical spine which is associated with syncopal episodes. He has been thoroughly worked up with studies including electromyography, cinoradiography of the cervical spine function and evaluations by a neurologist in Williamsport and also at the Geisinger Medical Center. The patient has a problem with persisting restriction of motion in the cervical spine which results in 80% restriction of flexion and extension of the cervical spine and limitation of rotation to 30° right and left. The cause of pain and restriction of motion in the cervical spine is cervical spondylosis which was not a problem until the truck accident which occurred in December 1975."
>
> * * *
>
> "Based on my experience with Mr. Knight it is my opinion that he is not fit to work as a truck driver. It is not established that he has palindromic arthritis although the symptoms of joint pain could be related to such a syndrome. I believe the patient's problem is primarily physical rather than mental although an individual with pain and restricted motion persisting as long as seven years, such as in Mr. Knight's case, is certainly a candidate for an anxiety problem. So far as I can determine Mr. Knight is disabled with the cervical spine problem and it is not likely that specialized medical treatment will be effective in eliminating the pain syndrome associated with restricted motion and the syncopal episodes irregardless of their etiology."

By decision dated December 10, 1982 the Office hearing representative found that the weight of the medical evidence established that appellant was not disabled for work after August 14, 1980 due to the 1975 and 1977 employment injuries.

The Board finds that the case is not in posture for decision with respect to whether appellant has an employment-related emotional condition.

The Board further finds that appellant's employment-related disability dut to a physical condition had ceased by October 12, 1981.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has a disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[2]

The Office accepted that appellant sustained "post-traumatic cervical myoligamentous strain with possible cervical disc extrusion" as causally related to his 1975 and 1977 employment injuries. An Office medical adviser reviewed the case record on October 5, 1977 and stated the established diagnosis as hyperextension injury, cervical sprain, mild, resolving with functional overlay.

When the case was previously before the Board on appeal in 1981, the Office requested that the case be remanded because of a conflict in the medical evidence, necessitating referral of appellant and the case record to an impartial specialist for a rationalized medical opinion on whether appellant was still disabled as a result of the employment injuries. The Board granted the Office's motion. On remand, the Office selected Dr. Klinghoffer, a Board-certified orthopedic surgeon, as the impartial specialist. Dr. Klinghoffer examined appellant on October 12, 1981 and submitted his findings to the Office in a report dated October 22, 1981. Based on the history and medical records, Dr. Klinghoffer opined that appellant sustained a cervical spine tissue strain in 1975 and 1977; however, he found no residual physical evidence of such at the time of his examination. He further opined that appellant had no physical disability at that time that would prevent him from performing the type of work he was able to perform prior to the accidents. The doctor was aware of Dr. Berman's previous evaluation and opinion that appellant did not have an emotional problem; however, he believed that appellant's complaints may have been due to functional causes, and strongly suggested another psychiatric opinion. In situations where there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[3] Under these circumstances, the Board finds that the report of Dr. Klinghoffer constitutes the weight of the medical evidence. Accordingly, the Board finds that appellant had no physical disability after October 12, 1981 causally related to his employment injuries, as evidenced in the report of Dr. Klinghoffer. However, while Dr. Klinghoffer's opinion that appellant's complaints may be due to functional causes has no probative value, his recommendation for another psychiatric opinion, because he was the Office chosen impartial specialist, should have been carried out by the Office.[4]

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[2] *Anna M. Blaine*, 26 ECAB 351, and cases therein cited.

[3] *James P. Roberts*, 31 ECAB 1010.

On remand, the Office should refer appellant, together with a statement of accepted facts and the entire case record, to a Board-certified psychiatrist for a rationalized medical opinion on whether appellant has any disability of a psychiatric nature causally related to his employment injuries, and if so, how long a period. The Office should further develop the case record as it deems necessary, and thereafter, issue a *de novo* decision.

The December 10, 1982 decision of the Office of Workers' Compensation Programs is hereby reversed. The case is remanded to the Office for further proceedings as outlined in this decision and order.

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[4] When referring appellant to Dr. Klinghoffer the Office specifically authorized the doctor to consult with other specialists in other fields of medicine to support his diagnosis and opinion.

In the Matter of Charles Gilderoy Wotring *and* Department of Labor, Mine Safety and Health Administration, Oakland, Md.

Docket No. 84-161; Submitted on the Record;
Issued March 5, 1984

Before E. Gerald Lamboley, George E. Rivers, David S. Gerson

The issue is whether appellant's right pneumothorax is causally related to a February 2, 1981 employment injury.

On February 2, 1981 appellant, then a 53-year-old coal mine inspector, bruised his right ribs when he slipped and fell on ice. He stopped work that day and returned on April 7, 1981. He received continuation of pay from February 3 through March 19, 1981 and used annual leave to cover the rest of his absence from work.

Dr. Louis Rishel, a Board-certified surgeon, treated appellant on February 2, 1981 in a hospital emergency room, diagnosed "bruised right ribs," reviewed a chest x-ray and injected the bruised ribs. He also treated appellant on February 17, 1981.

Dr. Rishel reported on February 24, 1981 that appellant had presented himself that day "with shortness of breath and severe right chest pain," and that the examination revealed he had a "right pneumothorax which chest x-ray confirmed." He noted appellant was a "fairly heavy smoker." Appellant was hospitalized from February 24 to March 2, 1981. Dr.

Rishel reported the following in a discharge summary dated March 30, 1981:

"FINAL DIAGNOSIS:	(1) Right pneumothorax (2) Mild chronic obstructive pulmonary disease
"OPERATION: 2/24/81	(1) Insertion of right chest tube

> "HISTORY AND PHYSICAL: Discloses a 53-year-old . . . male who two weeks previously had had a severe fall with bruised ribs on the right. He then presented two weeks after this with a collapsed right lung which was quite evident with shortness of breath and no breath sounds on that side. The rest of the examination showed a heavy smoker, somewhat obese. ***
>
> "LABORATORY DATA: Hemoglobin 19.3 with 13,800 WBCs and 59 segs. Lytes normal. SMA 12 fairly unremarkable. Chest fully expanded after the tube was in. On first x-ray reveals a large right pneumothorax involving the entire upper third of the right hemithorax and pressing the lower lung at an average of 3 cm. from the chest wall. There are secondary atelectatic changes in the upper middle lobes. EKG [electrocardiogram] normal.
>
> "HOSPITAL COURSE: He underwent chest tube insertion, did quite well. Was finally discharged home when the tube was removed."

Dr. Rishel stated on an Office form report dated March 24, 1981 that "x-rays revealed an old healed rib fracture deformity of the right 6th rib in the posterior axillary line."

By letter dated July 28, 1981, the Office of Workers' Compensation Programs informed appellant that his condition of "bruised right ribs" had been accepted as causally related to his employment, but not his conditions of right pneumothorax and mild chronic obstructive pulmonary disease. The Office stated that any medical report submitted in support of the claim should include a detailed discussion in support of causal relationship.

Appellant submitted an August 11, 1981 report from Dr. Rishel which stated the following:

> "Mr. Wotring first presented to me on February 2, 1981, at which time I thought he had bruised ribs. However, two weeks later on February 24, 1981, he presented with severe chest pain and shortness of breath. At that time a spontaneous pneumothorax was quite evident. The x-ray showed that the lung had almost dropped completely down and under emergency type conditions, I inserted a chest tube. The lung expanded and sealed off well. He was discharged on March 2, 1981, and was doing quite well.

> "It is very interesting to have a collapsed lung after that period of time following his injury, but I am quite certain that it was a result of his injury on February 2, 1981. I released Mr. Wotring to return to work on April 6, 1981. *** "

Dr. Ira E. Kaplan, an Office medical consultant who is Board-certified in internal medicine, reviewed the case record on February 10, 1982 and opined that the pneumothorax was not causally related to the February 2, 1981 injury, Dr. Kaplan stated as follows:

> "No [causal relationship]. The patient had spontaneous pneumothorax. There is no medical rationale offered by Dr. Rishel to support a C/R [causal relationship] [between] injury on 2/2/81 and 2/24 two weeks later—the pneumothorax. The patient is a heavy smoker and chest x-ray showed mild COPD [chronic obstructive pulmonary disease].
>
> "Etiology of pneumothorax.
>
> 1. Spontaneous—cause unknown. (patient is too old [to have this]).
> 2. COPD with blebs that rupture.
>
> "[I] cannot accept the causal relationship because there was no penetrating trauma, [and] the delay of three weeks in the occurrence of the pneumothorax."

Dr. Kaplan estimated that bruised ribs would cause a two to three week period of disability and stated that the old healed rib fracture of the right sixth rib mentioned in Dr. Rishel's March 24, 1981 report is "not involved in this case."

In response to an April 8, 1982 Office request for a detailed rationalized report, appellant submitted an April 23, 1982 report in which Dr. Rishel stated the following:

> "I first saw Mr. Charles G. Wotring on February 2, 1981, at which time he had fallen upon the right rib cage. At that time, I felt that he had bruised ribs. The x-ray at that time showed an old healed rib fracture of his right 6th rib in posterior axillary line, there were no recent bony abnormalities seen in the right hemithorax, and no underlying associated pleural, parenchymal or vascular abnormalities noted. He presented to the Office on February 24, 1981 with a spontaneous type pneumothorax.
>
> "In reference to your letter since this man did have injury to the right rib cage and since rib fractures are sometimes difficult to pick up and since no cysts showed on his lungs which would give a pulmonary reason for the collapse, I feel that this pneumothorax was secondary to his right rib cage injury. Although this was a very slight and slow air leak, it certainly was complete. Although this is not the usual course of events for this, it certainly is possible and

it appears to be the only relation which I can discern which caused this problem."

Dr. Kaplan, the Office medical consultant, again reviewed the case record on July 20, 1982 and stated he agreed "that the outline of events is unusual." Dr. Kaplan further stated that "[t]here is no documentation of a rib fracture," and that "usually repeat films [are] suggested 7-10 days after DOI [date of injury] to pick one up if initial x-rays are negative."

To resolve the conflict in medical opinions between Drs. Rishel and Kaplan the Office referred the entire case record, and a statement of accepted facts and the chest x-ray films to Dr. Gregory R. Owens, Board-certified in internal medicine and pulmonary disease. Dr. Owens reviewed the materials submitted to him and reported on January 20, 1983 as follows:

> "Determination of the relationship between the chest trauma suffered by Mr. Wotring on February 2, 1981 and the development of a pneumothorax on February 24, 1981 is exceedingly difficult because of the difficult nature of interpretation of the chest radiographs provided and, more importantly, the scanty medical evidence that I was provided. Specifically, information relating to the patient's clinical course between the fall suffered on February 2 and the pneumothorax on February 24 would have been exceedingly helpful. In addition, it would have been helpful to know the manner of presentation on February 24 specifically whether it was acute or not. However, I will attempt to make a determination as requested on the information that has been provided.
>
> "Review of the medical records reveals that Mr. Wotring was 53 years old at the time he fell on the ice and developed right upper thoracic pain. Chest radiographs obtained at Garrett County Memorial Hospital reveal normal lung fields and a questionable old rib fracture of the 6th rib. The rib fracture is reported in Dr. Rishel's note, but I must say that it is an extremely questionable finding. There was no evidence of a new rib fracture. The patient had his ribs injected with anesthetic and was discharged. Three weeks later he was admitted, evidently with the acute onset of shortness of breath, and was diagnosed as having a significant pneumothorax. Chest radiographs this time do reveal a definite posterior rib fracture with questionable callus formation. It should be noted at that time that the patient's hemoglobin was 19.3, which suggests a long and heavy cigarette smoking history. The patient was treated in a standard manner with chest tube drainage and had complete reexpansion of his lung and was discharged to home.
>
> "Having reviewed the medical record, I believe that there are three clinical entities which must be considered in the etiology of the patient's pneumothorax, the chest trauma itself, the injection

> of the ribs at the time of chest trauma, and patient's probable underlying chronic obstructive pulomonary disease as manifested by his high hemoglobin, presumably secondary to cigarette smoking.
>
> "The development of a pneumothorax three weeks after chest trauma is exceedingly unlikely. In most instances, the pneumothorax develops either immediately or within 24 hours of the chest trauma. The only clinical instance in which a pneumothorax might develop in a delayed fashion after chest trauma would be either repeated chest trauma or some new clinical event such as a severe coughing episode. Since the medical record does not provide information documenting that either of these conditions occurred, I must state that it is my clinical opinion that it is extremely unlikely that the fall on the ice of February 2, 1981 is related to the subsequent development of a pneumothorax. However, because of the importance of this case, I performed a literature review to substantiate my own clinical belief about chest trauma leading to delayed pneumothorax. On this review, I could find no evidence of such relationship. Thus, I believe it likely that Mr. Wotring's pneumothorax was related to his underlying chronic obstructive pulmonary disease.
>
> "Thus, based on my clinical experience and my review of the literature, I believe that it is very unlikely the fall on the ice of February 2, 1981 was in any way contributory to the development of a pneumothorax on February 24, 1981."

Dr. Kaplan reviewed the case record on January 26, 1983 and stated that Dr. Owens concluded that the development of a pneumothorax three weeks after chest trauma is unlikely since it usually occurs within 24 hours, if not immediately.

By compensation order dated June 3, 1983 the Office rejected the claim on the grounds that "the evidence of record fails to support the claim of a relationship between the pneumothorax and a fall on ice which occurred on February 2, 1981."

The Board finds that the medical evidence of record fails to establish that appellant's right pneumothorax is causally related to the February 2, 1981 employment injury.

An award of compensation may not be based on surmise, conjecture or speculation. Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that his condition was causally related to his employment.[1] This burden includes the necessity of furnishing rationalized medical opinion evidence of a cause and effect relationship based upon a proper factual and medical background.[2]

Dr. Rishel, a Board-certified surgeon who treated appellant following the February 2, 1981 employment injury, lent some support to the claim.

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[1] *James W. Peyton*, 31 ECAB 540.

[2] *James W. Peyton*, *supra*.

However, he did not give any rationale in his August 11, 1981 report to support his being "quite certain" that the pneumothorax diagnosed on February 24, 1981 was causally related to the February 2, 1981 employment injury. His April 23, 1982 statement that he believed it "certainly is possible" that the pneumothorax was secondary to the February 2, 1981 injury because rib fractures are sometimes difficult to discern and because no cysts were apparent on appellant's lung to provide "a pulmonary reason for the collapse" is speculative. He acknowledged that the case did not represent the "usual course of events" for development of a pneumothorax. His statement that a relationship between the February 2, 1981 injury and the pneumothorax "appears to be the only relation which I can discern which caused this problem" is not suficient to establish causal relationship.

Dr. Kaplan, a Board-certified internist and Office medical consultant, opined that there was no causal relationship between the employment injury and the pneumothorax because of the three week delay and because there was "no penetrating trauma."

Dr. Owens, Board-certified in internal medicine and pulmonary disease and an impartial specialist, reviewed the case record, chest x-ray films and relevant medical literature and opined in a detailed well-rationalized report that development of a pneumothorax three weeks after chest trauma was "exceedingly unlikely." He concluded that the pneumothorax was related to appellant's underlying chronic obstructive pulmonary disease which in turn was presumed to be secondary to heavy cigarette smoking. The medical evidence of record fails to establish that the pneumothorax is causally related to the February 2, 1981 employment injury.

The June 3, 1983 decision of the Office of Workers' Compensation Program is hereby affirmed.

In the Matter of John H. Brown *and* Department of the Army, Fort Leonard Wood, Mo.

Docket No. 84-509; Submitted on the Record;
Issued March 6, 1984

Before George E. Rivers, Michele von Kelsch, David S. Gerson

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing made more than 30 days after its decision.

Appellant, a 46-year-old pest controller technician, filed a claim on

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August 24, 1981 alleging that he sustained a hearing loss due to exposure to hazardous noise in his federal employment from February 15, 1976 and continuing. By decision dated June 2, 1983 the Office awarded appellant a schedule award for a 9 percent binaural hearing loss. Attached to the decision was a list of options for appellant to follow including that of requesting a hearing before an Office hearing representative within 30 days of the issuance of the decision.

In a July 5, 1983 letter, postmarked July 14, 1983, and received by the Office on July 20, 1983, appellant, through his attorney, requested a hearing before an Office hearing representative.

By letter decision dated November 23, 1983 the Office found as follows:

> "Since your request [for a hearing] was not made within 30 days you are not, as a matter of right, entitled to a hearing on your case. We have considered the matter in relation to the issue involved and your request is hereby denied on the basis that any additional evidence may be introduced through a reconsideration application."

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides a claimant with the right to a hearing on his claim "on request made within 30 days after the date of issuance of the decision . . ." [1] As the Board has pointed out this section "is unequivocal in setting forth the limitation on requests for hearings . . ." [2]

Prior to the 1966 amendments to the Act, a claimant had no right under the Act to a hearing. Although granting that right in the 1966 amendments, Congress specifically limited a hearing as a matter of right where the request is filed within the requisite 30 days. In the present case appellant's July 5, 1983 letter requesting a hearing was filed more than 30 days after the June 2, 1983 Office decision. Appellant's request was not timely made and he therefore had no right to a hearing.

Even though appellant has no right to a hearing if not requested within 30 days the Office must exercise its discretion in either granting or denying a late request for a hearing.[3]

The Office, here, properly, exercised its discretion in denying appellant's request for a hearing. The Office considered the matter and determined that any new evidence appellant might have could be submitted together with a request for reconsideration. No arguments were advanced by appellant and there is nothing in the case record to indicate that a hearing would serve any useful purpose.

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[1] 5 U.S.C. section 8124(b)(1).

[2] See *Clyde Bovender*, 32 ECAB 1883.

[3] See *Herbert C. Holley*, 33 ECAB 140.

The November 23, 1983 decision of the Office of Workers' Compensation Programs is hereby affirmed.[4]

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[4] The Board notes that although the June 2, 1983 schedule award decision is within a year of appellant's current appeal to the Board, his attorney specifically asked the Board to review the November 23, 1983 Office denial of a hearing. Should appellant wish to appeal the schedule award he may file such an appeal within a year of that decision.

In the Matter of HARRY FEKERIS *and* U.S. POSTAL SERVICE, POST OFFICE, Springfield, Mass.

Docket No. 84–542; Submitted on the Record;
Issued March 7, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS,
DAVID S. GERSON

The issue is whether appellant has more than an eight percent permanent loss of use of his left hand for which he received a schedule award.

On June 22, 1976 appellant, a 48-year-old mailhandler, injured his left hand when he caught it between a conveyor and a door opening at work. On August 19, 1976 Dr. David Goldberg, a Board-certified orthopedic surgeon, performed an excision of tumor mass which had formed, on the tendon sheath, of the left middle finger, and an incision and biopsy of the flexor tendon sheath. Appellant was off from work following the injury until September 27, 1976 during which time he received continuation of pay and temporary total disability compensation.

On May 22, 1977 appellant again injured his left hand when he hit it against a rack at work. On June 13, 1977 Dr. Goldberg performed an excision of bony exostosis of the left metacarpal region of appellant's left hand. Appellant received continuation of pay from May 23 through May 26, 1977 and from June 12 through July 23, 1977 and compensation thereafter for time missed from work for a neuroma of his dominant left hand and radial ulnar nerve palsy as a result of his operation. He retired on April 4, 1979.

By letter dated May 18, 1981 the Office of Workers' Compensation Programs referred appellant to Dr. Erik A. Rosenthal, a Board-certified orthopedic surgeon specializing in hand surgery, for an evaluation of the employment-related permanent impairment of his left hand.

In a June 8, 1981 report Dr. Rosenthal set forth the following results of his examination of appellant's left hand:

"The left long finger is held in positioned extension, dorsal to the resting posture of the index, ring, and 5th fingers. This appears to be an avoidance posture. Wrist motion is + 75/70, symmetrical with the right side. There is a slight tremor in the left hand, relative to the right side.

"There are several healed scars over the palm of the hand. A curvalinear scar over the hypothenar eminence relates to a childhood accident. An apical 'V' scar over the radial aspect of the palm relates to an industrial accident of 1958. There are two transverse incisions over the distal palm of the long ray, coursing over the proximal third proximal phalanx of the long finger. The long finger, as mentioned above, is firmly positioned in hyperextension at the PIP joint. Active flexion of the PIP joint is associated with a snapping relocation of the lateral bands from their dorsal position.

"There is focal tenderness over the radial extreme of the transverse incisions described above, at the web of the index-long fingers over the base of the long finger. This tenderness is in the course of the radial digital nerve to the long finger.

"Sensibility is altered over the ulnar border of the index finger and radial border of the long finger. In these areas there is normal two-point discrimination, with subjective decrease in sensibility.

"The ulnar border of the long finger demonstrates prolonged two-point discrimination (12 mm.) with normal sweat. There is painful dysesthesia along the radial border of the long finger without detection of two-point discrimination.

"There is no clinical evidence of carpal tunnel compression. There is no evidence of intrinsic muscle tightness."

Dr. Rosenthal concluded as follows:

"(1) He has evidence of a peripheral neuropathy involving the left hand, primarily index, long and ring fingers.

"(2) Focal tenderness over the base of the long finger with painful dysesthesia suggests nerve entrapment or neuroma. A nerve block as a clinical trial would be appropriate. Surgical exploration, possibly with excision and neurorrhaphy and/or grafting should be considered.

"(3) The snapping lateral bands of the long finger may be a postural adaptation because of the painful dysesthesia involving the flexor surface of the finger. This condition may be eliminated if the digit were not excluded from normal hand functions.

"(4) He has a permanent partial impairment, but I do not think this should be considered an end result. His condition may be amenable to treatment, and the above recommendations should be considered.

"At this time I would estimate his permanent partial impairment of function to be approximately 30% of the total function of the

> dominant left hand. As mentioned above, I think further treatment is indicated."

By letter dated October 28, 1981 the Office referred appellant to Dr. Ann Hirschhorn, a Board-certified neurologist, for an evaluation of the degree of permanent impairment of his left hand and an opinion on whether he could perform sedentary work.

In January 19, 1982 report Dr. Hirschhorn stated as follows:

> "On neurological examination patient's left hand shows numerous scars. There is a well-healed curvilinear scar just distal to the hypothenar eminence which he states was from falling on a broken bottle in infancy. There is an irregular curved scar distal to the base of the left thumb he states occurred in 1958. His hand was caught between a cable and a pulley; the cut was sutured in South Dakota and he regained normal use of the hand. There are two scars at the base of the left middle finger in an irregular x shape from his 1976 and 1977 surgery. His left fifth finger has minimal proximal interphalangeal joint contracture. Patient is not aware of this or bothered by it. (When questioned he stated that it was probably secondary to his chilhood injury or infection in that scar from his 1958 injury). The left hypothenar eminence is flatter and narrower than the right. Patient tends to hold his left third and fourth fingers in extension at the M-P Joint and I-P Joints to avoid triggering the dysesthesia. He can move these joints but strength there is difficult to assess because of triggered dysesthesia. Strength is diminished in the intrinsic muscles of the left hand but again is difficult to assess completely. Deep tendon reflexes are symmetrically 2+ throughout. The rest of his motor examination is entirely within normal limits. Sensation is intact, except for subjective diminution to pinprick and touch on the left palm in the lateral aspect of the index finger, the entire middle finger, and the medial aspect of the fourth finger."
>
> * * *
>
> "Surgery for hand reconstruction has been suggested by Dr. Erik Rosenthal. Patient prefers to live with his residual symptoms.
>
> "He has not had a trial of medication to prevent the painful components of his dysesthesia, such as with Tegretol or Dilantin."

In a May 7, 1982 report an Office medical adviser stated without explanation, that the weakness in appellant's left hand constituted a five percent permanent impairment and the dysesthesia, two percent. He concluded that appellant had an eight percent permanent loss of use of his left hand.

By decision dated June 10, 1982 the Office awarded appellant a schedule award for an eight percent permanent loss of use of his left hand covering the period January 19 to June 4, 1982.

On April 20, 1983, at appellant's request, a hearing was held before an Office hearing representative. Dr. Rosenthal testified at the hearing, stating that his conclusion that appellant had a 30 percent permanent impairment of his left hand was based upon "the alterations and sensibility as well as the functional adaptations which his left hand had assumed, by virture of the discomfort and demonstrable painful focus, and altered sensiblity, which he demonstrated." Dr. Rosenthal stated that he again treated appellant on April 7, 1983 and made similar findings. He continued as follows:

> ". . . [Appellant] has a significant impairment of sensibility involving three fingers of his domimant hand, in addition to which the sensibility to his long finger constitutes a significant discomfort whenever it comes into contact with any surface, to the point where he excludes that finger from any function.
>
> "This imparts a significant impairment of functional endowments to his dominant hand.
>
> "We compute impairment as a summation of movement, postural deformities, sensory endowment, and muscular power or strength. The AMA Guide . . . primarily addresses itself to ranges of motion and loss of parts, and I don't believe it specifically relates to sensibility or relative power of various parts."

Appellant's attorney indicated at the hearing that appellant was reluctant to undergo any further surgery.

By letter dated June 29, 1983 the hearing representative requested a different Office medical adviser to review Dr. Rosenthal's testimony and to indicate the extent of the permanent impairment of appellant's left hand.

Based upon Dr. Rosenthal's medical evaluation and testimony and the AMA *Guides*, the medical adviser concluded in a July 8, 1983 report that as a result of sensory deficit, pain, and discomfort in the index, middle and ring fingers of his left hand, appellant had a five percent permanent impairment of that hand.

By decision dated October 5, 1983, made final on October 6, 1983, the hearing representative affirmed the Office's June 10, 1982 decision.

The Board finds that the Office improperly determined that appellant has an eight percent employment-related permanent impairment of his left hand.

Although the American Medical Association's *Guides to the Evaluation of Permanent Impairment* has been accepted by the Office and the Board as a general guide for evaluating the degree of permanent impairment, some impairments which prevent a limb from functioning normally, such as pain and weakness, are not reflected in the tables but should also be considered. All factors which prevent a limb from functioning normally should be considered, together with any loss of motion, in evaluating the degree of permanent loss of use for the purpose of determining a schedule award.[1]

Neither Dr. Hirschhorn nor Dr. Rosenthal indicated that appellant had any loss of range of motion of his left hand. Dr. Hirschhorn, a Board-certified neurologist, noted decreased sensation, diminished strength, and pain in appellant's left hand but did not assign a percentage figure to the degree of permanent impairment of that hand. Dr. Rosenthal, a Board-certified orthopedic surgeon specializing in hand surgery who examined appellant upon referral from the Office, did assign such a figure. Both in his June 8, 1981 report and in his April 20, 1983 testimony before the Office hearing representative Dr. Rosenthal concluded that as a result of tenderness, weakness, decreased sensation and pain appellant had a 30 percent permanent impairment of the left hand.[2]

The first Office medical adviser determined that appellant had an eight percent permanent loss of use of his left hand and the second Office medical adviser concluded that appellant had a five percent permanent loss of use of that hand. Both medical advisers relied, in part, upon Dr. Rosenthal's report. However, neither medical adviser explained why his conclusion as to the percentage permanent impairment of appellant's left hand differed from that of Dr. Rosenthal, a specialist in the relevant field.

The Office should, therefore, have an Office medical adviser estimate the degree of permanent impairment of appellant's left hand, with specific reference to the report and testimony of Dr. Rosenthal. Should the medical adviser conclude that appellant has less than a 30 percent permanent loss of use of his left hand he should explain the basis for his differing with Dr. Rosenthal's conclusion.

The October 5, 1983 decision of the Office of Workers' Compensation Programs hearing representative, made final on October 6, 1983, is hereby set aside and the case is remanded for further action in accordance with this decision to be followed by a *de novo* decision.

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[1] *William F. Simmons*, 31 ECAB 1448 and *Michael J. Satterlee*, 31 ECAB 1707.

[2] Dr. Rosenthal suggested that surgery in appellant's left hand might diminish the permanent impairment. However, Dr. Hirschhorn's January 19, 1982 report as well as appellant's attorney's testimony at the hearing made clear that appellant did not wish to undergo any surgery. Therefore, it appears that maximum improvement of appellant's left hand had been reached.

In the Matter of SUSAN M. HERMAN *and* U.S. POSTAL SERVICE, POST OFFICE, Miami, Fla.

Docket No. 83-1713; Submitted on the Record;
Issued March 8, 1984

pages tightly bound

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH,
DAVID S. GERSON

The issues are whether appellant is entitled to reimbursement for chiropractic services and whether appellant's alleged recurrence of disability on December 23, 1980 was causally related to her July 13, 1979 employment injury.

Appellant, then a 26-year-old clerk, filed a claim dated July 13, 1979 alleging that on that day she injured her lower back when her resting bar seat slid down. Three witnesses attested to the incident.

Dr. J. M. Greene examined appellant on the date of her injury; he stated that appellant would be totally incapacitated for at least three days and should then be evaluated by an orthopedist. A July 13, 1979 x-ray report from Dr. Gilbert H. Cohen, a Board-certified radiologist, stated that appellant's lumbosacral spine was normal, with no evidence of fracture or dislocation.

Dr. Melvyn G. Drucker, a Board-certified orthopedic surgeon, submitted this July 16, 1979 evaluation of appellant:

> "[Appellant] is a 26-year-old woman who injured her back in a work accident on July 13, 1979. She stated to me that a rest bar that she was sitting on gave way and she twisted her dorsal and lumbar spine.
>
> "She had originally been seen some time ago by Dr. Richard Weiss for back problems also as a result of a work accident that she had in October of 1978. She was treated symptomatically for this, however, she did not miss much work time and returned to work and was doing satisfactorily up until the present time.
>
> "Her pain at this time is fairly well-localized to the dorsal and lumbar region without significant radiation or paresthesias. She described being aggravated by activities that include turning, twisting, lifting or bending."

Dr. Drucker noted that the neurological examination was normal, as were flip and straight leg raising tests. X-rays failed to reveal any acute bony abnormality, but with a question of spondylosis of the first sacral segment on the right side. He concluded that appellant had sustained a mild dorsal and lumbar sprain, advising symptomatic treatment with local heat and outpatient therapy.

Dr. Robert Ennis, a Board-certified orthopedic surgeon, noted that appellant had been seen in the office for reevaluation of her back, that she had been previously examined in August 1979 for similar problems but at that time had recovered spontaneously. He stated that appellant's problem was vaguely localized in the lower lumbar region of her back, with no evidence of radiculitis or radicular symptoms and that neurological evaluation at this time was within normal limits. He concluded:

> "I feel that she has a chronic lumbar back strain, and have advised her to continue with muscle strengthening and range of motion exercise program.
>
> "I also feel that the excessive strain which she has been putting on her back as a result of overtime work and repetitive heavy lifting, bending and stooping is probably contributory.
>
> "I have advised her to discontinue these particular activities over the course of the next several weeks.
>
> "We will see her back on the 25th for follow-up."

Dr. Ennis stated in his report that appellant was able to perform her regular work on January 15, 1980 but listed some limitations on lifting, etc., and with the restriction of no overtime for one month. A February 13, 1980 report recommended three weeks of light duty without overtime.

In a narrative statement submitted on April 23, 1980, appellant referred to October 1978 and 1979 employment incidents, both prior to the July 13, 1979 injury.

On May 2, 1980, the Office received a notice of recurrence, with the date of recurrence given as "1-80." On July 22, 1980, the Office received notice of an April 1980 recurrence.

Dr. Stuart Kaplan, chiropractor, submitted an August 7, 1980 report stating that examination revealed a sustained trauma to the lumbosacral area which resulted in muscle spasm, subluxation and neurothelipis, with treatment consisting of spinal adjustment and physiotherapy. Dr. Kaplan stated that disability could not be determined at that time. In an August 13, 1980 letter, the chiropractor stated that appellant required four weeks of light duty. On September 17, 1980, Dr. Kaplan stated that appellant was able to perform her regular work; he also diagnosed spinal subluxation. On September 24, 1980, the chiropractor submitted an itemized bill for treatment rendered.

By letter dated October 3, 1980, the Office informed appellant that section 8101(2) of the Federal Employees' Compensation Act limited treatment by a chiropractor for an on-the-job injury and that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulations of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. The Office stated that Dr. Kaplan's bills would not be processed for reimbursement.

In a letter to appellant's representative, the Office stated that a conflict in medical evidence existed, noting that while Dr. Drucker's July 16, 1979 report stated that x-rays of the dorsal and lumbar spine "fail to reveal any acute bony abnormality and there is a question of spondylosis of the first sacral/segment on the right side" and Dr. Cohen's

July 13, 1979 report stated that x-rays of the lumbosacral spine revealed no radiographic demonstration of fracture or dislocation, Dr. Kaplan's September 19, 1980 report stated that the x-rays indicated an entirely different condition. The Office also asked if appellant had sustained a new injury or been involved in an accident between July 1979 and September 1980. The Office further noted:

> "The file also reflects the treating physicians chosen in the past to have been 'Orthopedic Associates' and Drs. Robert S. Ennis and Melvyn G. Drucker. The changing of physicians has not been authorized by this Office."

The case record was evaluated on November 6, 1980 by an Office medical adviser who stated:

> "What concerns me in this case is that Doctor Cohen who is a Board-certified orthopedist evaluated the claimant on July 13, 1979, and indicated that claimant had no fracture or dislocation, which also would mean subluxation. He indicated the claimant had normal lumbosacral spine series. Also, it should be pointed out that the claimant was seen by Dr. Drucker on July 16, 1979, who indicated the claimant had a mild dorsal and lumbar strain/sprain syndrome that should have resolved without residual in a short period of time. He said the claimant could return to work in a few days. Therefore, it is reasonable to conclude that the claimant did not have a subluxation as indicated by the chiropractor, as certainly the Board-certified orthopedist and Board-certified radiologist would know whether or not a dislocation or subluxation was present, and since the claimant had only mild symptomatology and no objective evidence to support any orthopedic disability, it is reasonable to conclude that no subluxation was present."

In a November 14, 1980 letter to appellant's representative, the Office stated that it had accepted that appellant sustained a low back strain on July 13, 1979 and a January 15, 1980 recurrence. The Office stated that it had not accepted an April 1980 recurrence and treatment had not been authorized.

On a form dated January 6, 1981, appellant alleged another recurrence had occurred on December 23, 1980. In a January 9, 1981 letter the Office informed appellant of her need to submit medical evidence from her attending physician.

Dr. Kaplan submitted a January 2, 1981 work limitations form stating appellant was unable to return to work. He also submitted a letter stating that appellant had been under his care for the past week due to a recurrent back condition, with appellant's missed days of work attributed to his recommendations to avoid any strain to the spinal area.

By letter dated January 21, 1981, the Office informed appellant that her December 23, 1980 recurrence could not be accepted, as the original July 13, 1979 injury had been accepted as a back strain and the x-rays at that time did not reveal evidence of subluxation. The letter stated:

> "Your attending physician, a chiropractor, can provide care and state it is a recurrence only if the original condition was shown by x-ray to have resulted in a subluxation."

In a report dated January 16, 1981, Dr. Kaplan stated that subsequent to her recurrence of disability he treated appellant on December 24, 26, 31, and January 2, 5 and 12; he diagnosed lumbosacral strain, myofascitis, neurothelipsis and subluxation L3-L4, L5-S1 with treatment consisting of "chiropractic spinal manipulation."

Appellant submitted an April 22, 1981 report from Dr. Gary Berns, a chiropractor, who opined that hospital x-rays taken April 12, 1979 revealed subluxation of the lumbar spine and that Dr. Dennis' July 16, 1979 x-rays revealed the same subluxations, as did the July 9, 1980 x-rays done by Dr. Kaplan, a chiropractor. Dr. Berns noted:

> "Dr. Kaplan also took x-rays of the cervical spine in which hypolordosis of the cervical spine was revealed, which may have been induced by the original accident or by structural compensation resulting from the original accident. These views also revealed subluxation of the cervical spine.
>
> "In conclusion, the [appellant] did have radiographic evidence of chiropractic subluxation in the original views and follow ups. Also, it is my opinion that these could cause symptoms suffered by [appellant]."

A June 4, 1981 letter from the Office read as follows:

> "This case was accepted for a low back strain when a rest bar collapsed on July 13, 1979.
>
> "A recurrence was accepted for January 15, 1980.
>
> "A second recurrence was not accepted for an April 1980 (date not given) onset. Medical evidence submitted by employee's physician, a doctor of chiropractic, submitted x-ray interpretations showing subluxation to have been present. X-ray interpretations by a doctor of medicine with a speciality in orthopedics, who saw the employee on July 16, 1979, failed to show any abnormality. The District Medical Director was asked to review the evidence of record and on doing so stated no subluxation was present as of July 16, 1979. Since subluxation was not established to have been present on July 16, 1979, a recurrence of disability due to subluxation could not be accepted as being present on April 1980 since it was not established to have been present originally.
>
> "A third recurrence has been received for December 23, 1980 and *was not* accepted.

vature with no fracture, contrary to the statement of Dr. Berns. The Office medical adviser who evaluated the case record opined it was reasonable to conclude that appellant did not have a subluxation as indicated by the chiropractors. The weight of the medical evidence was represented by these three reports.

Therefore, the opinions of Drs. Berns and Kaplan, under the circumstances present here do not constitute competent medical evidence to support a claim for compensation.[4]

The decision of the Office of Workers' Compensation Programs dated March 4, 1983 is hereby affirmed.

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[4] See *Thomas K. McKenna*, 30 ECAB 702; *Shirley A. Womack*, Docket No. 83-421 (issued March 30, 1983).

In the Matter of JACK R. LINDGREN *and* DEPARTMENT OF THE AIR FORCE, EDWARDS AIR FORCE BASE, Calif.

Docket No. 84-226; Submitted on the Record;
Issued March 9, 1984

Before GEORGE E. RIVERS, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellant has more than a 23 percent hearing loss in his right ear for which he received a schedule award.

Appellant, a 51-year-old former firefighter, filed a claim for hearing loss received May 19, 1981 by the Office of Workers' Compensation Programs.

Records submitted by the employing establishment, showed that appellant was exposed to hazardous noise levels in his employment. Copies of hearing conservation reports and employment audiograms conducted at the employing establishment between November 1967 and January 18, 1978 were also submitted to the Office.

On June 30, 1981 appellant had audiometric testing prepared for and an examination by Dr. George D. Chonkich, a Board-certified otolaryngologist. In his July 2, 1981 report, Dr. Chonkich stated:

> "Both audiograms [the June 30, 1981 audiogram and a June 12, 1980 audiogram prepared by Rodney R. Rowley, an audiologist] are consistent with a bilateral high frequency hearing loss. The low frequency component to the hearing loss in the right ear, I believe, is secondary to past history of ear infection and is not related to the noise exposure on the [appellant's] job . . . I feel that the bilateral high frequency loss is a noise-induced hearing loss and is related to

the [appellant's] noise exposure during the period of time between 1968 and 1979."

On referral by the Office, Dr. Chonkich reexamined appellant and stated in an October 12, 1982 letter, that the August 17, 1982 audiogram was "essentially unchanged" from the one conducted on June 30, 1981, except for a decrease in speech discrimination from 100 percent bilaterally to 84 percent in the right ear and 92 percent in the left. Dr. Chonkich affirmed his July 2, 1981 opinion which stated that appellant's bilateral high frequency sensorineural hearing loss was related to noise exposure and the low frequency or conductive component of the right ear hearing loss was related to a prior ear infection. Dr. Chonkich recommended a hearing aid evaluation.

The Office referred the case record to its medical consultant Dr. Schindler, a Board-certified otolaryngologist, who stated the following in his January 21, 1983 report:

> "When comparing this audiogram [August 17, 1982] with audiograms prior to claimant's employment, he is noted to have a slight reduction in his hearing in his left ear . . . This would tend to indicate that the claimant's hearing has in fact been affected, at least in his good ear, from noise exposure and then one must surmise that if it is affecting the good ear, it would also be affecting the bad ear.
>
> "It is therefore my conclusion that [appellant's] right ear, though it has had previous disease and medical problems with it, has been affected adversely by exposure to hazardous noise. Unfortunately, we do not have 3,000 cycle per second testing on this [appellant] and require that in order to calculate schedule awards."

On February 1, 1983 appellant was rereferred to Dr. Chonkich for audiometric testing to measure hearing ability at frequencies of 1000, 2000, and 3000 cycles per second. An audiogram was performed on March 9, 1983.

In a June 14, 1983 letter, Dr. Schindler stated that he had reviewed the March 9, 1983 audiogram and found appellant had sustained a 22.5 percent hearing loss in the right ear and a zero percent loss in the left. By applying the Office's standardized procedures for evaluating hearing loss in both ears, Dr. Schindler concluded appellant sustained a 22.5 percent right monaural loss. The date of maximum improvement was fixed as March 9, 1983, the date of appellant's last audiogram.

By compensation order dated October 7, 1983 the Office granted appellant a schedule award for 23 percent permanent right monaural hearing loss, entitling him to 11.96 weeks of compensation for the period from March 9, 1983 to May 31, 1983.

On appeal appellant contends that the amount of the award is inadequate because it was only paid from March 9, 1983 to May 31, 1983.

Appellant asserts that he is entitled to payment of compensation since May 1980 and he should continue to receive it. Appellant further contends the Office refused to authorize the trial purchase of a hearing aid recommended by Dr. Chonkich [1] and that the computation of his weekly wage was too low because he worked seventy-two hours each week.

The Office evaluates industrial hearing loss in accordance with the standards of the National Institute for Occupational Safety and Health, using the frequencies of 1,000, 2,000, and 3,000 cycles per second. These standards are found in Chapter 6 of *Occupational Exposure to Noise.*[2] Using these and other standards adopted by the Office and approved by the Board, the hearing loss in either ear must exceed an average at these frequencies of 25 decibels when the audiogram is based on an ISO-ANSI calibration, as was the case here, in order for there to be a compensable loss under the Federal Employees' Compensation Act. The first 25 decibels are discounted as having no significance with respect to the ability to hear everyday speech under everyday conditions.

The Board finds that the Office properly applied the approved procedures to the March 9, 1983 audiogram submitted by Dr. Chonkich. The evidence establishes that under these procedures, appellant has no more than a 23 percent right monaural hearing loss.

The schedule awards provision of the Federal Employees' Compensation Act[3] provides for compensation to employees sustaining permanent impairment from loss, or loss of use, of specified members of the body. The Act specifies the amount of compensation to be paid for particular impairments; the award for total (100 percent) loss of monaural hearing is 52 weeks of compensation. Less than total loss is compensated at a proportionate rate, so that for a 23 percent monaural hearing loss the award is 11.96 weeks, or 23 percent of 52 weeks. The Act requires the compensation to be based on an employee's "monthly pay"[4] which, in a case such as this, is "the monthly pay at the time of injury."[5]

The weekly compensation in a case such as this is determined by the employee's monthly rate of pay on the date of injury.[6] Where the injury was sustained over a period of time, as in this case, that date is the date of last exposure to the employment factors causing the injury. Here, the record shows the injury was sustained over a five-year period, ending on June 9, 1979. Appellant's weekly compensation under the award was based on his rate of pay on that date. Overtime pay is not included in determining appellant's weekly pay rate,[7] but his premium pay was included in the calculation.[8] The Board finds that the evidence shows that June 9, 1979 was appellant's date of last exposure and that the Office is correct in setting the appellant's rate of compensation under the award based on his salary on that date. The period of award is to commence with the date of maximum improvement.[9]

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[1] In an October 24, 1983 letter sent to appellant, the Office stated that appellant was authorized to purchase a hearing aid on a trial basis and could continue to wear it if the hearing aid improved his hearing.

[2] *Occupational Exposure to Noise*, published in 1972 by the U.S. Department of Health, Education and Welfare, Health Services and Mental Health Administration, National Institute for Occupational Safety and Health. The National Institute was established by section 7(a) of the Occupational Safety and Health Act, 84 Stat. 1597.

[3] 5 U.S.C. section 8101(4).

[4] As defined in 5 U.S.C. 8101(4).

[5] *James C. Baverly*, 31 ECAB 933; *Lyle S. Lane*, 30 ECAB 80; *Jasper Witherspoon*, 26 ECAB 344.

[6] *Jasper Witherspoon*, *supra*.

The "date of maximum improvement" is the point at which the injury has stabilized and will not improve further.[10] That determination is based on the medical evidence,[11] and the date is usually the date of the medical examination which determined the extent of the hearing loss.[12]

The Board finds that the Office was correct in finding March 9, 1983, the date of appellant's only audiogram after his last date of exposure, which included a 3,000 cycles per second measurement of his hearing ability, as the date of maximum improvement.

The decision of the Office of Workers' Compensation Programs dated October 7, 1983 is affirmed.

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[7] 5 U.S.C. section 8114(e).

[8] *Frederick Michael Benedict*, 27 ECAB 478; *John E. Crowder*, 32 ECAB 1838.

[9] *Jasper Witherspoon*, *supra*.

[10] *Marie J. Born*, 27 ECAB 623.

[11] *Ibid.*

[12] *Ibid.*

In the Matter of VIOLA M. MUNDY, claiming as natural guardian for the children of GEORGE SHULER *and* DEPARTMENT OF THE AIR FORCE, CIVIL AIR PATROL, Tucson, Ariz.

Docket No. 84–174; Submitted on the Record;
Issued March 9, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of a $12,092.33 overpayment of compensation.

On May 14, 1959 the employee, then a 34-year-old electrician, was killed in an airplane accident while engaged in an operational mission with the employing establishment. On May 18, 1959 appellant, widow of the deceased employee, filed a claim for death benefits with the Office of Workers' Compensation Programs (then the Bureau of Employees'

Compensation). By compensation order dated August 5, 1959 the Office accepted appellant's claim and advised her to notify it of any change in her status as a widow.

By letter dated January 16, 1961 appellant notified the Office of her forthcoming marriage on January 28, 1961 and requested that compensation benefits be paid to her as the natural guardian of her two children, Marian Kay Shuler born April 12, 1955 and John Alvan Shuler born August 3, 1957.

By compensation order dated February 27, 1961 the Office awarded compensation to appellant as natural guardian of Marian and John Shuler "the sum of $90.00 per month representing compensation on behalf of the Shuler minors share and share alike effective February 1, 1961 and thereafter continuing until they die, marry or reach the age of 18 or if over the age of 18 and incapable of self-support until they become capable of self-support." In a letter attached to the Office decision appellant was advised to notify the Office if the children should die, marry, reach the age of 18, or leave her custody and that any check that she received after the date of such occurrence must be returned to the Office. She was also instructed to periodically complete Office Form CA-12 for the purpose of claiming continuing compensation benefits on behalf of the children.

Appellant filed continuing claims for compensation and indicated in the Form CA-12 dated July 27, 1973 that Marian had turned 18 and on April 10, 1975 that Marian had married and was no longer in her custody. In the claim form filed May 5, 1976 appellant notified the Office that John had turned 18 and on July 17, 1977 that he had joined the navy and was no longer in her custody. For the years 1978 and 1979 appellant filed compensation claims despite the fact that Marian and John were no longer minors or in her custody. Payments of compensation were paid, however, to December 1, 1980.

By letter dated February 9, 1981 appellant was requested to provide further information to aid the Office in determining if either Marian or John were in a student status after reaching age 18 or were still dependent for support. Appellant submitted a letter dated June 5, 1981 which indicated that Marian had graduated from high school in June 1973.

On March 12, 1982 and April 14, 1982 the Office informed appellant that an overpayment of $12,092.33 had developed and a preliminary finding that she was not without fault in creating the overpayment because she "should have been aware that their entitlement had ceased at age 18 because the compensation order dated February 27, 1961 informed you that it would cease at age 18," and that the CA-12 sent in 1973 reminded her of the existence of age limitations on their entitlement. The Office informed appellant of her right to submit evidence on the matter of fault and on the amount of the overpayment declared and her right to a hearing on the matter.

On May 6, 1982 appellant responded that she should not be held at fault, stating that she had completed the CA-12 forms as requested and that she was not aware of the Office's February 27, 1961 compensation order.

By decision dated February 8, 1983 the Office found that appellant was not without fault in the creation of the $12,092.33 overpayment because she had been informed and should have been aware that her children's entitlement to benefits ceased at age 18.

By letter dated February 24, 1983 appellant stated that she should not be held at fault in that the payments that continued after Marian and John turned 18 made her believe that the "directives covering payments had been changed."

By decision dated July 28, 1983 the Office found appellant was not without fault in the creation of the $12,092.33 overpayment.

The Board finds that appellant was not without fault in the creation of the $12,092.33 overpayment.

Section 8129(b) of the Federal Employees' Compensation Act provides:

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [the Act] or would be against equity and good conscience."

It will be noted that, in order to qualify for this waiver, the recipient of an overpayment of compensation must be without fault.

In determining whether an individual is "without fault" what constitutes "fault" depends on whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[1]

In the present case it is apparent that the Office applied the third standard in finding her at fault in creating the overpayment. The evidence of record indicates that appellant was requested by the Office to submit information annually concerning her children's ages and their dependency status. Furthermore, she had been instructed by the Office to return any checks received after the date the children reached age 18 together with a full explanation of any change occurring in the children's status. Although appellant notified the Office that her children had eventually left her custody, she continued to apply for compensation on their behalf and did not return the checks as required after they reached age 18.

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[1] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2-claim.

The Office correctly determined that appellant was at fault when she continued to apply for and accept compensation benefits, knowing that her children were not entitled to them. Since appellant was not "without fault," the provision of section 8129(b), the waiver of overpayment, was not applicable.

The February 8, 1983 and July 28, 1983 decisions of the Office of Workers' Compensation Programs are affirmed.

In the Matter of MARY JEAN THOMAN, claiming as widow of RICHARD C. THOMAN *and* VETERANS ADMINISTRATION, REGIONAL OFFICE, Indianapolis, Ind.

Docket No. 84-25; Submitted on the Record;
Issued March 14, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its prior determination that the employee's death resulted from his employment, and if so, (2) whether the Office properly declined to waive the overpayment of compensation that was paid to appellant on account of the employee's death.

On the morning of January 10, 1973, the employee, a 56-year-old supervisory appraiser, awoke with chest pain. He was hospitalized and died four hours later. The death certificate reported the immediate cause of death as an acute myocardial infarction due to atherosclerotic heart disease.

Appellant, the employee's widow, filed a claim for death benefits alleging that the death resulted from employment stress. In a February 13, 1974 statement, she elaborated on the stressful aspects of the employee's work, noting in particular his difficulties with a new supervisor. Appellant also submitted a January 16, 1974 affidavit from the employee's co-worker in this regard.

The Office obtained the employee's medical and employment records. On the basis of this information, the Office prepared a statement of accepted facts which indicated that the employee had sustained a myocardial infarction June 15, 1964; that he was hospitalized from September 30, 1969 to October 7, 1969 for arteriosclerotic heart disease, hiatus hernia, and essential hypertension; that in September 1970 a new division chief was assigned to the employee's division; that this division chief created a stressful work environment; that the employee was hospitalized in March 1971 for a ruptured abdominal aneurysm and was off work until May 5, 1971; that the employee came under "intense pressure" from the new division chief to increase production from the staff; that he sustained a second myocardial infarction on October 20, 1972 and was off work until January 8, 1973, when he resumed a heavy workload; and that he worked two days until his fatal myocardial infarction on January 10, 1973.

On June 17, 1975, the Office's medical director reviewed the statement of accepted facts and the case record. He opined that the employee's death was accelerated "due to job stress and pressure."

On June 23, 1975, the Office informed appellant that it had determined that the employee's death "was causally related to the stress and pressures of his employment" and that she was entitled to elect benefits under the Federal Employees' Compensation Act. On July 1, 1975, she elected these benefits over those of the Civil Service Retirement Act. The Office awarded her death benefits retroactive to the employee's death.

On January 29, 1981, an Office medical adviser reviewed the case record. He stated that while stress did not cause coronary artery disease, the employee "returned to a stressful work situation within 6 weeks[1] of suffering a second complicated myocardial infarction . . ." He opined that the employee's third and fatal myocardial infarction "was probably related to too much stress too soon."

The Office referred the employee's medical records, background information, and a statement of accepted facts to Dr. Irving D. Fagin, a Board-certified cardiologist of professorial rank. In a report dated February 19, 1981, Dr. Fagin noted that the employee had hypertension and a history of cigarette smoking, which were two factors predisposing an individual to the development and progression of coronary artery disease. Dr Fagin further stated that the influence of chronic stress as a factor in coronary atherosclerosis was "highly tenuous." He opined that the occupational stress the employee experienced "did not play a material role in causation, acceleration, or aggravation" of his heart disease and did not "materially contribute to his death from heart disease." He reiterated that:

"[I]t is my opinion there is not significant causal relationship be-

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[1] Actually, his return to work was closer to eleven weeks after his second myocardial infarction.

> tween Mr. Thoman's occupation and the heart disease that he had which ultimately killed him."

A second Office medical adviser reviewed the case record and stated that there was "no scientific evidence that stress causes coronary artery disease."

The Office referred the case record and a statement of accepted facts to Dr. Howard E. Rowan, a Board-certified cardiologist of professorial rank. After reviewing this information, Dr. Rowan opined:

> "While it is possible that the stress may aggravate or accelerate the development of arteriosclerosis and while it is possible that intense stress applied to an individual with underlying arteriosclerotic heart disease could cause a significant increase in cardiac work which might precipitate coronary ischemia, those factors do not appear to be operational in Mr. Thoman's case. As stated above, the perceived stress was clearly late in the course of his disease after the disease process had become manifest and, secondly, his final myocardial infarction was clearly not precipitated by acute job stress in that it occurred in the middle of the night, waking him from a sound sleep.
>
> "There are unknown factors in regard to the development of Mr. Thoman's arteriosclerotic process. We know nothing of his heredity and no details as to his base-line lipids. We do know that he suffered from some variety of high blood pressure and a documented long-standing cigarette smoking habit which persisted through two heart attacks and an abdominal aneurysm repair. We also must consider his age of 57[2] to be a risk factor in the development of his disease process. Although certainly not elderly, 57 years of age can be considered a risk factor for arteriosclerotic cardiovascular disease.
>
> "In summary, Mr. Thoman had a disease process which can be accounted for on the basis of known phenomena, none of which include his occupation as being a factor in his disease process. Specifically, there is no reason to implicate his job situation as causing, precipitating, aggravating or influencing the progress of his illness."

On June 30, 1983, the Office rescinded its determination that the employee's death was employment related and terminated appellant's compensation.

On August 3, 1983, the Office made a preliminary finding of a $131,639.11 overpayment of compensation as "All payments made under Federal Compensation have been in error." The Office found that appellant was without fault in the creation of the overpayment; it explained to her the provision regarding waiver of overpayments and informed her of her right to a prerecoupment hearing. In response, appellant submitted financial information to the Office and argued that the overpayment of compensation should be waived. On September 12, 1983, the Office denied waiver.

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[2] Apparently, age 56.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where, as here, the Office later decided that it had erroneously accepted the claim.[3]

The Board finds that the Office failed to meet its burden of establishing that the employee's death did not result from his employment.

Based upon uncontroverted medical evidence from the Office's medical director, the Office determined on June 23, 1975 that the employee's January 10, 1973 death was employment related; it awarded appellant death benefits for over ten years until it rescinded this determination on June 30, 1983. In reopening the case, the Office sought the opinion of the first Office medical adviser. He supported the claim, stating that although stress did not cause heart disease, he believed that in this instance employment stress precipitated the fatal myocardial infarction.

The Office then obtained the opinion of Dr. Fagin, a Board-certified cardiologist of professorial rank. However, Dr. Fagin did not address the central issue of whether employment stress precipitated the fatal myocardial infarction. Dr. Fagin opined that there was no relationship between Mr. Thoman's occupation and the heart disease that . . . ultimately killed him." In so stating, Dr. Fagin seemed to be expressing the opinion, shared by the first medical adviser, that employment stress did not cause the employee's heart condition. However, Dr. Fagin did not address the crucial issue of whether employment stress, superimposed on the underlying heart condition, precipitated the fatal myocardial infarction. The second Office medical adviser apparently interpreted Dr. Fagin's report as referring only to the cause of the heart disease. After reviewing the record, the second Office medical adviser commented that he concurred with Dr. Fagin and that there was "no scientific evidence that stress causes coronary artery disease." As Dr. Fagin did not address this central issue, his opinion did not support the Office in terminating appellant's death benefits.

The Office then referred the case record to Dr. Rowan, a Board-certified cardiologist of professorial rank. Although Dr. Rowan concurred with the opinions of the first Office medical adviser and Dr. Fagin that employment stress did not cause the employee's heart disease, he was the only physician to express the opinion that this stress did not precipitate the fatal event. His opinion is insufficient to establish that the employee's death did not result from factors of his employment because his sole rationale was that the myocardial infarction occurred in the middle of the night.

The June 30, 1983 decision of the Office of Workers' Compensation

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[3] *James Cash, Jr.*, 31 ECAB 1110.

Programs, which terminated appellant's death benefits, is reversed. Accordingly, the September 12, 1983 decision, which ordered recoupment of all compensation paid on account of the employee's death, is set aside.

In the Matter of AARON CRENSHAW *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84-244; Submitted on the Record;
Issued March 16, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant's employment-related exposure to asbestos caused a disabling pulmonary condition or a permanent impairment of his lungs.

On May 15, 1981 appellant, then a 45-year-old shipfitter, filed a claim for asbestosis which he attributed to his exposure to asbestos in his federal employment.

The employing establishment submitted copies of chest x-rays made from November 7, 1967 to January 1981, of pulmonary function studies done from August 5, 1976 to January 21, 1981, and of questionnaires completed by appellant regarding his smoking history and symptoms.

In a January 13, 1981 report Dr. Reuben R. Merliss, a Board-certified internist, set forth appellant's history, symptoms, and findings of a pulmonary function study. Dr. Merliss stated that appellant's diffusion capacity was 50 percent of normal and that a chest x-ray showed pleural asbestosis and a question of parenchymal asbestosis. Dr. Merliss concluded:

> "All in all this patient's pulmonary functions and his diffusion capacity and x-ray findings indicate a classification of two or a little greater. On the other hand his exercise tolerance is quite good, and I expect that an American Medical Association classification of two would be just about right for this patient. Therefore as a result of asbestosis, predominantly pleural, this patient has suffered lung injury great enough to put him in classification II of the American Medical Association classification of pulmonary disability."

On July 7, 1982 the Office of Workers' Compensation Programs referred appellant, with a statement of accepted facts, to Dr. Oscar R.

Scherer, who is Board-certified in pulmonary diseases. Dr. Scherer submitted an October 1, 1982 report which included results of pulmonary function studies, a diffusing capacity test, arterial blood gas testing, and a pulmonary exercise stress test. Also included was a September 1, 1982 report from Dr. Edward Drasin, a Board-certified radiologist, stating that a chest x-ray made that date showed bilateral pleural plaques but no parenchymal abnormalities consistent with pneumoconiosis. In his October 1, 1982 report Dr. Scherer, after setting forth appellant's history and symptoms, concluded:

> "The patient has bilateral pleural plaques which resulted from his exposure to asbestos while in federal civilian employment. These plaques would in no way be expected to cause any pulmonary limitation. There is no radiologic evidence for interstitial pulmonary fibrosis and the pulmonary function studies are probably normal except for small airway obstruction which has not definitely been shown to be related to asbestos exposure. His limitation on exercise is from cardiovascular limitation without pulmonary abnormalities or a pulmonary limitation reached.
>
> "The patient should have no further exposure to asbestos. He should see his private physician at Kaiser Hospital for further evaluation for mild cardiomegaly and continued observation of his blood pressure. He should have serial observation of his total lung capacity and chest x-rays and should not resume cigarette smoking."

In a January 26, 1983 report Dr. Judd Shellito, who is Board-certified in pulmonary diseases and who reviewed the case record as an Office medical consultant in this case, stated:

> "The diagnosis is established as asbestos exposure with evidence of pleural plaques on chest x-ray. There is insufficient evidence to support a diagnosis of perenchymal asbestosis in the face of a normal physical exam, normal lung markings on chest x-ray, normal spirometry, and normal total lung capacity, a well-preserved diffusing capacity, and an exercise evaluation showing no ventilatory limitation to exercise."

Dr. Shellito concluded that appellant was not disabled for his regular position by disease resulting from asbestos exposure, and that appellant's percentage of respiratory impairment was zero, applying the American Medical Association's *Guides to the Evaluation of Permanent Impairment* to Dr. Scherer's findings. In a May 5, 1983 report Dr. Shellito stated:

> "Specific additional information is requested regarding a comparison of two medical evaluations of the claimant; the first from Dr. R. Merliss dated January 13, 1981, and the second from a pulmonary

"Subsequently, a formal claim has been received for compensation due to the above recurrences and for payment of chiropractic services. Following this, additional medical evidence has been received including an interpretation of x-ray films made at Parkway General Hospital on April 12, 1979. Our files do not contain a copy of this film and its interpretation. I am therefore requesting that you submit a copy of the interpretation of all x-rays made of the lumbosacral spine at Parkway General Hospital on April 12, 1981 and April 13, 1981. To aid in your response, enclosed is a copy of the Emergency Room Records we have of [appellant's] admission on April 13, 1981.

"On receipt of the above, I will be in further contact with you. There is no conflict in our paying for chiropractic services, i.e., manual manipulation, if subluxation is demonstrated by x-ray to exist. However subluxation is not mentioned according to our records until April 1980 on a claim of recurrence of disability when on injuries of October 12, 1978, March 29, 1979, April 13, 1979, and July 13, 1979 subluxation is not mentioned."

The report of April 3, 1979 x-rays dated April 13, 1979 were then submitted. Dr. Sanford I. Robbins stated there was slight straightening of the lumbar curvature but that no fracture was seen.

By compensation order dated August 4, 1981, the Office denied appellant's claim on the ground that the medical evidence was not sufficient to establish that the disability after January 15, 1980 was causally related to the injury on July 13, 1979.

Appellant's representative requested a hearing, which was held on February 22, 1982. By decision dated June 9, 1982, the hearing representative denied appellant's claim, finding that the weight of the medical evidence rested with the opinions of a Board-certified specialist, Dr. Cohen, a Board-certified radiologist, who found no evidence of a subluxation on the date of injury.

Appellant appealed to the Board, which on October 8, 1982 remanded the case for this reason:

> "[A]ppellant is requesting authorization for continued treatment by her chiropractor. There is no indication in the case record that treatment by Dr. Kaplan has been authorized by the Office. In a letter dated October 17, 1980 the Office informed appellant's attorney that a change in physicians had not been authorized. However, the June 9, 1982 decision did not touch on the issue of authorization. Consequently the case will be remanded for a decision on this aspect of the case. In order to preserve appellant's right of appeal the June 9, 1982 decision is set aside to await further proceedings by the Office on remand to be followed by a *de novo* decision." [1]

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[1] Docket No. 82-1853.

By compensation order dated March 4, 1983 the Office again denied appellant's claim on the ground that there was no indication in the July 16, 1979 report from the attending physician that a subluxation existed as a result of the July 13, 1979 injury and that the injury did not cause disability commencing December 23, 1980. In the memorandum accompanying the decision, it was stated that "A chiropractic physician, Stuart Kaplan, advised the Office on August 7, 1980 that he was treating [appellant]." The Office advised Ms. Herman on 10/30/80 that chiropractic care was limited to manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. The memorandum also stated: "The records show that Dr. Robert Ennis was the treating physician and that Dr. Kaplan the chiropractic was not authorized to treat Ms. Herman. The claimant filed a recurrence of disability form CA-2a stating a recurrence had occurred on 12/23/80. The information in item 19 of the form Ca-2a describes an aggravation of a preexisting condition and not a recurrence as stated. The claimant's statement, dated 1/12/81 further supports an aggravation of a preexisting condition."

The Board finds that the Office properly denied appellant reimbursement for unauthorized chiropractic treatment.

The Office is required by 5 U.S.C. 8103 to provide all medical care necessary as a result of an employment injury. It is further provided that this care shall be furnished by or on the order of physicians designated or approved by the Office. In the absence of an emergency, an employee may not recover for the cost of medical care obtained without prior approval.[2] There is nothing in the case record to indicate that the Office authorized treatment by Dr. Kaplan.

With respect to the issue of whether appellant's alleged December 23, 1980 recurrence was causally related to her July 13, 1979 injury, the Board finds that she has not established that the recurrence was so related. The only evidence in this case concerning the recurrence was the reports of the two chiropractors, Drs. Berns and Kaplan.

Section 8101(2) of the Federal Employees' Compensation Act provides that a chiropractor is a "physician . . . only to the extent that [his] reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . ."[3]

Dr. Cohen, a Board-certified radiologist, and Dr. Drucker, a Board-certified orthopedic surgeon, did not find any spinal subluxation. Dr. Cohen concluded in this July 13, 1979 x-ray report that appellant's lumbosacral spine was normal. Dr. Drucker stated that x-rays failed to reveal any bony abnormality. In addition, the report of the April 1979 x-rays stated there was only a slight straightening of the lumbar cur-

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[2] *Alfred Schreiber*, 23 ECAB 235; *Richard Bowen*, 33 ECAB 1015; Mildred A. Lindall, 35 ECAB 287.

[3] 5 U.S.C. section 8101(2).

> specialist, Dr. O. Scherer, dated October 1, 1982. Pulmonary function testing obtained through Dr. Merliss showed normal spirometry and a normal total lung capacity. The diffusing capacity was said to be decreased at 19.1 The chest x-ray showed bilateral pleural plaques. The lung markings were normal. Dr. Scherer also found normal spirometry and normal total lung capacity. The diffusing capacity obtained through Dr. Scherer was within normal limits at 99% of predicted. In addition, Dr. Scherer performed a noninvasive exercise pulmonary evaluation which showed no ventilatory limitation to exercise. The chest x-ray obtained through Dr. Scherer also showed bilateral pleural plaques with normal lung markings.
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> "The two reports are not in conflict with each other. It is accepted by both physicians that there is asbestos-related pleural abnormality on chest x-ray. Dr. Merliss incorrectly considers this a cause of respiratory impairment. The only possible point of conflict is the difference in diffusing capacities obtained through the two physicians. In this regard priority must go to the most current and normal value. Asbestos-related diffusion impairment would not be expected to resolve to normal with time. * * * The normal exercise pulmonary evaluation obtained through Dr. Scherer provides a more comprehensive evaluation of the claimant than that of Dr. Merliss, and speaks strongly against any underlying interstitial pulmonary disease.
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> "In conclusion, I find no objective evidence to change my findings reported on January 26, 1983."

By a decision dated September 8, 1983 the Office found that appellant had sustained pulmonary injury consistent with employment-related exposure to asbestos, but that there was no evidence of disability or of impairment using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. The Office authorized periodic medical examinations at the Office's expense.

The Board finds that appellant does not have a disabling pulmonary condition causally related to his exposure to asbestos at work.

There is no medical evidence that appellant's employment-related asbestos exposure caused a disabling pulmonary condition. Appellant continued to work following the filing of his claim, no physician stated he was disabled, and Dr. Shellito concluded that he was not disabled.

The Board finds that the case is not in posture for a decision as to whether appellant has permanent impairment of his lungs causally related to his asbestos exposure at work which would entitle him to a schedule award.

The American Medical Association's *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office and approved by the Board as an appropriate standard for evaluating schedule losses under the Federal Employees' Compensation Act. Dr. Shellito adequately explained why he applied the AMA's *Guides* to the findings of Dr. Scherer rather than to those of Dr. Merliss, stating that Dr. Scherer's inclusion of a normal exercise study[1] provided a more comprehensive evaluation and spoke strongly against underlying interstitial pulmonary disease. Dr. Shellito further stated that the only possible point of conflict between the two doctors was the difference in diffusing capacities, and that priority had to be accorded to the later and normal value (from Dr. Scherer), as an asbestos-related diffusion impairment would not be expected to resolve to normal with time.

Dr. Shellito, however, did not adequately explain how application of the AMA *Guides* resulted in his conclusion that appellant had a class 1, zero percent impairment. In particular, Dr. Shellito did not specifically address the finding in Dr. Scherer's pulmonary function testing of an FVC of 81 percent of predicted, in light of the table in the AMA *Guides* which appear to indicate that the FVC [Forced Vital Capacity] for a class 1, zero percent impairment should not be less than 85 percent of predicted.

The decision of the Office of Workers' Compensation Programs dated September 8, 1983 is hereby affirmed insofar as it determined that appellant did not have a disabling pulmonary condition. Insofar as it determined that appellant's exposure to asbestos at work did not cause a permanent impairment of his lungs, the Office's decision is set aside and the case remanded to the Office for further development to correct the deficiency noted above, to be followed by a *de novo* decision on this aspect of the case.

In the Matter of Rocco A. Ranaudo *and* New York City Police Department, Brooklyn, N. Y.

Docket No. 83–1159; Hearing held February 24, 1984;
Issued March 21, 1984

Appearances: *John J. Maguire, Esq.* and *Rocco Ranaudo* for appellant; *Daniel T. Franklin, Esq.* for the Director, Office of Workers' Compensation Programs.

Before E. Gerald Lamboley, Margaret Pallansch, Michele von Kelsch

The issue is whether the injury sustained by appellant, a local police officer, came within the provisions of the Federal Employees' Compensation Act authorizing the payment of benefits, under certain conditions, to local law enforcement officers.

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[1] It should be noted that the guidelines established by the Office for the evaluation of disability in asbestos-related claims include exercise test results as being relevant in such a determination. See Federal (FECA) Procedure Manual Chapter 2-806, FECA Tr. No. 81-44, issued August 1981, p. 60.

On October 1, 1978 appellant, then a 37-year-old police officer, sustained a lumbosacral and cervical back injury while in the performance of duty. The case record shows that on that date appellant approached an idling motor vehicle where the driver appeared to be asleep behind the wheel. When appellant reached in the automobile and attempted to turn the ignition key off the operator of the vehicle (Jean Mariot Richemond) grabbed his arm and accelerated the vehicle, at which time appellant flipped his left leg over the hood. After travelling approximately 100 feet, the automobile hit a curb and came to a stop. Appellant subsequently arrested the vehicle operator for driving while intoxicated and reckless endangerment. Appellant discovered at the precinct station that the vehicle operator was an illegal alien and completed the arrest sheet to bring this to the attention of the U. S. Immigration and Naturalization Service.

In support of appellant's contention that Richemond was sought by immigration authorities as an illegal alien at the time of his October 1, 1978 arrest, appellant submitted the following January 4, 1982 statement from the New York district director of the Immigration and Naturalization Service (INS):

> "Reference is made to your request under the Freedom of Information Act for information from the records of the Immigration and Naturalization Service concerning the status of Jean Mariot Richemond.
>
> "Please be advised that our records reflect that the above-named subject entered the United States without inspection on or about January 10, 1977, at the port of New York. The subject remained in the United States without authority and was granted permission to remain in the United States on March 26, 1980 pending a visa petition filed in his behalf. Subject entered the United States as a lawful permanent resident on June 30, 1981 at the port of Champlain, New York."

By compensation order dated February 22, 1982 the Office of Workers' Compensation Program rejected appellant's claim for compensation under the Federal Employees' Compensation Act on the ground that he was not covered by 5 U.S.C. section 8191[1] at the time of his injury. In an attached memorandum, the Office pointed out that "although it is a Federal crime to be in the United States without inspection, Officer Ranaudo was not on that occasion, in the act of apprehending or attempting to apprehend a person for the commission of a crime against the United States as enumerated in 5 U.S.C. 8191."

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[1] An individual is covered under 5 U.S.C. 8191 et seq. when on a given occasion he/she is:

"1. A law enforcement officer and to have been engaged on that occasion in the apprehension or attempted apprehension of any person . . .

A. for the commission of crime against the United States, or

B. who at that time was sought by a law enforcement authority of the United States for the commission of a crime against the United States, or

C. who at that time was sought as a material witness in a criminal proceeding instituted by the United States; or

"2. A law enforcement officer and to have been engaged on that occasion in protecting or guarding a person held for the commission of a crime against the United States or as a material witness in connection which such a crime; or

"3. A law enforcement officer and to have been engaged on that occasion in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States."

Appellant requested a hearing before an Office hearing representative which was held on November 16, 1982. In a decision dated January 14, 1983 the hearing representative affirmed the Office's earlier decision on the ground that at the time of his injury appellant was not engaged in the apprehension of a Federal offender so as to bring him within the scope of section 8191.

The Board finds that the evidence does not establish that appellant was engaged in the apprehension or attempted apprehension of a federal offender at the time of his injury so as to bring him under section 8191. At the time of his injury, appellant was engaged in a local police matter, investigation of a possible traffic violation. It was only information later developed by the police department that the person arrested by appellant was determined to be a possible federal offender. In similar situations, the Board has held that later discovery of a federal crime or potential federal crime arising out of local activity during which a police officer was injured does not in itself bring the injury within the scope of section 8191.[2]

The Board also finds that there is no evidence of record which establishes that at the time of his injury appellant was engaged in the apprehension of a person "who at that time was sought by a law enforcement authority of the United States for the commission of a crime against the United States" as set forth by section 8191(1)(B). The January 4, 1982 statement from the INS does not acknowledge that the agency knew as of January 10, 1977 that Mr. Richemond, the person arrested by appellant on October 1, 1978, was in violation of federal law.

The decision of the Office of Workers' Compensation Programs dated January 14, 1983 is hereby affirmed.

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[2] *Edward L. Jackson*, 31 ECAB 550; *Angel F. Poggi*, 28 ECAB 199; *Michael B. McKeon*, 28 ECAB 8.

In the Matter of Robert N. Vachon *and* Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N. H.

Docket No. 84–458; Submitted on the Record;
Issued March 22, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issues are (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of an overpayment and that the overpayment was therefore not subject to waiver; and (2) if appellant was not without fault, whether the Office properly ordered him to pay $200.00 every month for the purpose of recovering the overpayment.

Appellant, a 59-year-old electric welder, filed a claim on September 11, 1973 alleging that he sustained a hearing loss due to his exposure to hazardous noise during the course of his federal employment from which he was separated on May 27, 1972.

By decision dated March 21, 1974 the Office granted appellant a schedule award for a 48 percent binaural hearing loss entitling him to 96 weeks of compensation covering the period of October 24, 1973 to August 26, 1975.

An Office memorandum dated April 14, 1980 indicates that on that date appellant and his son requested to speak to a claims examiner regarding "future entitlement to compensation."

The Office determined that since appellant's schedule award was to end on August 26, 1975 and he continued to be paid to March 26, 1980, there was an overpayment of compensation in the amount of $47,121.22. By letter dated August 15, 1980 the Office informed appellant of this overpayment and asked him to provide an explanation as to why he was not at fault in the creation of it and if he was not, why its recovery would defeat the purpose of the law or would be against equity and good conscience.

In an August 28, 1980 response appellant's attorney contended that appellant was not at fault in the creation of the overpayment for the following reason:

> "At the time [appellant] began to receive benefits, he was not aware that same was to end 96 weeks of compensation. When his award for compensation was received, it was apparently opened and filed by his wife, as she handled all family financial and other related matters at that time. [Appellant's wife] suffered a cardiovascular accident in October of 1979, and as a result thereof, became totally disabled. Thereafter, [appellant] had to assume all responsibility for family financial and other related matters. While going through his wife's files, in early April, 1980, he discovered his award for compensation and first learned that it should have terminated almost five years ealier. He and his son immediately went to your office in Boston, reported the problem, and had the payments stopped."

In an affidavit, sworn to by appellant on September 30, 1980, appellant's attorney reiterated his contention that appellant was not at fault in the creation of the overpayment:

> "In early April, 1980, while going through his wife's files, he discovered a form entitled, 'Award of Compensation' dated March 21, 1974. To the best of his recollection, this is the first time that he had ever seen said form and became aware of the fact that his compensation was to have ended after 96 weeks thereof. It is his belief that when the form was received, the envelope in which it was mailed was opened by his wife and subsequently filed by her without apprising him of the contents thereof as such had been her normal procedure during the course of their marriage up until the time of the October 4, 1979, CVA [cardiovascular accident] when he began to take care of all family business and financial matters. He did not have the time to begin going through the files earlier because of the demands on his time which his wife's illness created, until January 12, 1980 when she entered the extended care facility.
>
> "Immediately after he became aware of the fact that his compensation should have terminated almost five years earlier, he and his son Kevin, went to the Office of Workers' Compensation Programs in Boston and reported the problem."

By letter decision dated October 15, 1982 the Office found that appellant was at fault in the creation of the overpayment of $47,121.22.

At appellant's request a hearing was held before an Office hearing representative on May 3, 1983. At the hearing appellant stated that his wife used to open all of the mail at the time he received his schedule award. He had no recollection of having seen the award himself or of his wife having shown it to him. He stated that his wife gave him the checks from the schedule award to deposit but that none of them indicated how long the schedule award was to be paid. Appellant thought he would be receiving compensation indefinitely. He did not realize that the schedule award payments were supposed to have ended until his wife entered a nursing home in early 1980 and he went through her papers and saw the notice of the schedule award indicating the length of time it was to run. He also stated that before she became ill his wife would place the important mail on his bureau for him to see but that in this case he does not remember seeing the copy of the schedule award.

Appellant submitted a financial affidavit dated May 3, 1983 which indicated that his assets totalled $64,335.29 ($46,700 of which included his home, automobile and pickup truck, $3,818.81 in savings accounts, $10,910.51 in certificates of deposit and $2,905.97 in life insurance policies) that his monthly expenses totalled $1,066.44, and that his monthly income totalled $1,173.90.

By decision dated August 24, 1983 the hearing representative found that appellant was at fault in the creation of the $4,121.22 overpayment. As to how the overpayment was to be collected he stated as follows:

> "Taking into consideration the amount of the overpayment and the financial status of the claimant, it is found that $200.00 per month is appropriate. Financial information in the case file record shows the claimant's total monthly income to be $1,173.90. His total monthly expenses are $1,066.44. In addition claimant has a savings account balance of $3,818.81 and $10,910.51 in certificates of deposit. Repayment of $200.00 per month would not create a financial hardship."

The Board finds that the Office properly determined that appellant was not without fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act provides that "Adjustment or recovery by the United States may not be made when incorrect payment his been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[1]

A determination of "fault" depends on whether the facts show that the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[2]

In the present case appellant contended that he had no knowledge that his schedule award payments were to end on August 26, 1975 because he did not see the Office's March 21, 1974 decision granting the schedule award, which contained this information, until sometime in April 1980 when he went through his wife's papers. Up until the time his wife became ill toward the end of 1979, she would open all of the mail coming into their home. The Board notes however, that the schedule award was addressed and mailed directly to appellant, who deposited the monthly checks of compensation he received. He reasonably should have known that the schedule award was to have ended on August 26, 1975 and that he was not entitled to any compensation thereafter. Appellant was not without fault within the meaning of section 8129(b) in the creation of the overpayment.[3]

The Board further finds that the Office acted improperly in directing appellant to pay $200.00 each month for the purpose of recovering the overpayment.

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[1] 5 U.S.C. section 8129(b).

[2] Pursuant to *Califano v. Yamasaki*, 422 U. S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2807, Developing and Monitoring Payments, Part 2-claims. See *Wanda L. Brown*, 33 ECAB 1133.

[3] See *James Lewis*, 31 ECAB 868 and 34 ECAB 121.

The Board notes that the Office hearing representative, after pointing out that appellant's monthly income exceeded his monthly expenses by only $107.35 and that his assets in savings accounts and certificates of deposit totalled $14,729.32, concluded that paying $200.00 a month toward the recovery of the overpayment would not create a financial hardship upon appellant. However, the hearing representative provided no reasoning for this conclusion.[4]

The Office should therefore reconsider the amount of money appellant will be required to pay each month. In determining that monthly payment, the Office should take into account the financial status of appellant and should explain why collecting that particular amount would not cause him any undue financial hardship.

The August 24, 1983 decision of the Office of Workers' Compensation Programs hearing representative is affirmed insofar as it found that appellant was not without fault in the creation of the overpayment. Insofar as it directed him to pay $200.00 a month in order to recover the overpayment the August 24, 1983 decision is hereby set aside and the case is remanded for further action in accordance with this decision, to be followed by a *de novo* decision.

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[4] See *Wilbur Lee Bressie*, 33 ECAB 6.

In the Matter of JAMES E. JOHNSON *and* U. S. POSTAL SERVICE, POST OFFICE, Baltimore, Md.

Docket No. 84–169; Submitted on the Record;
Issued March 23, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issues are: (1) whether appellant was in the performance of duty when he was injured on December 14, 1975 while driving a truck belonging to the employing establishment, and (2) whether the Office of Workers' Compensation Programs hearing representative properly determined that an overpayment of compensation in the amount of $24,408.96 was not subject to waiver and was therefore recoverable by the Office at the rate of $50.00 per month.

On March 17, 1976 appellant, then a 30-year-old part-time flexible letter carrier, filed a claim alleging that he sustained a possible hairline fracture of his right hand on December 14, 1975 when he was involved in a traffic accident. He stopped work on January 7, 1976. Appellant's supervisor stated on the reverse of the claim form that the injury had been sustained while in the performance of duty.

In a March 23, 1976 letter to the Office of Workers' Compensation Programs, the employing establishment controverted appellant's claim and stated that appellant "had deviated from his route and that he was not in the performance of his duty at the time of the accident." The employment establishment also reported that appellant "did not seek medical attention until January 6, 1976, at which time he reported to the medical unit at the post office."

Appellant submitted medical evidence in support of his claim and returned to work on an intermittent basis on April 26, 1976. In an April 27, 1976 disciplinary action the employing establishment suspended appellant for 30 days on the ground that he had deviated from his assigned route when he was injured on December 14, 1975.

On May 3, 1976 the Office determined that appellant had sustained a right wrist sprain on December 14, 1975 and authorized the payment of compensation for temporary total disability and medical benefits. He received compensation for intermittent periods of disability from February 21, 1976 through September 23, 1976. Appellant returned to work on September 24, 1976.

On April 14, 1977 appellant stopped work. He subsequently claimed a recurrence of disability due to his December 14, 1975 traffic accident and sought treatment for his hand from his attending physician, Dr. Homer C. House, a Board-certified orthopedic surgeon of professorial rank. In a June 13, 1977 report on an Office form Dr. House noted that he had performed an "exploration, external neurolysis, superficial radial nerve, and exploration and arthrodesis, second carpal metacarpal joint, right hand" on April 18, 1977. He diagnosed "dorsi-flexion impaction injury to right dominant hand" and causally related appellant's disability to the December 14, 1975 injury.

On June 20, 1977 the Office determined that appellant had sustained an April 14, 1977 recurrence of his December 14, 1975 wrist condition and authorized the payment of compensation for temporary total disability and medical benefits. He received compensation from April 14, 1977 through August 12, 1977, and returned to light-duty work on August 13, 1977.

On November 14, 1977 appellant stopped work as no light-duty work was available at the employing establishment. He subsequently claimed a recurrence of disability beginning November 14, 1977, and began receiving compensation for temporary total disability effective November 14, 1977.

In an April 7, 1978 response to an Office request for a current evaluation, Dr. House related the findings of his April 3, 1978 examination.

He concluded that appellant's "strength in the right hand will continue to improve as he realizes that his hand is fully recovered and I further estimate that he will have no residual disability as a result of his injury." Appellant returned to work on May 15, 1978.

On September 21, 1978 Dr. Allan H. Macht, a Board-certified surgeon, submitted a report in which he related that appellant "has difficulty using his right hand." Dr. Macht noted a prior 1970 right hand injury and concluded that appellant "continues response weakness to have pain and discomfort in the area of the scar on the dorsum of the right hand with weakness in the right hand. He now has an overall 40 percent permanent partial disability of his right hand including the previous injury to this hand in 1970." In an April 17, 1979 report an Office medical adviser concluded that appellant had a 40 percent permanent impairment of his right hand. He stated that the date of maximum improvement was September 21, 1978, the date of Dr. Macht's report.

On May 23, 1979 the Office issued appellant a schedule award for a 40 percent permanent impairment of the right hand for the period from September 21, 1978 through August 4, 1980, for a total of 97.60 weeks of compensation.

In an October 4, 1979 response to an employing establishment inquiry, the Office notified appellant that his schedule award payments were being discontinued effective September 13, 1979. The Office stated that further development was necessary in reference to whether he was in the performance of duty on December 14, 1975, and requested that he submit additional information.

On October 17, 1979 appellant submitted a map and a statement in which noted:

> "I had completed my normal collection for that day. My collection had two parts. I had never run the second part of the holiday schedule ever. I was told to go to Allegheny Avenue in Towson, the most direct route to use would have been the beltway, and not Greenmount Avenue unless I had to pick up mail at boxes on Greenmount Avenue. The reason is because of lights and traffic at that time of day.
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> "I had completed my normal collection for that day. As stated above, the reasons I was going the way I went was to pick up something to eat, which was three or four blocks off the fallway.
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> "The reason that I didn't report the injury was because I thought I was not hurt that badly. But several days later a knot came up on my wrist, then I asked to have medical treatment out the station where I was working.
>
> "There were no injuries sustained either on or off duty between the date it was first reported to my supervisor.
>
> "No, I didn't file for any workers' compensation until the date it was reported to my supervisor."

In an Office claims examiner notation of October 17, 1979 the examiner noted:

> "Claimant stated that during the Christmas overtime, they were not required to eat at a certain time, whenever possible. He also said that this was overtime and he was not familiar with the route that he was assigned. It was not his regular route."

In a November 15, 1979 response to an Office inquiry, the employing establishment submitted a copy of the schedule for route number 26, and stated:

> "All collection schedules for Towson use Charles Street as the main route whether they begin at the Post Office Garage or the Main Post Office. Charles Street is one block from the garage and approximately nine blocks from the Main Office. It is a direct route to the first collection in Towson.
>
> "Deviation from the route of travel is very easy to substantiate because our routes are so defined. Because of the deviation, [appellant] was suspended for thirty days. This suspension was not grieved by the [National Association of Letter Carriers]. I am attaching pay records which indicate the employee was in a leave-without-pay status for the entire thirty days."

In a July 14, 1980 supplemental response to an Office request for information, the employing establishment stated:

> "The fact that an employee was not familiar with a route certainly would not justify deviation. At the time of injury, [appellant] had approximately one and one-half years experience in collection assignments. While he may not have been familiar with the particular route he was working, he was certainly knowledgeable in reading collection schedules and driving in the Baltimore delivery area.
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> "The reference in your letter concerning lunch breaks during Christmas is totally false. The explicitness of our collection schedules would never permit an employee to eat lunch when and where they desired. The schedule which I submitted was a Christmas collection route and did include a specific lunch period. Let me emphasize that lunch schedules are set by management and if included on the collection route have a designated time and site."

On October 14, 1981 the Office issued a compensation order which found that appellant was not in the performance of duty when he was injured on December 14, 1975 while stopping for lunch. The Office therefore vacated the schedule award and concluded that all compensation received by appellant for the period from February 21, 1976 through September 12, 1979 was an overpayment.

In an October 24, 1981 letter decision the Office found an overpayment of $24,408.96 and stated that "you had deviated from your route and it has been determined you were not in the performance of duty at the time of the accident of December 14, 1975." A preliminary finding that appellant was "without fault" in the creation of the overpayment was made, and he was informed of his right to a hearing before an Office hearing representative on the issue of waiver. On November 11, 1981 appellant requested a hearing which was held on September 20, 1982.

In an August 17, 1983 decision, finalized on August 18, 1983, the Office hearing representative affirmed the October 14, 1981 decision. The hearing representative also determined that the resulting overpayment of $24,408.96 should not be waived and ordered repayment at the rate of $50.00 per month.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation. This holds true where, as here, the Office later decides that it erroneously accepted the claim.[1]

The Board finds that the Office sustained its burden of proof when it rescinded its prior acceptance of appellant's injury as having been sustained while in the performance of duty. The evidence establishes that appellant had substantially deviated from the course of his employment for personal reasons, and was therefore no longer in the performance of duty when he was involved in the accident of December 14, 1975.

An employee who is on a trip for his employer is under the protection of the Federal Employees' Compensation Act while engaged in activities essential to or reasonably incidental to these special activities. However, when he deviates from the activities incidental to his employment, he ceases to be within the protection of the Act and an injury occurring during such deviation is not compensable. An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip unless the deviation is so insubstantial that it may be disregarded.[2]

In this case, after appellant's supervisor directed him to make a special trip to Towson to pick up the mail on Allegheny Avenue and pick up lunch on route, appellant did not take the assigned and most direct route to the assigned mailbox. His journey of more than two and one-half miles west of Charles Street, the official route going due north to Towson, in search of a familiar restaurant, constituted a personal mission. At the time of the accident he had not resumed his journey to Towson and was not engaged in any activity reasonably incidental to his employment mission.[3] Therefore, the injury sustained under such circumstances is not compensable.

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[1] See *Edsel Sammons*, 32 ECAB 740.

[2] See *Ethyl L. Evans*, 17 ECAB 346.

[3] See *George W. Stark*, 7 ECAB 275.

With respect to the issue of the recovery of the overpayment, the Board finds that the case is not in posture for decision.

In *Orba Light*,[4] the Board held that in cases involving a waiver of an overpayment of compensation, the Office must issue a decision which:

> "Includes both detailed findings of fact and, applying these findings, a rationalized opinion on (1) whether recovery of the overpayment would 'defeat the purpose of this subchapter [of the Act]' and (2) whether recovery would be 'against equity and good conscience.'"

Here, the Office hearing representative failed to make detailed findings of fact or offer adequate rationale in support of his decision. He did not adequately address the contention of appellant's representative that the overpayment should be waived as unduly burdensome, nor did he adequately consolidate appellant's expenses and compare them against his spendable income.

Accordingly, the case will be remanded to the Office for *de novo* consideration of the waiver issue and for a *de novo* decision, with appropriate and detailed findings of fact and rationale.

The August 17, 1983 decision of the Office of Workers' Compensation Programs, finalized on August 18, 1983, is affirmed insofar as it found that appellant was not injured while in the performance of duty on December 14, 1975; it is reversed and remanded with respect to the issue of waiver of the overpayment for a *de novo* decision in accordance with the Board's decision.

In the Matter of Edward D. Given *and* U.S. Postal Service, Post Office, Utica, N.Y.

Docket No. 84–394; Submitted on the Record;
Issued March 23, 1984

Before E. Gerald Lamboley, George E. Rivers, Michele von Kelsch

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to compensation subsequent to April 23, 1981 on the ground that he refused an offer of suitable work by the employing establishment.

The case was previously on appeal before the Board. The Board's May 10, 1982 decision sets forth the relevant facts and history of the case.[1] In that decision the Board set aside the Office's December 1, 1981 decision, stating that the employing establishment did not provide a complete description of what appellant's light duty entailed "so that the Office [could have] objective criteria to consider in making its determination as to whether the job offered is suitable work within the employee's work restrictions." [2] Such a description, according to the Board, was particularly important in this case in light of the nature of appellant's light duty work, which involved a classroom situation, and in light of the August 11, 1981 report from Dr. David M. Chaplin, a Board-certified orthopedic surgeon, who stated that appellant's "subjective symptoms preclude him from undertaking repetitive work with the right hand or relying on his right hand for support or safety." Therefore, the Board remanded the case to the Office to request the employing establishment to set forth in detail the physical requirements of the light-duty job it offered to appellant and to have Dr. Chaplin give his opinion as to whether appellant is able to perform the duties of that job.

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[4] 33 ECAB 1270. See also *Koba H. Tillotson*, Docket No. 82–1798, issued September 9, 1982.

By letter dated June 1, 1982 the Office requested from the employing establishment a description of the light-duty position that it made available to appellant.

The employing establishment submitted a description of the position offered appellant which was read and signed by him on March 18, 1982. The position, part of the Work Recovery Program, was described as follows:

> "Assigned on a daily Monday through Friday basis (or less if necessary) to Audio-visual training, textbook study, typing and other desk duties. The employee would be studying in a relaxed office area, utilizing a chair with a back, and would be able to sit or stand as he/she feels necessary. There is room under the desk for an employee's legs to be elevated if needed and the Post Office Medical Unit (on the lower floor) can provide physical therapy or other treatment, if designated by you."

In a September 9, 1982 letter the employing establishment stated as follows:

> "The Work Recovery Program was designed to meet the needs of the individual employee. Virtually any medical restriction could be accommodated in this flexible environment. For example, if an employee needed assistance threading a film strip or inserting a cassette at their individual learning center, an instructor was available at all times to provide the assistance. In [appellant's] case the Safety Awareness course he took on 4/20/81 involved listening to cassette tapes. The courses the following day involved $2^1/_2$ hours of listening

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[1] 33 ECAB 1102.

[2] See *Harry B. Topping, Jr.*, 33 ECAB 341.

tion, substernal chest tightness, and progressive dyspnea on exertion which has been present for the last several months to a year and a half . . ." Dr. Lugliani reported appellant's chest x-ray "demonstrates increased bronchovascular markings with increased interstitial changes suggestive of pulmonary fibrosis which is most probably as a result of his asbestos exposure history," and reported that a pulmonary function test "demonstrates mild obstructive disorder." He reported his impressions were "mild obstructive airway disease" and "probably pulmonary asbestosis," and recommended further diagnostic studies.

Appellant also submitted an April 20, 1982 report by Dr. James W. Eisenberg, an internist, concerning a March 19, 1982 examination. Dr. Eisenberg reported the following:

> "*X-RAY FINDINGS:*
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> "Chest x-ray including obliques reveals increased bronchovascular and interstitial lung markings. There was moderate thickening and irregularity of the interstitial spaces. There is bilateral pleural plaquing consistent with pulmonary and pleural asbestosis. The heart size is normal.
>
> "*LABORATORY FINDINGS:*"
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> * * *
>
> "Pulmonary Function Studies: Forced vital capacity is 80% of predicted, without significant change after bronchodilators. FEV_1 is 92% of predicted without significant change after bronchodilators. These findings are consistent with a mild restrictive pulmonary defect.
>
> "*DIAGNOSIS:* 1. Pleural and pulmonary asbestosis with restrictive lung disease."

Dr. Eisenberg concluded appellant "has disability representing 25 percent of the whole man" due to pleural and pulmonary asbestosis, was at increased risk of developing other diseases and should be provided ongoing medical care.

By letter dated July 16, 1982, the Office referred appellant with a statement of accepted facts and the asbestos exposure history provided by the employing establishment to the pulmonary division of the U.C.L.A. Medical Center for further evaluation.[2] The statement of accepted facts stated there was "[n]o asbestos exposure outside of Long Beach Naval Shipyard as indicated [on summary provided by the employing establishment]." Dr. Jeanne M. Wallace, Board-certified in both internal medicine and pulmonary disease, reported on September 24, 1982 that appellant gave a history of smoking one pack of cigarettes a day for 38 years, of having "a chronic dry cough which is worse at night," of being able to walk "3-6 blocks on the level," but of developing shortness of breath when "walking upstairs after only 10-15 steps." Dr. Wallace reported as follows:

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[2] There is no indication that the Office submitted the case record to the U.C.L.A. Medical Center.

> "*Chest X-ray:* PA [posterior-anterior], lateral, and bilateral oblique chest films were performed on August 11, 1982, and were of satisfactory quality for interpretation. The soft tissues, mediastinum, and lung parenchyma were within normal limits. There was no evidence of pleural calcifications or thickening. Therefore, the chest x-ray was within normal limits.
>
> "*Pulmonary Function Studies:* Pulmonary function studies were performed on August 11, 1982. The vital capacity was 75% of predicted, the FEV_1 was 83% of predicted, and FEV_1/FVC was 77% of predicted. The FEF 25-75% was 78% of predicted which is normal. The subdivision of the lung volumes evaluated by gas diffusion to equilibrium demonstrated that the TLC was 75% of predicted, the RV was 65% of predicted, and FRC 62% of predicted. The lower than expected FRC and RV could be due to technical problems as the claimant was not obese. The carbon monoxide diffusing capacity was 64% of predicted which is borderline low. Arterial blood gases performed while the claimant was breathing room air were pO_2 79, pCO_2 37, pH 7.4.
>
> "INTERPRETATION: The vital capacity and TLC are in the lower limits of normal. However, this claimant is of the black race and such individuals can have lung volume measurements 10%-15% below that of predicted. In addition, the carbon monoxide diffusing capacity is borderline reduced. Although these findings do not constitute evidence for restrictive lung disease, a lung compliance study would be helpful as one possible means for demonstrating early interstitial lung disease."

* * *

> "*IMPRESSIONS:* (1) History of 20 years of asbestos exposure which was primary and secondary and light to moderate. (2) History of smoking, currently inactive. (3) History of dyspnea on exertion out of proportion to any abnormal findings on the pulmonary function studies. (4) Borderline hypertension.
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> "*Discussion:* The claimant gives a history of 20 years of asbestos exposure which was primary and secondary and light to moderate. However, the current evaluation does not demonstrate any findings which definitely relate to the asbestos exposure. However, the claimant does give a history of dyspnea on exertion which is not explained by any findings on the pulmonary function tests. In addition, the pulmonary function tests do demonstrate an isolated borderline low diffusing capacity. Therefore, a standard exercise study as well as compliance study would be helpful in possibly un-

> covering any very early interstitial lung disease which could be related to the exposure to asbestos. The claimant does have an increased risk for the development of pulmonary malignancy as he was exposed to asbestos and was a smoker. There is no evidence for pulmonary malignancy at this time. The claimant's performance capacity could be better evaluated once the standard exercise test is performed. However, there is probably some impairment of capacity simply based upon the claimant's age."

Dr. Wallace submitted the reports of the August 11, 1982 pulmonary function and blood gas studies, the former showing a maximum voluntary ventilation (MVV) of 105, or 76 percent of predicted normal and a forced vital capacity (FVC) of 3.42 or 75 percent of predicted normal. She also submitted on October 19, 1982 exercise study by Drs. Paul Lin and D.P. Tashkin which concluded that "[al]though patient complained of severe shortness of breath, there is no evidence for mechanical limitation of ventilation in this study nor is there evidence for cardiovascular abnormality, pulmonary vascular defects or gas exchange abnormalities." Their reports further concluded that "[p]atient's exercise tolerance may be limited to deconditioning." Dr. Wallace also submitted an October 19, 1982 lung compliance study by Drs. Lin and Tashkin which showed "mildly decreased lung compliance." Dr. Wallace concluded as follows in a December 3, 1982 report:

> "The results of these tests [exercise and lung compliance studies] do not demonstrate any pulmonary or cardiovascular etiology of the claimant's symptoms of dsypnea on exertion. However, with the borderline decreased pulmonary compliance there is some concern that the claimant may have a very early form of restrictive lung disease. Such a process could be due to the history of asbestos exposure. It would be advisable to provide follow-up in approximately 1 years time to look for any progression of this pulmonary function abnormality."

Dr. Judd Shellito, an Office medical consultant who is Board-certified in internal medicine and pulmonary disease, reviewed the case record on March 13, 1983 and stated the following:

> "The claimant is a 63-year-old male who received asbestos exposure while employed at the Long Beach Naval Shipyard in a variety of positions from 1954 to 1975. Asbestos exposure is estimated as being moderate in degree and secondary in frequency. Included in the records is an evaluation of the claimant by an internist, Dr. J. Eisenberg. The chest x-ray showed bilateral pleural plaques and increased interstitial markings. Pulmonary function tests were said to have shown a restrictive defect. In reality, the spirometry was normal. Also included in the records is an evaluation of the claimant

by Dr. R. Lugliani, dated February 27, 1981. The chest x-ray was also said to show increased interstitial markings. Pulmonary function testing was said to show a 'mild obstructive disorder.' The specific test values are not included in the records. The claimant had received a more current evaluation from a pulmonary specialist, Dr. J. Wallace, with a report dated September 24, 1982. There is a greater than a 38 year cigarette smoking history. Dyspnea on exertion is present after climbing one-half flight of stairs. Physical examination revealed no evidence of clubbing or significant abnormal pulmonary sounds. The chest x-ray showed no evidence of pleural abnormality or abnormalities of the lung markings. This was the opinion of a consulting radiologist, Dr. J. Collins. Pulmonary function testing revealed normal spirometry. The forced vital capacity was 3.42, the FEV_1 2.62, and the FEV_1 to forced vital capacity ratio was 77%. A total lung capacity was questionably abnormal at 75% of predicted. This value may in fact be normal, given the claimant's black race. A diffusing capacity determination was decreased at 64% of predicted. Arterial blood gases obtained at rest on room air showed no evidence of significantly abnormal arterial oxygen desaturation.

"To further evaluate the claimant, an exercise pulmonary evaluation was performed on October 19, 1982. The claimant was exercised to achieve 86% of his predicted maximal oxygen consumption. Minute ventilation was 37% of his previously achieved maximal voluntary ventilation, indicating there was no ventilatory limitation to exercise. No gas exchange abnormalities were noted. A static lung compliance determination was done which showed borderline increased lung stiffness.

"1. According to the medical evidence available at this time, no condition or disability was caused by the accepted conditions of employment.

"2. The diagnosis is established as asbestos exposure without current evidence for asbestos related pulmonary disease. No pleural plaques have been demonstrated on the most current chest x-rays. Previous pleural abnormality noted on x-ray may reflect technical differences or conditions other than asbestos related pleural disease. Asbestos related pleural plaques would not resolve with time. There is insufficient evidence to support a diagnosis of parenchymal asbestosis in the face of a normal physical exam, normal lung markings on chest x-ray, normal spirometry, and an exercise evaluation showing no ventilatory or gas exchange limitation. The claimant does have a decreased total lung capacity and decreased diffusing capacity, but these likely reflect racial variation rather than significant pulmonary disease. The claimant's normal exercise pulmonary evaluation speaks strongly against parenchymal asbestosis.

"3. The claimant is not disabled from his position due to disease resulting from exposure to asbestos while in federal employment.

"4. The percentage of respiratory impairment utilizing AMA criteria and the more sensitive exercise pulmonary evaluation is 0%."

By compensation order dated July 15, 1983, the Office rejected the claim on the grounds that "[t]he claimant has no pulmonary disease or condition resulting from exposure to asbestos in the performance of duty."

The Board finds that the case is not in posture for decision.

Dr. Lugliani, a specialist in pulmonary disease, reported on February 27, 1981 that appellant's chest x-ray showed "increased bronchovascular markings with increased interstitial changes suggestive of pulmonary fibrosis," and concluded appellant had "probable pulmonary asbestosis." He interpreted pulmonary function tests to show a "mild obstructive airway disease," and recommended further diagnostic testing. Dr. Eisenberg, an internist, reported on April 20, 1982 that a chest x-ray showed "moderate thickening and irregularity of the interstitial spaces," and "bilateral pleural plaquing consistent with pulmonary and pleural asbestosis." He interpreted pulmonary function studies which included a forced vital capacity (FVC) of 80 percent of the predicted normal value as "consistent with a mild restrictive pulmonary defect."

Dr. Wallace, Board-certified in internal medicine and pulmonary disease, reported that an August 11, 1982 chest x-ray was "within normal limits," that vital capacity and total lung capacity were "in the lower limits of normal," and that the carbon monoxide diffusing capacity "is borderline reduced." She opined that although these findings "do not constitute evidence for restrictive lung disease," a lung compliance and exercise study would help discern "any very early interstitial lung disease which could be related to the exposure to asbestos." Dr. Wallace opined after reviewing results of the lung compliance and exercise tests that while they did not show a pulmonary or cardiovascular cause for appellant's symptoms of dyspnea on exertion, there was "some concern," given "the borderline decreased pulmonary compliance," that appellant "may have a very early form of restrictive lung disease," which "could be due to the history of asbestos exposure." Dr. Wallace recommended follow-up of "this pulmonary function abnormality." She did not specifically address appellant's August 11, 1982 forced vital capacity or maximum voluntary ventilation which were reported as 75 and 76 percent of predicted normal, respectively, nor did she apply the criteria of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* to these and other test results. The Board notes that the "interpretation" portion of the August 11, 1982 report of the pulmonary function study was deleted from the copy of the report in the case record.

Dr. Shellito, an Office medical consultant who is Board-certified in internal medicine and pulmonary disease, stated that the lung compliance test "showed borderline increased lung stiffness," but did not comment on Dr. Wallace's statement that this may be evidence of "a very early form of restrictive lung disease," which could be due to appellant's asbestos exposure. The medical consultant instead opined that "no condition or disability was caused by the accepted conditions of employment." In addition, although Dr. Shellito stated that the percentage of respiratory impairment according to the AMA *Guides* was zero, he did not include his calculations or analysis, particularly for the MVV and FVC values reported on August 11, 1982.

The case will be remanded to the Office for further development. On remand, the Office should clarify appellant's smoking history and amend the statement of accepted facts to include an accurate smoking history and to include periods of asbestos exposure prior to July 1954. The Office should obtain a complete copy of the report of the August 11, 1982 pulmonary function study and attempt to obtain appellant's 1981 and 1982 chest x-ray films. The Office should then refer appellant with the films, an accurate statement of accepted facts and the case record to a specialist, preferably Board-certified in pulmonary disease, who has not been connected with the case previously, nor associated with anyone previously connected with the case. The Office should request the specialist to perform a complete pulmonary evaluation including new x-rays and pulmonary function studies and to have a serial reading made of the previous x-rays. The specialist should address whether appellant has a pulmonary condition causally related to asbestos exposure at work and if so, whether appellant has any permanent impairment or disability [3] due to that condition. After any further development deemed necessary by the Office, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated July 15, 1983 is hereby set aside and the case remanded to the Office for further development.

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[3] See *Dennis L. O'Neill*, 29 ECAB 151, 269.

In the Matter of JOSEPHINE M. CALLAHAN *and* DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH CARE FINANCING ADMINISTRATION, Kansas City, Mo.

Docket No. 84-535; Submitted on the Record;
Issued March 26, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant's April 8, 1983 fall at work was sustained in the performance of duty.

On April 8, 1983 appellant, then a 57-year-old statistician, was standing up and talking on the telephone at work when she fell to the floor unconscious. She was hospitalized from April 8, 1983 to April 15, 1983, did not return to work, and retired on disability effective June 17, 1983.

Four coworkers submitted statements dated April 15, 1983 in which they asserted they found appellant unconscious lying on her side on the floor and breathing very heavily. Two of the coworkers stated they had heard a "thud" or "crash" immediately before discovering appellant on the floor. One coworker stated that a second coworker turned appellant onto her back and removed her eyeglasses. Appellant's telephone was described by one coworker as "dangling" and by another as being "on the floor."

By letters dated May 3, 1983, the Office requested that appellant and her coworkers state whether appellant "fell directly to the floor or whether she struck an intervening object." Appellant replied on May 9, 1983 that she was "unconscious" at the time of the fall and was therefore unable to answer the Office's question. She stated "However, I would assume I struck an object because of the bloodshot left eye, black/blue color surrounding left eye and swelling 'hickey' on left temple." She stated she had no history of losing consciousness. Appellant's coworkers replied in May 1983 statements that they had not witnessed the actual fall and had only observed her on the floor.

Appellant submitted the records from her April 8 to April 15, 1983 hospitalization. Dr. Nadine Johnson-Giannopoulos, Board-certified in internal medicine, hematology and medical oncology and appellant's attending physician, reported on April 8, 1983 that appellant had been found unconscious on the floor at work by coworkers who had heard "a sudden noise." Dr. Johnson-Giannopoulos reported that upon arriving at the emergency room appellant "was awake and alert but somewhat confused and had total memory loss for events early in the morning" and events while at work. Dr. Johnson-Giannopoulos reported the only sign of trauma was a "large hematoma, lateral left orbit." She further reported that appellant had a history of breast cancer with bone metastasis and had been scheduled for "spine radiation."

Dr. Curtis P. Schworm, Board-certified in diagnostic radiology, reported that results of a CT [computerized axial tomography] scan of the head were "really most compatible with a stroke," but that in view of the history of metastatic neoplasm, a "metastatic lesion could not be entirely excluded . . . " Dr. Jean M. Moroney, a neurologist, reported on April 9, 1983 a history of the April 8, 1983 fall at work and of appellant being aware "for the past 2 months . . . of some hesitation in her speech," and of having "difficulty expressing herself." Dr. Moroney's impression was a "syncope, [of] undetermined etiology," which "may have been a seizure." Dr. Moroney reported on April 11, 1983 that an electroencephalogram was "abnormal . . . indicating left cerebral dysfunction in the presence of bilateral cerebral dysfunction."

Dr. Johnson-Giannopoulos reported on April 15, 1983 that the final diagnoses were as follows:

> "Carcinoma of the breast with bone metastasis. Episode of unconsciousness, transient—etiology not entirely determined. Possible minor stroke. Cannot entirely rule out left cerebral metastasis. Mild compression fractures of L2, 3 and 4, probably on basis of osteoporosis, although metastasis cannot be entirely ruled out."

The employing establishment submitted an April 20, 1983 report by Dr. Johnson-Giannapoulos prepared in connection with appellant's disability retirement in which the doctor diagnosed the April 8, 1983 occurrence as a "possible seizure, possible stroke" based on the "abnormal head [CT] scan," and stated that appellant had "lumbar compression fractures from the fall on 4-8-83."

An Office of Workers' Compensation Programs medical adviser reviewed the case record and a statement of accepted facts on June 6, 1983 and opined as follows:

> "It appears from an examination of this claimant's file that her fall was due to preexisting medical problems which are not work related. She is suffering from cancer of the right breast which was removed in previous surgery, and she at present has bone metastasis with a pathological fracture of her rib and evidence of metastasis to the spine with one area being involved at T11 and more involvement apparently at L4-L5. The liver likewise seems to be involved with the spread of cancer. CT scan of the head was read as showing an appearance most compatible with a stroke. In view of the patient's history, however, of metastatic neoplasm, the doctor suspected metastatic cancer to the brain could not be entirely excluded. ***"

The medical adviser concluded that appellant's "period of unconsciousness" was due to either a stroke or seizure and that "this period of unconsciousness and the resultant fall were not due to factors of her federal employment."

By compensation order dated September 12, 1983, the Office rejected the claim on the grounds that "[t]he medical evidence of record indicates that the fall was due to a personal, nonoccupational pathology which caused the employee to fall and to suffer injury upon striking the floor," and that therefore "the injury is not a 'personal injury while in the performance of duty' . . . " The Office determined that the injury "does not arise out of a risk connected with the employment and it is not compensable."

The Board finds that appellant's April 8, 1983 fall at work was not sustained in the performance of duty. The evidence of record establishes that appellant's fall was idiopathic in nature, without intervention by any factor of employment, and therefore is not compensable.

It is a well-settled principle of workers' compensation law, and the Board has so held, that where an injury results from an idiopathic fall i.e., when a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface without intervention or contribution by any hazard or special condition of employment, it is not within the coverage of the Federal Employees' Compensation Act. Such an injury does not arise out of a risk connected with the employment and it, therefore, is not compensable.[1]

Dr. Johnson-Giannopoulos, Board-certified in internal medicine, hematology and medical oncology, opined after obtaining a neurological consultation and reviewing radiological tests that the etiology of appellant's episode of transient unconsciousness was "not entirely determined," that based on the abnormal CT scan it was possibly a stroke or seizure, but that left cerebral metastasis could not be ruled out entirely. The Office medical adviser who reviewed all the evidence of record, opined that the April 8, 1983 episode was due to a stroke or seizure, and that it and the resulting fall were not due to any factors of employment.

Appellant has the burden of establishing that she struck an object connected with her employment during the course of her idiopathic fall.[2] Neither appellant, nor her coworkers could state whether appellant fell directly to the floor or struck an intervening object. Appellant's statement that she "would assume" she struck an object other than the floor because of the condition of her left eye and swelling of her left temple is speculative and does not establish that she struck an object connected with her employment during the course of her idiopathic fall.

The September 12, 1983 decision of the Office of Workers' Compensation Programs is hereby affirmed.

In the Matter of PATRICK COSTELLO *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Oberlin, Ohio

Docket No. 84–167; Submitted on the Record;
Issued April 2, 1984

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[1] ***Chunny Wong***, 31 ECAB 579, and cases cited therein.

[2] ***Chunny Wong***, *supra*.

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant's June 19, 1974 myocardial infarction and subsequent disability were causally related to factors of federal employment.

Appellant, then a 41-year-old air traffic control specialist, filed a claim on August 13, 1974 alleging that the myocardial infarction he sustained on June 19, 1974 was causally related to factors of his federal employment. He stopped work on June 20, 1974 and returned to work on an administrative detail on August 19, 1974. He filed a claim for compensation for the period beginning November 25, 1974.

On November 6, 1974, appellant submitted a statement in connection with his employment as an air traffic control specialist. With respect to the issue of causal relationship, he stated:

> "I feel that my job as a controller working under the conditions and coping with the situations recounted above; the forced move from Pittsburgh, rotation of shifts, understaffing, forced overtime, inadequate equipment, performance of mandatory training, the near mid-air collisions I have been involved in, and now in addition to all this, the complete change to a new radar system before we were really ready for it; have contributed substantially to my heart attack of June 19, 1974, and return to this stress job and shift work, I believe would aggravate my condition."

In a letter dated August 27, 1974, the employing establishment's medical officer, Dr. R. H. Wehr, requested claimant's treating physician, Dr. DeMarco, to give the resume of treatment, diagnosis, type and medication prescribed and prognosis in order to determine whether appellant met the medical qualifications for the performance of OATCS duties and eligibility to hold a second Class Airman Medical Certificate.

Dr. DeMarco responded that the diagnosis was myocardial infarction and treatment included all the usual treatment in cardiac care and then progression to the regular hospital area and home. He also noted that claimant had premature ventricular contractions controlled by Pronestyl. He noted additional medications of Isordil and Librium. Dr. DeMarco further noted that appellant's prognosis would depend on the Master's test of four month plus a stress test and coronary arteriogram. He went on to say that the claimant was "well enough to have returned to work—eliminating his previous stress job — he now works at a desk with regular day shift only. He returned to work on August 19, 1974." Dr. DeMarco also reported that appellant was seen in consultation by Dr. Richard F. Runser and that claimant was told "not to return to his former stress job at the radar screen and not to work changing shifts."

Dr. Runser, submitted a consultative report dated June 28, 1974. He stated:

> "This 40-year-old man was referred for cardiac evaluation. He was hospitalized a week ago after suffering an acute myocardial infarction. On the day of admission, he developed retrosternal chest pain radiating into the jaw and the left arm. The electrocardiogram indicated an acute anteroseptal wall infarction. He had a reasonably uncomplicated post-infarction period except for periodic premature ventricular beats and brief episodes of ventricular tachycardia which was controlled with Lidocaine and Pronestyl. Approximately one month before his myocardial infarction, he experienced a similar episode of chest pain which lasted for only 15-20 minutes associated with diaphoresis. He did not seek medical help at that time. He has been chronically obese for many years. Four years ago, there was a suspicion of hypertension, but this did not continue after follow-up evaluation. He has smoked 2-3 packs of cigarettes per day. He has used alcoholic beverages excessively in the past but has stopped drinking completely 18 months ago. He also has a history of chronic, recurrent, migraine headaches. There is no family history of cardiovascular disease except for two grandparents and one uncle. No family history of diabetes or hypertension."
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> * * *
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> "*IMPRESSION:* Acute Myocardial Infarction.
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> "*RECOMMENDATION:* The patient appears to be doing very satisfactorily at this point following a normal convalescence of about three months, I would strongly consider coronary arteriography on this man to determine the extent of his coronary artery disease and possibly obtain some idea about prognosis. At this point, it seems possible that this man can return to gainful employment. He certainly should stop smoking, he should lose weight and he should have some dietary restrictions in calories and animal fat."

The Office medical director reviewed the case record and expressed the opinion that appellant's June 19, 1974 myocardial infarction was causally related to his federal employment. As a result, the Office accepted appellant's claim and began paying compensation for temporary total disability effective November 24, 1974.

On July 31, 1981, an Office medical adviser reviewed the medical evidence and was of the opinion that appellant's myocardial infarction of June 19, 1974 was not causally related to his federal employment as an air traffic control specialist. However, the medical adviser recommended that appellant be referred to a medical specialist "to determine past and present causal relationship and present work-related WTL's [work tolerance levels]."

On September 3, 1981, appellant, along with a statement of accepted facts and the case record, was referred to Dr. Martin I. Broder, a Board-certified cardiologist, for an opinion regarding the issue of whether appellant's June 19, 1974 myocardial infarction, and subsequent disability, were causally related to factors of his federal employment. The statement of accepted facts submitted to Dr. Broder stated as follows:

> "1. Claimant is a male, born November 7, 1933, who was employed as an Air Traffic Controller by the Federal Aviation Administration in Oberlin, Ohio.
>
> "2. On June 19, 1974, claimant suffered an acute myocardial infarction approximately one hour after returning home from work. He was hospitalized.
>
> "3. Claimant timely filed a notice of occupational disease and claim for compensation.
>
> "4. Claimant was off work on leave until November 24, 1974, when he began receiving compensation for temporary total disability. He returned to work for the period August 19, 1974-October 23, 1974 only in a light-duty capacity.
>
> "5. In December, 1974, the claimant was admitted to Cleveland Clinic and underwent surgery for blocked coronary arteries.
>
> "6. Claim was accepted for acute myocardial infarction."

In a report dated December 18, 1981, Dr. Broder reviewed appellant's medical history, including the report of the December 1974 coronary bypass surgery of which the doctor did not have any records, his family and personal histories, and the results of appellant's physical examination and laboratory tests. The doctor then stated:

> "In my opinion this patient has arteriosclerotic heart disease, marked exogenous obesity, and a history of significant cigarette smoking. Despite his claim that a significant amount of emotional stress as result of his employment as an air traffic controller was the cause of his coronary artery disease, I think there is no medical justification for such a statement. In my opinion there is no data linking the production of coronary atherosclerosis to emotional stress in any employment situation. On the contrary, it would appear that his cigarette smoking was a much more important predisposing factor. There is no evidence that coronary atherosclerosis is either caused, precipitated, accelerated, or materially aggravated by job-related stress. In addition, there is no evidence that the acute myocardial infarction that this patient sustained was in any way related to his employment, either by causation, precipitation, acceleration or material aggravation.
>
> "In addition, there is no evidence that any preexisting condition was aggravated. It is unfortunate that this person was not allowed

to cassette tapes and the balance of the day was spent working with a Programmed Text Workbook."

By letter dated November 22, 1982 the Office set forth the requirements of the Work Recovery Program—audio-visual training, textbook study, writing and typing—and asked Dr. Chaplin whether appellant could perform these duties.

By letter dated November 24, 1982 Dr. Chaplin stated as follows:

> "I've reviewed your letter of November 22, 1982. I believe the classroom course work of the work recovery program is well-within his work capabilities and the restrictions I placed on him. There's no reason why he should not perform light duty classroom work."

In a December 16, 1982 report an Office medical adviser concluded that appellant could perform light duty classroom work.

By compensation order dated January 20, 1983 the Office found that appellant was not entitled to any compensation subsequent to April 23, 1981 on the ground that he "refused suitable work and is not entitled to compensation."

At appellant's request a hearing before an Office hearing representative was held on June 6, 1983. At the hearing appellant stated that the reason he left the light duty classroom work on April 23, 1981 was that it frustrated him; it was not that any limitation in the use of his right arm prevented him from doing such work.

By decision dated September 13, 1983 the hearing representative affirmed the Office's January 20, 1983 decision.

The Board finds that the Office properly determined that appellant was not entitled to compensation subsequent to April 23, 1981 under 5 U.S.C. section 8106(c)(2) on the ground that he refused suitable work offered to him by the employing establishment.[3]

On remand, at the request of the Office, the employing establishment submitted a detailed description of the duties required by the light duty classroom work it had offered appellant. Upon reviewing these job requirements, Dr. Chaplin, a Board-certified orthopedic surgeon, concluded that they were consistent with the physical restrictions he had placed upon appellant. With this job description together with Dr. Chaplin's medical opinion before it, the Office properly determined that the employing establishment had offered appellant suitable work. In further support of this conclusion is appellant's testimony during the June 6, 1983 hearing in which he admitted that his physical condition did not preclude him from performing the light duty classroom work made available to him by the employing establishment.[4]

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[3] Section 8106(c)(2) of the Federal Employees' Compensation Act states that "A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured from him is not entitled to compensation."

The September 13, 1983 decision of the Office of Workers' Compensation Programs hearing representative is hereby affirmed.

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[4] The Board notes that despite the fact that appellant is not entitled to compensation benefits he might still be entitled to receive medical benefits. See Office FECA Bulletin No. 83–51, issued on October 24, 1983, which addresses the application of 5 U.S.C. 8106(c)(2).

In the Matter of Raymond Charles *and* Department of the Navy, Long Beach Naval Shipyard, Long Beach, Calif.

Docket No. 84–442; Submitted on the Record;
Issued March 23, 1984

Before E. Gerald Lamboley, Michele von Kelsch, Willie T.C. Thomas

The issue is whether appellant has a pulmonary condition or impairment causally related to factors of employment.

On June 2, 1982, appellant, then a 62-year-old retired laborer and truck driver, filed a claim asserting he had a pulmonary condition causally related to exposure to asbestos in federal employment. Appellant asserted he had been exposed to asbestos "100% of my working time" while employed from November 1946 to August 1954 as a laborer at the Oakland Naval Supply Center, "at least half of the time" while working at the employing establishment from August 1954 through 1970 and less often from 1971 through August 15, 1975, the date he retired from the employing establishment. The employing establishment informed the Office of Workers' Compensation Programs that it estimated appellant's asbestos exposure during the period July 1954 to August 15, 1975 to be of "moderate" degree and "secondary" frequency.[1] The employing establishment did not comment on appellant's exposure prior to July 1954.

In support of his claim, appellant submitted a February 27, 1981 report by Dr. Robert Lugliani who specializes in pulmonary disease. Dr. Lugliani noted appellant had a history of "significant asbestos exposure," of smoking half a pack of cigarettes a day for approximately 30 years until quitting smoking in 1979 and noted that appellant complained of "increasing shortness of breath, dyspnea, cough, chest conges-

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[1] The employing establishment defined "moderate" as "asbestos dust visible on floor and work surface," and "secondary" as having "worked in conjunction with employees with primary exposure," or having worked with employee who "worked directly with asbestos on a regular basis."

> to return to his work, since I can find no evidence that he was unable to perform as an air traffic controller."

A second Office medical adviser reviewed the medical evidence and on February 21, 1982 negated causal relationship, stating:

> "I agree entirely with Dr. Broder's conclusions. Myocardial infarction is death of the heart muscle caused by insufficient blood supply to the muscle secondary to artherosclerotic plaquing of the blood vessels. There are risk factors delineated for the development of atherosclerosis, and these do include smoking. However, there is no scientific evidence in the medical literature that emotional stress causes, aggravates, precipitates or accelerates the development of atherosclerosis and therefore M.I. In the individual *with* atherosclerosis, acute emotional stress can induce angina or an M.I. However, this is not relevant in this case since the claimant was at home at the time. Therefore, I agree with Dr. Broder. The claimant's atherosclerosis and M.I. are not job related."

By compensation order dated March 25, 1982, the Office found "[t]hat there was no causal relationship between factors of employment and the claimant's disability for work and his myocardial infarction of June 19, 1974." The Office terminated appellant's compensation for temporary total disability effective April 22, 1982.

On August 26, 1982, the Office found that there was an overpayment of compensation in appellant's case in the amount of $184,820.96 as a result of the following: "You [appellant] were paid compensation for a condition of disability that was not causally related to factors of employment."

Appellant, by his attorney, requested a hearing before an Office representative, which was held on January 19, 1983. In a decision dated September 8, 1983, and finalized on the same date, the Office hearing representative affirmed the Office's March 25, 1982 decision finding that the Office met its burden of proof in establishing that appellant's myocardial infarction and subsequent disability were not causally related to factors of his federal employment. The hearing representative then set aside the Office's August 26, 1982 overpayment decision stating that "there has been no determination made that the claimant was not entitled to the compensation benefits which he received."

The Board finds that the Office has failed to meet its burden of proof of establishing that it erroneously accepted appellant's myocardial infarction as employment related.

The Office accepted appellant's myocardial infarction as employment related based on uncontroverted medical reports from Drs. DeMarco and Runser, and the review of this evidence by an Office medical director who supported causal relationship. The Office paid compensation for temporary total disability commencing November 24, 1974 through March 24, 1982. It terminated benefits based on the medical report of Dr. Broder and the concurring opinion of an Office medical adviser.

Dr. Broder stated in his December 18, 1981 report that appellant sustained an acute myocardial infarction at age 39; that two weeks prior to the infarct appellant had developed chest discomfort and clamminess for about 15 minutes; that two weeks later an acute myocardial infarction occurred while appellant was at home watching television and that "nothing unusual had happened at work that day."

The Office in its statement of accepted facts did not address the issue of whether appellant was subjected to pressure and stress during the course of his work day despite the fact that the claim was apparently accepted based on this premise. Moreover, Dr. Broder did not address the question of whether pressure and stress during the course of a work day can precipitate a myocardial infarction in an individual such as appellant with a similar degree of atherosclerotic heart disease.

Further, the Office medical adviser in concurring with Dr. Broder offered his own rationale as to why this claim is not compensable. He stated:

> "In the individual with atherosclerosis, acute emotional stress can induce angina or an M.I. However, this is not relevant in this case since the claimant was at home at the time."

This rationale by the medical adviser suggests that an injury manifesting itself after the work day and at home is *per se* noncompensable. Appellant reported in his November 6, 1974 statement that on "June 19, 1974 just after returning home from working the 7:00 a.m. to 3:00 p.m. shift I had a heart attack . . ." The deficiency in the medical adviser's rationale is it does not address the following questions:

1. Whether appellant sustained emotional or physical stress during his work shift and/or because of his rotating hours work shift.
2. Whether it is possible for a myocardial infarction to manifest itself one or two hours after the physical or emotional stressor that may have precipitated it.
3. Whether the location or place where the myocardial infarction manifested itself is determinative, or, simply one factor to be considered in determining compensability in the first instance.

Due to the above noted deficiencies and unaddressed questions raised by the opinions of Dr. Broder and the medical adviser, the Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation.

The decision of the Office of Workers' Compensation Programs hearing representative, dated September 8, 1983, and finalized on the same date terminating appellant's compensation is hereby reversed.

In the Matter of WAYNE D. HACKNEY *and* DEPARTMENT OF AGRICULTURE, FOOD SAFETY AND QUALITY SERVICE, Philadelphia, Pa.

Docket No. 83–2074; Submitted on the Record;
Issued April 5, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's disability after December 12, 1979, the date the Office of Workers' Compensation Programs terminated his compensation, is causally related to a December 5, 1978 employment injury.

On December 5, 1978, appellant then a 42-year-old meat inspector, scraped his left leg in the area of his calf on a viscera cart. He continued to work through January 11, 1979, stopped working on January 12, 1979 and returned to his usual work on March 12, 1979. He used sick leave and received continuation of pay during his absence from work.[1] Appellant claimed a recurrence of disability effective May 8, 1979 and stopped work that day. He has not returned to work. He received compensation for temporary total disability for the period May 9, 1979 through December 12, 1979.

Dr. R. H. Kuhn, a Board-certified family practitioner, reported on February 8, 1979 that he had first examined appellant on January 12, 1979 and diagnosed a "2 1/2 cm. ulcer [on the] anterolateral surface-left lower leg," causally related to the December 5, 1978 employment injury. Dr. Kuhn further reported that appellant had evidence of varicose veins preexisting the employment injury.

Dr. Thomas H. Lamb, a dermatologist, presented a detailed history of injury in a June 10, 1980 narrative report, and stated the following on June 24, 1980:

> "It is my opinion that the accident could have easily introduced bacteria and the opportunity for an area of infection and subsequent stasis dermatitis to occur. It must be borne in mind, however, that predisposing factors may have played a significant role. I am making reference to a patient who has prominent varicosities, is overweight, and who most likely has chronic venous insufficiency of the left lower extremity. Therefore, it is my impression that an injury of most any type in the specific area, could have led to the present disability."

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[1] The Office of Workers' Compensation Programs subsequently determined appellant was not entitled to continuation of pay because his claim for continuation of pay, as opposed to compensation, was not timely filed.

A medical adviser of the Office of Workers' Compensation Programs reviewed the case record in November 1980, diagnosed "contusion antero-lateral surface of left lower leg with subsequent development of ulcer, due to underlying venous insufficiency and diabetes," and opined that the condition was employment related.

At the recommendation of the medical adviser the Office referred appellant to Dr. J. Harold Harrison, a Board-certified surgeon, and submitted to Dr. Harrison the medical evidence of record and a statement of accepted facts. Dr. Harrison examined appellant on February 10, 1981 and reported the following on February 11, 1981:

> "Mr. Hackney, based on the information submitted, has sustained a minor injury to the left leg that is superimposed on probable chronic venous insufficiency and marked varicosities of the leg leading to infection, pigmentation and superficial ulceration. This has initially responded to treatment and has subsequently broken down again."
>
> * * *
>
> "In answer to your specific questions:
>
> "1. The diagnosis is Stasis Ulcer of Left Leg superimposed on chronic venous insufficiency and marked varicose veins.
>
> "2. Whether the ulcer of the leg was caused or aggravated by employment injury of December 5, 1978, as stated above I repeat, the injury aggravated the underlying cause.
>
> "3. The present condition of the leg is the result of the contusion, infection, and ulceration superimposed on his preexisting condition of chronic venous insufficiency and varicose veins as stated above.
>
> "4. It cannot be stated that the present left leg condition of the claimant is entirely due to and caused by preexisting venous insufficiency, and not related to the work injury.***
>
> "5. The matter of whether the aggravation of the underlying condition ended in February of 1979, when it was stated that the ulcer was healed, is not totally clear either from the patient or what is indicated in the record. I cannot be certain that it did totally clear. The record would have to bear this out. If in fact it had totally healed, then this would terminate the disability from the original injury.
>
> "6. The complaints and condition of the claimant's left leg since May 1979 is caused by a combination of the preexisting conditions primarily being chronic venous insufficiency and marked varicose vein with aggravation from the injury.***"

In response to April 20, 1981 and June 22, 1981 Office requests to clarify his report, Dr. Harrison stated on July 6, 1981 that "the aggravation factor to the injury had ceased in February of 1979" because appellant had been considered able to return to work then and had apparently refused to have surgery of veins necessary "to get the matter corrected."

A second Office medical adviser reviewed the case record on August 11, 1981 and opined that appellant's condition had been temporarily aggravated by the employment injury and that such aggravation had ceased in February 1979.

The Office by compensation order dated August 18, 1981 rejected the claim for compensation for the period beginning May 8, 1979 on the grounds that appellant's disability during that period was not causally related to the December 5, 1978 employment injury.

Appellant's attorney requested a hearing before an Office hearing representative on September 10, 1981 and subsequently submitted July 22, 1981 and August 4, 1981 reports by Dr. E. Lawrence Hanson, Board-certified in surgery and thoracic surgery. Dr. Hanson reported as follows on July 22, 1981:

> "I saw Mr. Wayne D. Hackney in the Office today for independent medical examination. He's a 43-year-old man who says he injured his leg on the job two and a half years ago. His wife amplified this by saying that he scraped his leg and it became infected. He saw Dr. Holmes at Saint Vincent Health Center about three and a half weeks after the injury, and at that time there was an infection present and a sore which would not heal. In the two and a half years since that time the sore has never healed and has gotten worse. He states that at the present it is 'ten times as bad as it was when it started.' The leg is swollen and painful and the pain is worse at night. He awakes at night on occasion with the pain. He's had to take pain pills for control of the discomfort."
>
> * * *
>
> "His physical examination is confined to the area in question, namely his lower extremities. Both legs show evidence of venous disease with prominent veins; however, the pathology is more severe on the left side. The findings are typical of deep vein thrombosis and postphlebitic syndrome; however, they are somewhat unusual in that they are present on the lateral aspect of the leg rather than in the more common site, the medial aspect. This raises the question as to etiology, and I think that might be important in determining the cause of the injury.
>
> "The findings that determine the diagnosis are the pigment deposition in the skin, the woody fibrotic edema surrounding the area of ulceration and the weeping ulceration itself. These findings are all related to increased tissue fluid in the subcutaneous tissue that is caused by incompetence of the patient's venous supply in this area. When he stands, the pressure gradient of the veins in the

> erect position puts pressure on this area and causes fluid to leak from the vein. This makes it very susceptible to injury and infection and once this occurs, the susceptibility remains forever. There is no treatment, either medical or surgical which can reverse it, and the only thing that can be done is to maintain external pressure on the edematous area to keep the tissue fluid squeezed out and prevent the breakdown of skin with its attendant susceptibility to injury. What I was saying about the location of the disease has importance as follows: Usually this occurs on the medial aspect of the leg and is related to venous perforators between the superficial (saphenous venous system) and the deep venous system in the core of the leg. The fact that this man's problem is occurring on the lateral aspect of the leg makes me think that his phlebitis may have been injury related and caused by the infection rather than the other way around. I have no way of proving this, of course, but on the basis of this, I think a case could be made for the fact that his current disability is related to the injury."

In the August 4, 1981 report, Dr. Hanson stated there was "no relationship between the trauma and the venous disease, but the trauma could increase the likelihood that phlebitis would occur in the face of the venous disease." Dr. Hanson opined that the "injury then led to infection, and the infection was the thing that led to the postphlebitic syndrome which he [appellant] has now." Dr. Hanson indicated that appellant had a postphlebitic syndrome in the left leg only because "only the left leg was injured," and stated that both the pigmentation and ulceration were caused by the postphlebitic syndrome. He stated that "[t]he ulcerations never have gone away," and that appellant stated they had "gotten worse." Dr. Hanson stated:

> "An informed formulation of this problem would conclude that:
> (a) The patient had a mild venous abnormality (varicose vein)
> (b) The injury led to phlebitis
> (c) The phlebitis led to postphlebitic syndrome or deep venous insufficiency which is characterized by pigmentation and ulceration."

An Office hearing representative reviewed the case record and concluded the case was not in posture for decision. The hearing representative set aside the August 18, 1981 decision and remanded the case to the district office with directions to obtain medical reports from other physicians who had treated appellant, to prepare a new statement of accepted facts and to refer appellant and the case record to Dr. Harrison to clarify whether the employment-related aggravation of appellant's condition was permanent or temporary, and if temporary, the date aggravation ceased.

On remand of the case, appellant's attorney submitted additional reports from the treating physicians including a December 12, 1981 report by Dr. James C. Pope, a Board-certified surgeon, which stated in part as follows:

> "The patient was first seen by me in July 1979 and at that time was a meat inspector for U.S.D.A. and had a chronic infection of the left leg for approximately some six months. The calf of the left leg was much larger than on the right and somewhat more firm and appeared to have venous insufficiency of the left leg. Arterial examination was essentially within normal limits. It was my opinion at that time the patient should undergo venogram but the patient did not return for an appointment until December 12, 1979. At that time his ulcerated area was completely healed but the area continued to be discolored. No active ulceration at that time. Again it was my opinion that the patient should have a venogram and perhaps consultation with . . . [a] vascular surgeon at Emory.
>
> "The patient was seen again one year later on December 5, 1980. At that time the patient had four ulcers on the lateral aspect of the leg and was started on unna boots, once a week until these were healed and it was my opinion at that time the patient should undergo a vein stripping as soon as his ulcers were completely healed. The patient was placed on this regimen with good healing of his ulcers and was last seen in the office on January 27, 1981 when all the ulcers but one were completely healed and the uphealed ulcer measured 1.5×2 cms. and appeared to be healing satisfactorily. A venogram was done in December 1979 which revealed multiple superficial varicosities and no evidence of deep venous problems.
>
> "In summary, it is my conclusion that Mr. Wayne Hackney did indeed have preexisting venous disease and sustained an on-the-job injury resulting in large, infected ulcer on the lateral aspect of his left leg. I do believe at the present time or at least the last time I saw Mr. Hackney in my office his ulcer on his leg was almost completely healed. It is my opinion also that Mr. Hackney's ulcer will probably break down again in the future if subjected [to] much stress such as long term standing.***"

In response to an Office request, the employing establishment submitted appellant's personnel and medical records and the position description of meat inspector and stated *inter alia* that the position required "at least eight hours of walking and standing" and "moderate lifting and carrying objects between 15-44 pounds." The employing establishment informed the Office that it had terminated appellant's employment effective April 16, 1982 due to his "absence from duty without permission."

The Office prepared a detailed statement of accepted facts which it referred with the case record to Dr. Harrison on July 7, 1982 with a request that Dr. Harrison clarify whether the December 5, 1978 employment injury had caused a temporary or permanent aggravation and the cessation date of any temporary aggravation. Dr. Harrison replied as follows in an October 28, 1982 report:

> "I have again reviewed all the information forwarded to me concerning the above and examined him on the 31st of August, 1982. At the time I saw him he was still having discomfort in the left leg. He states that the leg hurts when he places it in a dependent position or does any walking and states that he has made no effort to go back to work. On examination he was found to have prominent veins filling into a pigmented area on the lateral aspect of the leg. There was also some pigmentation of the medial aspect behind the malleolus. There was no evidence of ulceration at the time. He says that he has been wearing ace bandages on the leg, but at the time I saw him he was wearing only support hose.
>
> "There is actually very little that I can add to my communication with you on February 11, 1981 and July 6, 1981. He has chronic venous insufficiency with marked varicose veins and statis changes of the left leg. There is no doubt that the minor injury to the leg of 12-5-78 aggravated the situation leading to ulceration. The effects of this aggravation, according to all records that I can see, is only superficial with the ulceration. There is nothing to suggest that this injury caused any aggravation of the basic underlying problem of chronic venous insufficiency, varicose veins and statis. As stated previously, there is no question in my mind that his problem was only temporarily aggravated and that at the time when his ucler had healed in February and he went back to work, that his temporary aggravation had ceased. His problems thereafter were related to his original disease."

An Office medical adviser who had not previously reviewed the case record reviewed it on November 24, 1982 and stated that Dr. Harrison's October 23, 1982 report supported appellant's disability as "due to his varicose condition," and not to the ulcer incurred in the employment injury "which apparently went on to heal satisfactorily," while Dr. Hanson's August 4, 1981 report stated that appellant had a postphlebitic syndrome which was a "permanent disability" and was causally related to the employment injury. The medical adviser opined that the findings of the December 1979 venogram which "shows varicosities in the superficial (saphenous) venous system," supported the opinion of Dr. Harrison and established that the effects of the employment injury were temporary.

Another Office medical adviser reviewed the case record and stated as follows on December 2, 1982:

> "Review of this chart reveals an overweight individual with severe

> vascular insufficiency, who according to Dr. Austin is also a one pack per day smoker. This is the kind of ongoing condition where the leg is doomed to break-down with minimal trauma and the incident in question merely precipitated the problem. Phone calls to Drs. Astin, Lamb, and Grace Holmes reveal there was never complete healing under their care.[2] It was completely healed by December 12, 1979, as noted in Dr. Pope's letter of December 12, 1981: 'It was my opinion at that time the patient should undergo venogram but the patient did not return for an appointment until December 12, 1979. At that time his ulcerated area was completely healed but the area continued to be discolored. No active ulceration at that time.' Though one year later when seen, it was open again; this is no more than one would expect with the underlying disease. Therefore, what Dr. Harrison had stated was correct with the exception that he had been led to believe that the ulcer was completely closed by February of 1979, when it in fact had alternately exacerbated and improved until it was finally healed as of December of that year. Perhaps one of the factors in the poor healing in question is the patient's lack of adherence of the regimen put forth by his physicians, as more than one has stated. Therefore, it appears we have erred in the date, but that this as previously stated is a matter of temporary aggravation of underlying pathology with the aggravation having ceased no later than December of 1979."

By compensation order dated December 21, 1982, the Office determined that the December 5, 1978 employment injury had caused a temporary aggravation of appellant's condition beginning May 8, 1979 which had ceased by December 12, 1979, the date specified by the medical adviser, and authorized compensation for this period. A December 17, 1982 Office memorandum incorporated into the decision discussed the reports of Dr. Harrison and of an Office medical adviser, but did not mention Dr. Hanson's reports.

At the request of appellant's attorney, a hearing was held before an Office hearing representative on June 6, 1983 at which appellant testified. Appellant's representative contended at the hearing that the Office was incorrectly focusing on the date an ulceration had healed, that the ulceration was merely a symptom of the postphlebitic syndrome, that the syndrome, not the ulcers disabled appellant and that the syndrome was causally related to the December 5, 1978 employment injury.

By decision dated July 15, 1983 and finalized July 21, 1983, the hearing representative determined that "the record establishes that the aggravation of the underlying pathology, the chronic venous insufficiency, ceased no later than December 12, 1979." The hearing representative found that "the record contains no medical opinion evidence which supports that the disability subsequent to December 12, 1979 was due to or causally related to the employment injury of December 5, 1978," and that the reports of Dr. Harrison and the November 24, 1982 and December 2, 1982 reports of the Office medical advisers represented the weight of the medical evidence.

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[2] The case record contains three memoranda by the medical adviser concerning these telephone conversations. Dr. Holmes was an associate of Dr. Kuhn.

The Board finds that the case is not in posture for decision and will be remanded to the Office for further development. There is a conflict of medical opinion concerning whether the December 5, 1978 employment injury caused a temporary or permanent aggravation of appellant's condition.

Dr. Harrison, the Board-certified surgeon to whom the Office referred appellant, submitted a detailed February 11, 1981 report which stated that the employment injury had aggravated appellant's preexisting venous insufficiency and varicose veins, that such aggravation was temporary and that if appellant's ulcer "had totally healed, then this would terminate the disability from the original injury." He suggested February 1979 as the date aggravation ceased, but based this estimate on an incorrect history of the ulcer having healed by that time. These conclusions, however, were inconsistent with other opinions expressed in his report that the condition of appellant's left leg at the time of the February 10, 1981 examination was the result of the employment-related contusion which caused infection and ulceration superimposed on the preexisting chronic venous insufficiency and varicose veins. Dr. Harrison also opined that one could not state that the current condition of appellant's leg was entirely due to the preexisting conditions and not due to the employment injury. Dr. Harrison's October 28, 1982 opinion is also based on a incorrect history of the ulcer healing in February 1979 and is contrary to his opinion that appellant's current condition was due in part to the employment injury.

Dr. Hanson, Board-certified in surgery and thoracic surgery, opined in a well-reasoned report that appellant had a preexisting mild venous abnormality, and that the employment injury had caused an infection which led to phlebitis and postphlebitic syndrome characterized by pigmentation and ulceration. Dr. Hanson also opined that appellant's preexisting incompetent venous supply made him "very susceptible to injury and infection," and that "once this occurs, the susceptibility remains forever."

The Office medical adviser who reviewed the case on November 24, 1982 noted there was conflict of opinion between Drs. Harrison and Hanson, and stated that the venogram results supported Dr. Harrison's opinion that the effects of the employment injury were temporary. While Dr. Hanson's apparent unawareness of the venogram results somewhat diminishes the weight of his report, the report still has sufficient weight to create a conflict.

On remand, the Office should prepare a statement of accepted facts and refer appellant with the medical evidence of record, the statement, and a description of the duties and physical requirements of appellant's job to an appropriate Board-certified impartial specialist for a rationalized opinion concerning whether the December 5, 1978 employment injury caused a temporary or permanent aggravation of appellant's underlying condition. If the specialist believes the employment injury caused only a temporary aggravation, he or she should state when the aggravation ceased. The specialist should address whether the employment injury caused a permanent aggravation of the underlying condition and whether there are permanent residuals of the employment injury, including an increased sensitivity to reinjury and reinfection,[3] which prevent appellant from continuing in his usual employment. After any further development of the evidence deemed necessary by the Office, it should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated July 15, 1983 and finalized July 21, 1983 is hereby set aside and the case remanded for further development.

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[3] See *Janice N. Cooper*, 32 ECAB 528.

In the Matter of JOSEPH ROBINSON *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84–615; Submitted on the Record;
Issued April 5, 1984

Before E. GERALD LAMBOLEY, WILLIE T.C. THOMAS, DAVID S. GERSON

The issue is whether appellant has any disability causally related to an employment-related pulmonary condition.

On June 23, 1983 appellant, then 57 years old, filed a claim alleging that he sustained a pulmonary condition as a result of exposure to asbestos during his federal employment as a laborer and warehouseman from November 14, 1963 to April 5, 1981. He retired on disability effective December 10, 1982.

The Office of Workers' Compensation Programs accepted as factual appellant's exposure to asbestos during federal employment.

In support of his claim, appellant submitted a September 1, 1982 report from Dr. George S. Cohlmia, a general surgeon, who examined appellant on December 14, 1981, and reported the following:

"*PHYSICAL EXAMINATION:*

"This is a well-developed, well-nourished male in no acute distress. Respiratory rate is 14, blood pressure is 130/90, pulse is 70.

"The physical examination is within normal limits, except for a grade II/VI systolic murmur at the apex. The rest of the physical exam is completely within normal limits, including the respiratory system, which shows no abnormalities.

"*Comment:* On physical examination, this patient shows no evidence of respiratory insufficiency."

* * *

"*PULMONARY FUNCTION STUDIES:*

* * *

"(1) *Spirometry:* The FVC [forced vital capacity] is 3.05 liters or 71% of predicted, which is decreased and indicates mild restrictive disease. The FEV-1 [forced expiratory volume in one second] is 2.61 liters or 84% of predicted, which is at the lower limits of normal and indicates no significant obstructive disease. The FEF [forced expiratory flow] 25-75 and the rest of the flow rates are within normal limits and indicate no obstructive disease. The FEV-1:FVC ratio is normal, showing no obstruction.

"(2) *Lung Volumes*: The SVC is 3.09 liters or 72% of predicted. The RV is 1.71 liters or 81% of predicted. The TLC is 4.80 liters or 80% of predicted. The FRC is 2.19 liters or 70% of predicted. The lung volumes are, in general, decreased and indicate mild restrictive disease.

"(3) *Diffusion Capacity:* The DLCO is 20.23 milliliters per minute per millimeter of mercury, or 77% of predicted, which shows a mild reduction.

"(4) *Maximum Ventilatory Volume*: The MVV, as noted, is within normal limits.

"*Impression:*

(1) Mild to moderate restrictive pulmonary disease.

(2) No evidence of obstructive pulmonary disease.

(3) Mild reduction in the diffusion capacity.

(4) Normal maximum ventilatory volume.

"*Comment:* This patient's pulmonary function tests are abnormal and show mainly a mild to moderate restrictive pulmonary disease alone. Because this patient's smoking history has been very minimal, these abnormalities most likely are due to his asbestos exposure, especially in light of the fact that they are restrictive.

"*X-RAYS:*

"The patient was seen by Dr. Stanley Sizler and x-rays were performed by him. Four views of the chest were obtained, including

> two oblique views. Dr. Sizeler is a Board-certified radiologist who has extensive experience with asbestos-related disease. His impressions are as follows:
>
> '(1) Aortic tortuosity and elongation, prominent left ventricular contour and transverse cardiomediastinal size related at least in part to considerably higher right then left hemidiaphragm, ?hepatomegaly, ?partial eventration.'
>
> "*Comment:* There is no evidence of pleural or parenchymal asbestosis.
>
> "*Discussion:*
>
> "Mr. Joseph Robinson is a 56-year-old gentleman who has had exposure to asbestos while working in the shipyards.
>
> "At the present time, he has moderate symptoms of respiratory insufficiency. This patient has no history of lung disease. He does have a history of coronary artery disease and exertional angina, which may affect his exercise tolerance. He has only smoked cigars occasionally and has never inhaled, so this should not affect his respiratory system.
>
> "His laboratory and electrocardiogram are within normal limits. His pulmonary function tests are abnormal and show mainly a mild to moderate restrictive disease, most likely influenced by his asbestos exposure. The patient's x-rays show no evidence of pleural or parenchymal asbestosis."
>
> * * *
>
> "This patient fits into the category of Class II-III of the American Medical Association's classification for workers' disability and respiratory impairment."

In order to obtain further evaluation of appellant's condition, the Office referred appellant, together with a statement of accepted facts and the entire case record, to Dr. Gregory D. Anderson, a Board-certified internist and pulmonary specialist. With respect to his October 12, 1983 examination of appellant, Dr. Anderson reported the following:

> "Pulmonary function studies show a mild restrictive defect with preservation of gas exchange and diffusing capacity. Forced vital capacity is 3.21 liters, 80% predicted, FEV1 2.69 liters, 92% of predicted, ratio FEV_1/FVC 84%. Lung volumes are reduced in proportion. Total lung capacity 4.22 liters, 72% of predicted. Diffusing capacity is normal at 99% of predicted and blood gasses, breathing room air are: $pO_2$83.$pCO_2$39.pH 7.38."
>
> * * *
>
> "Chest X-ray: PA, lateral and oblique chest films show several fibrotic strands in the right middle lobe, but pulmonary parenchyma is otherwise normal. There is minimal pleural thickening along the lateral aspect of the left hemithorax without associated calcification

> or pleural fluid. Cardiac silhouette is mildly increased but pulmonary vasculature is normal.
>
> "*IMPRESSION:*
>
> 1. Probable asbestos induced pleural thickening.
> 2. Minimal post inflammatory changes, right middle lobe.
> 3. Atherosclerotic heart disease with angina pectoris.
> 4. Exogenous obesity.
> 5. Hypertension.
>
> "On the basis of this individual's prior asbestos exposure, changes in present chest radiographs, I feel this individual likely has asbestos induced pleural changes. These are minimal in degree and there is no evidence of parenchymal fibrosis or intrathoracic malignancy at this time. I feel the minimal fibrotic stranding seen in the right middle lobe is most likely post inflammatory in nature, possibly as a result of previous pneumonitis.
>
> "Pulmonary function studies show a mild restrictive defect with preservation of gas exchange and diffusing capacity. In order for pleural disease to cause such a defect, a much greater degree of thickening would be expected.
>
> "I believe this individual's major cause of disability is cardiac in nature, i.e., angina pectoris. There is likely a degree of physical deconditioning owing to his sedentary lifestyle and obesity as well."

An Office consultant, Dr. Charles C. McDonald, a Board-certified internist, reviewed the medical records and submitted the following November 20, 1983 report:

> "The files contain an evaluation by Dr. George Cohlmia dated September 1, 1982. At that time, dyspnea when walking five blocks on level ground or climbing one flight of stairs was noted. A minimal smoking history was noted. Physical examination of the lungs was noted. There was grade 2/6 systolic murmur. Pulmonary function tests showed an FVC of 3.05 liters (71% of predicted). The FEV_1/FVC ratio was normal. A total lung capacity was 4.8 (80% of predicted). Diffusion was 20.23, or 77% of predicted. Doctor Cohlmia's conclusion was moderate restrictive pulmonary disease with decreased diffusion. Chest x-rays showed no evidence of pleural or parenchymal disease. Doctor Cohlmia gave no diagnosis with respect to asbestos-related disease.
>
> "The file contains a pulmonary specialist evaluation by Dr. Gregory Anderson, which was dated October 12, 1983. Angina pectoris is noted with exertion, but there are no pulmonary complaints. A physical examination of the heart and lungs is normal. Pulmonary function tests show mild restriction, with a normal diffusion. Chest x-rays show 'minimal pleural thickening along the lateral aspect of

"is determined by the type and characteristics of the tumor itself and to the biologic characteristics of the individual having the tumor; trauma has not been implicated, to my knowledge."

The compensation order of the Office of Workers' Compensation Programs, dated August 29, 1983, is hereby affirmed.

In the Matter of MARK A. COGNETTI *and* DEPARTMENT OF THE TREASURY, U. S. SECRET SERVICE, Washington, D. C.

Docket No. 83-35; Submitted on the Record;
Issued April 9, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether the injury sustained by appellant, a member of the United States Secret Service Uniformed Division, came within the provisions of section 8191 of the Federal Employees' Compensation Act.[1]

At approximately 10:45 p.m. on October 31, 1980 appellant, then a 26-year-old officer of the United States Secret Service Uniformed Division, sustained a self-inflicted gunshot wound to the right temple. The case record shows that the incident occurred in the locker room of the employing establishment where appellant was in the process of dressing for his 11 p.m. to 7:30 a.m. tour of duty. The injury occurred when appellant put his service revolver to his head following a discussion with colleagues concerning the Russian roulette sequence of a movie. The record does not indicate that appellant's actions were the result of an intent to bring harm to himself.

On January 9, 1981 appellant filed a claim for compensation benefits pursuant to the Federal Employees' Compensation Act for his disability since the October 31, 1980 incident. By compensation order dated April 9, 1981 the Office of Workers' Compensation Programs denied his claim on the ground that it did "not fall within the purview of 5 U.S.C. 8191, as there was no direct involvement of a federal crime."

Appellant appealed this decision to the Board and the case was docketed as No. 81-1494. However, on January 12, 1982 the Office filed a motion setting forth the applicable law in this case and requested that the Board remand the case for further development. In particular, the Director noted that "members of the United States Secret Service Uniformed Division,[2] like members of the Metropolitan Police Force, the

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[1] 5 U.S.C. section 8191.

[2] Formerly known as the Executive Protective Service.

Fire Department of the District of Columbia, the United States Park Police Force, and applicable members of the United States Secret Service Nonuniformed Division, are eligible for compensation pursuant to the District of Columbia Policemen and Firemen's Retirement and Disability Act, D. C. Code section 4-521 *et seq.*" The Director cited *James David Finch*[3] where the Board found that while a member of the U. S. Park Police Force is not an employee under section 8101(1) of the Act, he is eligible for benefits pursuant to section 8191 of the Act. He noted that following the *Finch* decision the Office issued FECA Program Memorandum No. 219 (March 3, 1977) which stated that "members of the Secret Service covered by the D. C. Policemen's Retirement and Disability Act, were covered as law enforcement officers under 5 U.S.C. section 8191." This memorandum further noted:

> "[S]uch personnel are covered by the provisions of 5 U.S.C. 8191(3) while they perform all official duties. Any duty hours of these employees would be considered to be in the lawful prevention of, or attempt to prevent, the commission of a federal crime."

In light of these provisions, the Director requested remand of the case for further development of the evidence on "appellant's official duties and duty hours, and as to circumstances surrounding the injury and a *de novo* decision." The Board granted the Director's motion by order dated February 25, 1982.

On remand, the Office obtained statements from appellant's coworkers describing the October 31, 1980 incident and a copy of the official investigation report completed by the employing establishment. The employing establishment also submitted a May 1, 1981 decision of its Administrative Review Board finding that "the actions and conduct of Officer Cognetti that occurred at approximately 2245 hours on Friday, October 31, 1980, were not in the performance of duty." The Director of the Uniformed Secret Service noted in a May 24, 1982 letter to the Office that appellant's "set work schedule and regular duty hours were from 11 p.m. to 7:30 a.m."

The case record shows that on June 30, 1982 the Office issued the following "FECA Program Memorandum No. 270" which supersedes Program Memorandum No. 219:

> "The Executive Protective Service, the U. S. Park Police, and those members of the Secret Service who are covered by the D. C. Policemen and Firemen's Retirement and Disability Act are considered law enforcement officers under 5 U.S.C. 8191.
>
> "It has been determined that such personnel must be actively engaged in one of the specific activities described in 5 U.S.C. 8191(1),

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[3] 24 ECAB 181.

> (2) or (3) to qualify for coverage as nonfederal law enforcement officers. Since this extension of the Federal Employees' Compensation Act limits coverage to specific activities involving crimes against the United States, the general performance of duty criteria applying to those covered as employees under 5 U.S.C. 8101(1) are irrelevant under 5 U.S.C. 8191-93. For example, injuries occurring in any of the numerous tangential activities of law enforcement, such as reporting for work, changing clothing, etc., would not normally come under 5 U.S.C. 8191, even though the laws enforced in the job deal solely with crimes against the United States.
>
> "It is to be noted that U.S. Secret Service Agents are covered by the provisions of 5 U.S.C. 8101 until they elect coverage under the D. C. Policemen and Firemen's Retirement and Disability Act. When such coverage is elected, the provisions of 5 U.S.C. 8191 *et seq.* would apply."

By compensation order dated August 11, 1982 the Office rejected appellant's claim for compensation on the ground "that the injury did not occur under circumstances within the provisions of 5 U.S.C. 8191."

On appeal, appellant's attorney argues that appellant's presence in the employing establishment locker room dressing for his tour of duty which was to begin within 15 minutes was a "reasonable time which places [him] within the definition of performance of duty." He further asserted that the Office's Program Memorandum No. 270, superceding No. 219, was "prepared specifically to deny [appellant] his benefits."

In her brief in support of the Office's decision, counsel for the Director argues that the interpretation of the coverage provided by section 8191 as set forth in Program Memorandum 270 is correct. Specifically, she asserts that "the mere fact that a law enforcement officer works in a jurisdiction which is exclusively under federal control does not raise a presumption that *all* of the officer's activities are directed toward the prevention of a federal crime. A law enforcement officer who is changing clothes in the locker room prior to duty and accidentally shoots himself is not "on that occasion" apprehending or attempting to apprehend a person for a federal crime, or engaged in the prevention of a federal crime, as required by the very specific language of section 8191."

In the alternative, counsel for the Director argues that "even if performance of all official duties by an officer of the United States Secret Service Uniformed Division were within the purview of section 8191, appellant would not be entitled to benefits because his injury occurred prior to the performance of any official duty: he was injured in the locker room *prior* to reporting for duty, and the record indicates that the Chief of the United States Secret Service Uniformed Division specifically stated that appellant was not in the performance of his official duty when the injury occurred."

Appellant's attorney filed a second brief with the Board on May 24, 1983 wherein he reasserted that the Office's issuance of Program Memorandum 270 was done specifically to deny appellant his benefits in violation of due process. He added that "an administrative rule and regulation usually will not be construed to operate retrospectively where the intention to that effect does not unequivocally appear." *Propper* v. *Clark*, 377 U. S. 472.

In a memorandum dated May 31, 1983, the Board requested the Director to respond to appellant's arguments. Counsel for the Director submitted that "the decisions cited by appellant are not applicable in this case because an Office program memorandum is an internal administrative document, not a rule or regulation." *Schweiker* v. *Hansen*, 450 U. S. 785. She also asserted that Program Memorandum 270 is a proper exercise of the Director's discretion under 5 U.S.C. section 8191 and that it must be applied in this case. Citing *Thorpe* v. *Housing Authority*, 393 U. S. 268, counsel for the Director asserted that application of Memorandum 270 would not result in "manifest injustice because appellant's injuries did not result in any manner from reliance upon Program Memorandum 219."

Counsel for appellant was served with a copy of the Director's brief but did not respond within the allotted time.

The Board finds that even applying a liberal interpretation of the term "performance of duty" to the facts in this case results in the conclusion that appellant was not in the performance of his duties as a uniformed officer of the Secret Service at the time of his self-inflicted head wound. Without reaching the issue of the propriety of application of Office Program Memorandum 270, the Board finds that applying the standard of Program Memorandum 219 to the facts of appellant's case results in the finding that while appellant may have been eligible for benefits as a law enforcement officer under section 8191 he was not in the performance of his official duties as a law enforcement officer at the time of his self-inflicted gunshot wound. Even under the most liberal interpretation, the act of deliberately placing oneself in the situation of self-inflicting a gunshot wound would be such a deviation from the performance of duty as to remove the action from the coverage of the Act.[4]

The decision of the Office of Workers' Compensation Programs, dated August 11, 1982, is affirmed.

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[4] See *Morris Perringer*, 18 ECAB 341; Larson, *Workmen's Compensation Law*, section 2300.

In the Matter of ETHEL D. CURRY *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION CENTER, Biloxi, Miss.

Docket No. 84–529; Submitted on the Record;
Issued April 10, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH,
DAVID S. GERSON

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further merit review pursuant to 5 U.S.C. section 8128(a) was proper.

On August 25, 1971 appellant, a 49-year-old food service worker, injured her lower back while lifting silverware out of a bucket. She continued working, but when pain in the back did not subside, she saw Dr. John B. O'Keefe, a Board-certified orthopedic surgeon. He hospitalized her from August 31, 1971 to September 25, 1971 for traction and physical therapy. In a September 23, 1971 attending physician's report, he diagnosed myositis of the thoracolumbar muscles.

Appellant returned to work on October 13, 1971, but could work only a few hours due to back pain. The employing establishment filed a notice of recurrence of disability on October 20, 1971, and appellant remained off work through December 28, 1971.

In a November 1, 1971 report, Dr. A. William Dunn, a Board-certified orthopedic surgeon, noted that appellant had back pain on flexion and extension of the lumbar spine, but found "nothing of any clinical significance" in x-rays of the cervical, thoracic, and lumbosacral spine and pelvis. He stated that he found "no neuromusculoskeletal cause for her complaints," and that no orthopedic treatment was indicated. In a December 28, 1971 report, Dr. O'Keefe stated he agreed with these conclusions.

The Bureau of Employees' Compensation (now the Office of Workers' Compensation Programs) paid appellant compensation for time off work through December 28, 1971.

On October 18, 1973, appellant began receiving physical therapy for pain and tenderness in the lumbosacral area of her back. In a December 28, 1973 report, Dr. M. F. Longnecker, a Board-certified orthopedic surgeon, stated that x-rays of the lumbosacral spine revealed "moderate degenerative changes involving the vertebral bodies," along with "some mild narrowing at the L5–S1 interspace." He stated a diagnosis of "chronic mechanical back pain, secondary to . . . degenerative arthritis."

Appellant stopped work after December 15, 1973 and went on leave without pay on January 21, 1974. She retired on disability effective February 25, 1974. After she claimed compensation for her continuing disability, the Office referred her to Dr. Longnecker for examination and evaluation of her current condition.

In a May 21, 1975 report, Dr. Longnecker opined that appellant had a permanent condition of mild to moderate chronic mechanical back pain secondary to degenerative arthritis and a chronic lumbosacral strain. He stated his neurologic exam was normal and that he found "no evidence of radiculopathy to indicate . . . a ruptured disc . . ."

The Office paid compensation for temporary total disability effective January 18, 1974.[1]

After referral by the Office, appellant was examined on March 21, 1979 by Dr. Longnecker, who stated in an April 5, 1979 report that appellant was "essentially unchanged." He indicated that appellant could return to "sedentary work" not requiring stooping, lifting, or bending. After an Office medical adviser opined in a May 24, 1979 report that appellant could work eight hours a day in a job requiring light lifting, standing, and walking, the Office on November 20, 1979 determined that appellant had the earning capacity of an order clerk II and reduced her compensation based on that wage-earning capacity, effective October 11, 1979.

The Office then referred appellant, along with the copies of her medical records, to Dr. Crampton Harris, Jr., an orthopedic surgeon, for examination and evaluation. In a December 4, 1979 report, the doctor reviewed appellant's medical history and stated:

> "PHYSICAL EXAMINATION: Revealed an obese . . . female who weighs 230 pounds. It is apparent from examining the patient that she is exaggerating her symptomatology. On alternate standing on the two feet there was no residual muscle spasm. Bending motions were within normal limits. There was no reflex or sensory change in either lower extremity.
>
> "X-RAYS: Show osteoarthritis.
>
> "OPINION: Back complaints secondary to obesity and arthritis consistent with the patient's age.
>
> "RECOMMENDATION: In my opinion the claimant's present condition is in no way related to any injury she may have sustained on August 25, 1971, when she lifted some silverware out of a bucket.
>
> "In my opinion she has no residuals remaining due to effects of this so-called injury of August 25, 1971.
>
> "Any work limitations this patient has would be due to her obesity which is a self-inflicted condition. She has no restrictions on her work from the standpoint of physical disability resulting from injury.
>
> "In looking through your reports on this patient, I would agree with the report of Doctor A. William Dunn of New Orleans that no orthopedic treatment is needed and in my opinion she needs to be put back to work and taken off the disability rolls."

By compensation order dated January 29, 1980, the Office terminated appellant's compensation, effective February 28, 1980, finding she was "no longer disabled for work as a result of the employment-related condition."

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[1] Appellant elected to receive compensation over retirement benefits.

Appellant requested reconsideration and submitted a March 18, 1980 report of Dr. Jack Waxman, a Board-certified rheumatologist. This report diagnosed mild osteoarthritis in the knees and back, along with "weight-induced strain . . . at the apophyseal joints in the low back causing additional muscle spasm, which is contributed to further by [appellant's] anxiety state."

Appellant was hospitalized from October 15 to October 21, 1982, during which time she received steroid injections for her low back pain and underwent a lumbar myelogram. In an October 19, 1982 consultation report, Dr. John J. McCloskey, a Board-certified neurosurgeon, stated that the myelogram showed "a transcentral disc protrusion at L4, possibly L5." He diagnosed lumbar spinal stenosis and stated that "if the symptoms persist . . . a decompressive laminectomy and possibly disc excision would be indicated."

Appellant was again hospitalized from December 14 to December 22, 1982, and on December 16, 1982, Dr. McCloskey performed an L4 and L5 laminectomy and excision of the L4 disc. Appellant developed cardiac arrhythmias postoperatively and was treated by Dr. Edgar Hull, a Board-certified internist.

Appellant subsequently submitted the hospital reports of her October 1982 and December 1982 hospitalizations. She also submitted a January 18, 1983 note of Dr. Chris E. Wiggins, an orthopedic surgeon and her attending physician during her October 1982 hospitalization, stating that she was "permanently totally disabled due to back pain, and if the history as given by her is correct . . . then that relates back . . . at least in part to her previous industrial back injury." In a February 21, 1983 report, Dr. Wiggins recounted appellant's medical history, including her recent hospitalizations, and diagnosed "lumbar spinal stenosis as a result of lumbar disc disease." He also stated, "It is somewhat unclear why this is not being handled as a workmen's compensation case if the history as given by the patient is correct; namely, she did hurt her back on the job while in a federal facility."

A May 24, 1983 claims examiner's memorandum noted that the hospital reports only described appellant's physical condition and did not address the issue of causal relationship, and that Dr. Wiggins' January 18, 1983 note was not "substantiated by any medical rationale."

By compensation order dated May 31, 1983, the Office denied appellant's request for reconsideration on the ground that the evidence submitted in support of the request lacked "substantial probative value."

Appellant again requested reconsideration and submitted a June 8, 1983 report of Dr. Wiggins which recounted appellant's history of injury and stated, "Having only the history as given by [appellant] to go on, I would still consider this as being workmen's compensation related if the injury she had initially was on the job, and it was appropriately documented and the workmen's compensation commission authorized treatment for it and that it has continued up to present." The doctor stated that appellant was totally disabled due to degenerative disc disease.

Appellant subsequently submitted copies of medical reports previously submitted to the Social Security Administration in connection with a Social Security Disability claim. Among these were statements of Drs. Wiggins and Hull referring to their previous reports; a June 27, 1983 report of Dr. Steven Fineburg, a general practitioner, that related the results of physical examination; a January 25, 1983 report of Dr. Henry C. Mostellar, Jr., a Board-certified neurosurgeon, relating the results of his physical examination; and a January 25, 1983 x-ray report of Dr. Charles E. Shopfner, a Board-certified radiologist, which stated that x-rays of the lumbar spine showed "mild generalized osteoarthritis with slight degeneration of the fourth and fifth [lumbar] discs and facets."

A November 17, 1983 claims examiner's memorandum noted that the reports of Drs. Mostellar, McCloskey, Hull and Fineburg did not offer opinions on the issue of causal relationship and that Dr. Wiggins did not support his opinion on that issue with medical rationale.

By compensation order dated November 30, 1983, the Office again denied appellant's request for reconsideration, finding that the evidence submitted in support of the request lacked "substantial probative value" and therefore did not warrant reopening the case on the merits.

The Board notes that the only decisions before it are those of the Office dated May 31, 1983 and November 30, 1983 which found that the evidence submitted in support of the requests for reconsideration was insufficient to require review of the January 29, 1980 merit decision. Since more than one year has elapsed from that decision until the filing of appellant's appeal on December 19, 1983, the Board lacks jurisdiction to review that decision.[2]

The Board finds that the Office's refusals to reopen the case for a merit review were improper.

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128.[3] Accordingly, as is well-established under Board precedent,[4] the Office is required to reopen a case on its merits when such evidence or contentions are presented.

In the present case, appellant submitted relevant evidence not previously of record that was sufficient to require the Office to reopen the case for reconsideration. Following the January 29, 1980 compensation order terminating her compensation, appellant submitted a January 18, 1983 note and a February 21, 1983 report of Dr. Wiggins, an orthopedic surgeon who treated appellant during her October 1982 hospitalization, expressing the doctor's opinion that appellant's condition was causally related to her August 25, 1971 employment injury. Following the May 31, 1983 compensation order denying reconsideration, appellant submitted a June 8, 1983 report of Dr. Wiggins also supporting causal relationship. These reports are relevant with respect to the issues in the case.

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[2] 20 CRF section 501.3(d)(2). See *Nicholas Gatto*, 25 ECAB 300.

[3] *Eladio Joel Abrera*, 28 ECAB 401.

[4] See, e.g., *Cynthia L. Lee*, 15 ECAB 425; *Leopold J. Gunston*, 18 ECAB 149; *San Paul Banks*, 32 ECAB 960.

The Board notes that the Office's compensation orders of May 31, 1983 and November 17, 1983 refused to reopen appellant's case because of the findings that the additional evidence lacked "substantial probative value." This is not the correct test to follow in determining whether to reopen a case for reconsideration.[5]

Following remand, an Office medical adviser should review the entire case record, including the additional relevant reports of Dr. Wiggins. After such further development as is necessary, the Office should issue a *de novo* decision on the merits of the case.

The decisions of the Office of Workers' Compensation Programs are hereby reversed and the case remanded for further proceedings consistent with this decision.

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[5] See notes 3 and 4, *supra*.

In the Matter of Richard N. Thomas *and* Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N. H.

Docket No. 84-455; Submitted on the Record;
Issued April 13, 1984

Before E. Gerald Lamboley, Michele von Kelsch, David S. Gerson

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for review on the merits was proper.

Appellant, a 41-year-old physical science technician, injured his back on September 29, 1975 while moving a heavy container. He received continuation of pay from September 30 to November 13, 1975 and temporary total disability compensation from the Office thereafter for a lumbar muscle sprain.

In several reports from October 3, 1975 to April 1, 1976 Dr. Guy M. Esposito, a Board-certified orthopedic surgeon, did not find objective physical findings consistent with appellant's complaints of pain. He indicated only "mild degenerative disc disease."

An Office medical adviser completed a work tolerance limitations form dated June 6, 1976 in which he stated that appellant could perform a full time sedentary job but that he was limited to sitting for up to only four hours at any one time and to walking or standing for an hour at a time.

By letter dated September 10, 1976 the Office informed appellant that since the medical evidence indicated that he was no longer totally disabled a wage-earning capacity determination would be made.

On November 10, 1976, the state employment services selected two positions as being within appellant's capabilities and commuting distance—watchman and convoy guard.[1]

In a November 23, 1976 report an Office medical adviser concluded that appellant could perform the duties of either a watchman or convoy guard.

By letter dated September 29, 1977 the Office informed appellant that it was making a provisional adjustment in his compensation on the ground that he was no longer totally disabled. The Office determined that appellant's provisional wage-earning capacity was to be based on the minimum wage in the area where he lived.

In reports dated October 14, 1977 and March 7, 1978 and in a work tolerance limitations form dated October 13, 1977 Dr. Esposito again noted no objective physical findings.

In a May 10, 1978 report Dr. Chien-Min Chen, an orthopedic surgeon, who first saw appellant two years prior to his current report, stated that "examination today again revealed very little positive findings besides tenderness at the lumbosacral area . . . with slight limitation of straight leg raising on the right side." X-rays revealed minimal degenerative changes in appellant's lumbosacral spine. In a Februry 10, 1979 report Dr. Chen stated that due to appellant's low back strain "he should find a job which doesn't require too much lifting and he should not stay in one position constantly."

By decision dated September 7, 1979 the Office determined appellant's wage-earning capacity as of September 26, 1977 based upon the full-time position of watchman. That job was described as sedentary requiring lifting up to 10 pounds, touring the grounds, examining doors and the like to see if they were secure, and inspecting equipment to see the left hemithorax'. Doctor Anderson felt that possible pleural disease secondary to asbestos exposure was present.

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[1] Code No. 372.868 and No. 372.887, Department of Labor's *Dictionary of Occupational Titles*.

"As a result of the current examination, the following statements may be made:

1. The condition of pleural thickening was precipitated by the accepted conditions of employment.

2. The diagnosis was pleural thickening secondary to asbestos exposure. There is also a history compatible with angina pectoris.

3. The claimant is not disabled from his position due to disease resulting from exposure to asbestos while in federal employment.

4. The degree of respiratory impairment secondary to asbestos-related disease is 0%."

By letter decision dated December 15, 1983 the Office found that the medical evidence established that appellant had sustained pulmonary injury consistent with exposure to asbestos in the performance of duty, and therefore authorized periodic medical examinations at the Office's expense. However, it rejected appellant's claim for monetary compensation benefits on the basis that he had no evidence of impairment or disability at that time.

The Board finds that the case is not in posture for decision.

The Office has established guidelines for the evaluation of asbestosis claims.[1] These require that the medical reports used to determine the extent of any pulmonary disability include the following information:

> "*Pulmonary Function Studies:* Pulmonary function studies must include measurement of the following functions (the report of the results of the FVC, and Diffusing Capacity must include actual recorded values, the percent of predicted normal, and identification of the normal standard applied for tests conducted before and/or after the use of bronchodilators). The studies should be performed under the supervision or direction of a Board-certified pulmonary specialist.
>
> "A. *Forced Vital Capacity* (FVC) and *Forced Expiratory in one Second* (FEV_1) measured in liters and representing the best of three efforts; and the FEV_1/FVC ratio ($FEV_1\%$) computed from these results. . ."
>
> * * *
>
> "The report must be accompanied by appropriately labeled spirometric tracings (for all tests) showing distance per second on the abscissa and distance per liter on the ordinate."

The Office guidelines also suggest that the AMA *Guides* [2] be used to determine the percent of pulmonary impairment.

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[1] See Federal (FECA) Procedure Manual Chapter 2-806, FECA Tr. No. 81-44, issued August 1981, p. 54.

[2] American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 1971.

In the instant case, an Office medical consultant reviewed the medical evidence and noted that Dr. Cohlmia's September 1, 1982 report showed a forced vital capacity (FVC) of 3.05 liters or 71 percent predicted. The consultant concluded that "the degree of respiratory impairment secondary to asbestos-related disease is 0%." However, utilizing the AMA *Guides* a FVC of 71 percent represents a Class 2 (10%-20%) respiratory impairment. The consultant provided no rationale for his conclusions that appellant had zero percent disability. Moreover, Dr. Cohlmia's report also revealed a forced expiratory volume at one second (FEV_1) of 2.61 liters or 84 percent of predicted, and Dr. Anderson's October 12, 1983 pulmonary function studies showed a FVC rating which were consistent with Class 2 respiratory impairment under the AMA *Guides*.

On remand, appellant's case record should be referred to Dr. McDonald for a clarifying opinion as to how he arrived at zero percent impairment using either the pulmonary function studies, values of either Dr. Cohlmia or Dr. Anderson.

The December 15, 1983 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further development in accordance with this opinion, to be followed by a *de novo* decision.

In the Matter of RICHARD L. BLACET *and* U. S. POSTAL SERVICE, POST OFFICE, Decatur, Ill.

Docket No. 84-309; Submitted on the Record;
Issued April 6, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's disability after June 3, 1980 was causally related to factors of his federal employment.

This is the second appeal in this case. In the first appeal,[1] the Board on July 23, 1982 issued a decision remanding the case to the Office of Workers' Compensation Programs so that it could secure a medical opinion from the National Cancer Institute regarding the issue of causal relationship, as recommended by an Office medical adviser.

On remand the Office requested the National Cancer Institute to provide an opinion regarding the relationship of appellant's malignant melanoma, its metastasis and his federal employment.

In a note dated September 15, 1982, Dr. Steven A. Rosenberg, a

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[1] 33 ECAB 1591.

Board-certified surgeon and the Chief of Surgery at the National Cancer Institute, stated:

> "I have never seen Mr. Blacet personally and he has not been seen at the NIH since July 25, 1980. I have, however, briefly reviewed his chart.
>
> "I am not aware of any evidence that malignant melanoma is related to trauma. I also do not believe that there is any evidence that continued trauma plays any role in causing malignant melanoma to spread."

On March 22, 1983 the Office referred appellant, along with a statement of accepted facts and the case record, to Dr. Betty M. Hahneman, a Board-certified oncologist, for an opinion regarding the issue of whether appellant's malignant melanoma and its metastasis were causally related to factors of his federal employment.

In a report dated June 16, 1983, Dr. Hahneman stated:

> "I have reviewed the case file and background information sent to me in the case of Richard Blacet. I have also reviewed the recent literature concerning the role of trauma in malignant melanoma. My evaluation and opinion are as follows:
>
> "The diagnosis Malignant Melanoma of the left thigh, excised in 1975, with metastasis to the left groin area (iliac node dissection, 1977) and to the left hydrocele sac (1980).
>
> "It is my opinion that this condition was not caused nor was it materially aggravated by the chronic trauma to the left thigh. The location of the melanoma and its subsequent spread are entirely consistent with the natural history and usual progression of this disease. Although the work-related trauma may have caused the lesion to bleed, this tendency to bleed with trauma is also characteristic of melanomas.
>
> "In reviewing the literature on trauma in the etiology of malignant melanoma, I find no evidence that trauma such as chronic, repeated rubbing, can either cause melanoma, cause a benign mole to become a malignant melanoma, or cause spread from an existing melanoma to other areas of the body. For example, Ariel, a recognized authority on cancer, states, 'Trauma has been a constant and frequent claim by patients to have induced malignant changes, but the possibility of this occurring is most unlikely. Constant irritation, such as pressure from a belt, collar, suspenders, brassiere, or tight shoes, or the repeated trauma from shaving or scratching, has been implicated by patients. No definite proof exists, and results of studies of location of melanomas do not favor such hypotheses. It is more likely that ulceration and bleeding have been caused by an irritation upon a lesion which has already gone through transformation.' (I.M.

> Ariel, 'Theories Regarding the Cause of Malignant Melanoma'; Surgery, Gynecology, and Obstetrics, vol. 150, pp 907-917, June, 1980.)
>
> "With regard to spread of tumor to other areas of the body, it is generally accepted that this is determined by the type and characteristics of the tumor itself and the biologic characteristics of the individual having the tumor; trauma has not been implicated, to my knowledge."

An Office medical adviser reviewed Dr. Hahneman's report and on July 13, 1983 stated that he agreed with the doctor's opinion. In addition, the medical adviser stated:

> "Evidence in support of causal relationship is not striking, but it is reasonable to accept from a medical standpoint that the constant rubbing of the melanoma by the mail satchel was competent to produce local inflammation and bleeding. However, no medical evidence exists to support work-related material aggravation of the underlying disease, such as metastasis of malignant cells. Metastasic lesions are part of the normal progression of most types of cancers including melanomas. Medical evidence on file does not support causal relationship between the claimant's employment factors and metastasis of his malignant melanoma into the groin area."

By compensation order dated August 29, 1983 the Office found that "[t]he medical evidence of record fails to establish a causal relationship between the recurrent disability beginning June 3, 1980 and factors of employment."

The Board finds that the weight of the medical evidence fails to establish that appellant's disability after June 3, 1980 was not causally related to factors of his federal employment.

The Office, as directed by the Board, requested the National Cancer Institute to provide an opinion regarding the issue of causal relationship. Dr. Rosenberg, a Board-certified surgeon and the Chief of Surgery, responded on September 15, 1982 stating that he had reviewed appellant's chart and that he was not aware of any evidence that malignant melanoma was related to trauma or that there was any evidence that "continued trauma plays any role in causing malignant melanoma to spread."

The Office then referred appellant with the case record and a statement of accepted facts to Dr. Hahneman, a Board-certified oncologist, who expressed the opinion that the malignant melanoma was not caused or materially aggravated by any chronic trauma to appellant's left thigh due to his employment duties. In addition, the doctor stated that "the location of the melanoma and its spread are entirely consistent with the natural history and usual progression of this disease." Further, Dr. Hahneman stated that the spread of tumor to other areas of the body if any tampering had occurred. A watchman may also be required to perform janitorial duties, be deputized to arrest trespassers and accompany railroad shipments of valuables.

By letter dated September 28, 1979 appellant requested reconsideration of the Office's decision and in support thereof submitted a September 22, 1979 report from Dr. Chen who stated that appellant may be able to perform a job "which doesn't require any amount of lifting and where he will not be required to stay in one position too long."

The same Office medical adviser who previously commented upon the case stated that Dr. Chen's report did not indicate whether appellant could perform the duties of a watchman.

By compensation order dated February 22, 1980 the Office found that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision.

By letter dated April 17, 1980 appellant requested reconsideration of the Office's decision and in support thereof submitted medical reports from Dr. Chen and Dr. Jesse M. Galt, a Board-certified family practitioner.

In a November 29, 1972 report Dr. Galt noted that appellant had "recurring pain and discomfort in the low back area." In an April 2, 1980 report Dr. Galt, after noting normal physical findings, stated that "I still feel that a lot of his groin pain and discomfort is referred pain from his low back problem."

In an April 14, 1980 report Dr. Chen stated that appellant "is not able to stay in one position too long and [is] not able to do much lifting or frequent low back bending."

By compensation order dated August 27, 1980 the Office denied appellant a merit review on the ground that "the evidence submitted in support of the application for review is found to be of a cumulative nature and is not sufficient to warrant review of the prior decision."

By letter dated May 25, 1983 appellant requested reconsideration of the Office's decision and in support thereof submitted reports from Dr. Chen dated March 8, 1982 and January 10, 1983 in which he noted tenderness along the sacrum. In the March 8, 1982 report he stated that appellant should avoid sitting. In a May 23, 1983 report Dr. Chen stated that appellant "is not able to stay in one position too long, usually only five to ten minutes at a time for standing or sitting."

By compensation order dated September 9, 1983 the Office again refused to review the case on its merits.

By letter dated November 5, 1983 appellant again requested reconsideration and in support thereof submitted an August 16, 1983 work tolerance limitations form from Dr. Chen who concluded that appellant could not work a full eight hour day, and that he could sit or walk for up to only one hour a day.

In an October 21, 1983 memorandum an Office claims examiner stated that Dr. Chen's August 16, 1983 work tolerance limitations report "was unrationalized and failed to address [the] issue of causal relationship of current symptoms to original work injury."

By compensation order dated October 21, 1983 the Office refused to review the case on its merits.

The last merit decision by the Office in this case was dated February 22, 1980. Since appellant's appeal to the Board was not filed within one year of the date of that decision, the Board does not have jurisdiction to review it.[2] The only decisions before the Board on this appeal are those dated September 9 and October 21, 1983, both of which refused to review the case on its merits.

To require the Office to reopen a case for reconsideration a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions have not been presented, it is a matter of discretion on the part of the Office whether to reopen the case for further consideration under 5 U.S.C. section 8128.[3]

The Board finds that the Office's refusal to review the case on its merits was improper.

The March 8, 1982 and May 23, 1983 medical reports and the August 16, 1983 work tolerance limitations form from Dr. Chen, an orthopedic surgeon, noting appellant's limitations as to sitting and walking, appeared to be inconsistent with the physical requirements of the selected position of watchman. The position was described as sedentary and apparently required an unspecified amount of walking for the purpose of inspection; Dr. Chen, however, specifically limited the amount of time appellant could sit or walk to one hour a day. He also stated that appellant could not work a full eight-hour day, a requirement of the full-time position of watchman.

An Office claims examiner noted in an October 21, 1983 memorandum that Dr. Chen had not addressed the issue of causal relationship. However, the Office, in paying appellant compensation for his loss of wage-earning capacity, was not contesting the fact that his back condition was causally related to his employment injury but was instead contending only that his physical limitations were such as to allow him to perform the duties of a watchman.

The reports from Dr. Chen appear to be inconsistent with the requirements of the position of watchman, upon which appellant's wage-earning capacity was based. Since these reports are relevant and not previously of record, the Office is required to review the case on its merits.

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[2] 20 CFR 501.3(d).

[3] See *Norris Jones*, 30 ECAB 205.

The September 9 and October 21, 1983 decisions of the Office of Workers' Compensation Programs are reversed and the case is remanded to the Office for a merit review to be followed by a *de novo* decision.

In the Matter of GEORGE LANZY *and* DEPARTMENT OF THE ARMY, OAKLAND ARMY BASE, Oakland, Calif.

Docket No. 84–594; Submitted on the Record; Issued April 17, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request to subpoena witnesses for a hearing before an Office hearing representative.

Appellant, a 57-year-old mechanic, completed an Office of Workers' Compensation Programs form CA–1 (notice of traumatic injury and claim for compensation) alleging that he sustained an injury to his lower back and left leg on July 22, 1982. The form was signed and dated August 12, 1982 by appellant. The reverse side of the form was signed and dated September 9, 1982 by appellant's supervisor. September 9, 1982 was the date stated as the date the reporting office received notice of the injury.

By letter decision dated October 22, 1982 the Office informed appellant that he was not entitled to continuation of pay because he did not file written notice of injury within thirty days following the injury.

On November 11, 1982 appellant requested a hearing before an Office hearing representative.

On January 7, 1983 appellant requested the Office to make four specific employing establishment personnel available as witnesses at the hearing and to produce all official and nonofficial files pertaining to appellant's work-related injuries. Appellant alleged that the witnesses were involved in the receipt, or had knowledge, of his initiating the claim.

By letter decision dated December 13, 1983 the Branch of Hearings and Review denied appellant's request to subpoena witnesses. It explained that appellant's supervisor had already given a statement that he did not receive notice of injury until September 9, 1982. Therefore, the issuance of a subpoena to him would serve no useful purpose. With respect to the three other witnesses, the issuance of a subpoena to each of them was not relevant because they were not appellant's official supervisor.

Section 8126 of the Federal Employees' Compensation Act[1] states, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles***." The section of the Act gives the Office discretion to grant or reject requests for subpoenas.

In the instant case, appellant made a general statement that the witnesses were involved in the receipt, or had knowledge, of his initiating the claim. However, he did not provide a detailed statement indicating exactly what he hoped to prove nor has he attempted to produce the desired evidence in a manner other than by subpoena.

The function of the Board on this appeal is to determine whether there has been an abuse of discretion. The Office considered appellant's request, noted the issue before the Office, and explained why it denied appellant's request. The Board finds that the Office did not abuse its discretion in denying appellant's request to subpoena witnesses.

The December 13, 1982 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[1] 5 U.S.C. 8126; see also 20 CFR 10.133(b).

In the Matter of LEWIS J. ANGELONE *and* NEW YORK CITY POLICE DEPARTMENT, New York, N.Y.

Docket No. 83–1144; Hearing March 30, 1984;
Issued April 24, 1984

Appearances: *John J. Maguire, Esq.*, and *Lewis J. Angelone*, for appellant; *Daniel T. Franklin, Esq.*, for the Director, Office of Workers' Compensation Programs

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the injury sustained by appellant, a local police officer, on January 14, 1981 came within the provisions of the Federal Employees' Compensation Act authorizing the payment of benefits, under certain conditions, to local law enforcement.

On January 14, 1981 appellant, then a 29-year-old police officer, slipped and fell on snow and ice, injuring his back, while chasing three youths suspected of breaking into cars and trucks near the U. S. Post Office at South Fifth Street and Marcy Avenue in Brooklyn, N.Y. On December 3, 1981 appellant filed a claim for compensation for his January 14, 1981 injury. On his claim form appellant stated that "while responding to radio alarm, reporting larceny and burglary from Post Office and Post

Office vehicles, [he] slipped on icy roadway at location." The medical evidence of record indicates that appellant sustained substantial injuries to his back in his January 14, 1981 fall.

In a January 14, 1981 internal police department report, appellant described the incident as follows:

> "At approximately 0650 hrs. 1/14/81 I responded to a radio run 'three M-H [male Hispanics] breaking into trucks and cars.' Upon arrival I observed three males standing by a parked automobile. The males saw RMP [another officer] and started running. I pursued one male on foot, and at the southwest corner of Marcy Ave. and South Fifth St. I slipped on ice and snow, falling on my back causing injury to back, right knee, and right hand."

Appellant also submitted three "stop and frisk" reports, one of which was completed by officer Charles Prigge and the other two completed by an officer whose signature is illegible. These reports appear to indicate that all three youths whom appellant was chasing at the time of his injury were apprehended, that no contraband was found on any of them, that none was placed under arrest, and that none was charged with any crime, whether local or federal.

In a December 9, 1981 letter to appellant's attorney, the Office of Workers' Compensation Programs requested further information regarding the circumstances of appellant's January 14, 1981 injury. Specifically the Office inquired:

> "It is not clear exactly what the federal crime was in this case. Were the suspects apprehended? Were any of them convicted felons? Exactly what were they doing when Officer Angelone was chasing them? Was there a stolen car involved? Please advise the federal crime which was violated?"

In a May 17, 1982 reply, appellant's attorney submitted a transcript of the radio transmissions concerning the incident during which appellant's injury occurred, and contended that appellant "received compensable injuries on January 14, 1981 when he reported to a call in the area of Marcy and Grand Street, Brooklyn, New York, regarding a burglary and other crimes being committed at the United States Post Office nearby." The attorney did not indicate which specific federal crime was involved in the January 14, 1981 incident. The transcript of radio transmissions on the date in question reads as follows:

> "This tape is being reproduced by police officer Steve Bayomac, shield number 838, Communication Division, on April 13, 1981 at 1530 hrs. The following is reproduction of the call that was made on January 14, 1981, tape 3–39, channel #10, terrut #25, starting at 6 hrs., 44 minutes, 55 seconds, and concluding at 6 hrs., 45 minutes, 23 seconds:

"*Message #1: 911 call:*

911: '#722'

caller: 'I got a call from the Post Office. Two boys are breaking into their cars, the employees' cars, on Marcy Ave. and Grand Street extension under the highway.'

911: 'Marcy Ave. and Grand Street?'

caller: 'Yes. It's underneath the parkway on a little island underneath the highway.'

911: 'O.K'.

caller: 'Two Hispanic boys.'

911: 'O.K., bye.'

"*Message #1 is incomplete.*

"The following is a reproduction of a call that was made on January 14, 1981, tape 3–39, channel #13 terrut #28, starting at 6 hrs., 45 minutes, 19 seconds, and concluding 6 hrs., 42[sic] minutes, 45 seconds:

"*Message #2: 911 call:*

caller: 'Yes, there are 3 kids trying to break into cars underneath the highway near Marcy and Grand Street extension.'

911: 'Marcy Avenue and Grand Street?'

caller: 'Yeah, they got so brazen as to open up the back of an Elk truck and somebody saw them and chased them away and they took off, but they're still hanging around underneath the elevator structures and the Post Office cars in jeopardy. Who's checking the cars out? They're gonna break into them.'

911: 'O.K., how many are there?'

caller: 'Three. Do you think you can send an unmarked car, you might be better off.'

911: 'What cars are they trying to get in now?'

caller: 'They're just looking at all the cars. They're looking at which one to get into but the Elk truck they opened up the back.'

911: 'An Elk truck?'

caller: 'Yeah, it was a blue Elk Company truck. The kid opened up the back and a bus driver scared him away—a school bus driver, but they actually had the back open and the kid was gonna take something out of there, but the bus driver scared him away. They're hanging out underneath the elevator structure.'

911: 'Do you want to give your name?"

caller: 'Yeah, my name is William Schmier. I'm a postal employee. Our cars are getting ripped off around here left and right.'

911: 'O.K., we'll have the police there.'

"*Message #2 is not complete.*

"The following is a reproduction of 14th Division Frequency on January 14, 1981. Tape 3–39, channel #23, starting at 6 hrs., 47 minutes, 8 seconds, and concluding at 7 hrs., 46 minutes, 50 seconds.

"Message #3: Straight radio, 14th Division Frequency:"[1]

By compensation order dated June 3, 1982, the Office rejected appellant's claim on the ground that his injury "did not occur under circumstances bringing it within the provisions of 5 U.S.C. section 8191." In an accompanying memorandum of the same date, an Office acting chief of claims stated that "the cars in question were the cars of the individual employees and not Postal vehicles. Thus, no federal crime was involved."

Appellant requested a hearing before an Office hearing representative, which was held on December 13, 1982. At the hearing, appellant testified that crimes had been committed previously in the area where he was injured, and that "there is always a special attention on the place." He testified further that it was his understanding that he was attempting to apprehend persons for the commission of a crime against the United States and that he was also attempting to prevent a crime against United States' property. He stated that Postal vehicles were often parked on the traffic island to which he was responding, and contended that he was responding to prevent crimes against the trucks owned by the Postal Service.

In a February 4, 1983 decision, finalized February 7, 1983, the hearing representative affirmed the Office's June 3, 1982 decision. In his decision the hearing representative found that there was no evidence in the case record that a federal crime had been committed, nor that the automobiles the youths had reportedly burglarized were Postal Service vehicles.

Under the Federal Employees' Compensation Act, an individual seeking compensation benefits has the burden of establishing the essential elements of his claim.[2] Accordingly, in the present case, appellant has the burden of establishing that his January 14, 1981 injury occurred under the circumstances enumerated in section 8191 of the Act, the section pertaining to compensation benefits for local law enforcement officers under certain conditions.[3]

The Board finds that appellant has failed to sustain his burden of proof.

There is no evidence in the case record to suggest that the three youths whom appellant was chasing at the time of his injury were being sought by federal authorities for the commission of a crime against the United States (5 U.S.C. section 8191(1)(B)), or were being sought as material witnesses in a criminal proceeding instituted by the Unites States (5 U.S.C. section 8191(1)(C)), or that appellant was at the time of his injury engaged "in protecting or guarding a person held for the commission of a crime" (5 U.S.C. section 8191(2)). Accordingly, the only remaining questions are whether appellant was engaged in "the apprehension or attempted apprehension of any person for the commission of a crime against the United States" (5 U.S.C. section 8191(1)(A)) or whether appellant was engaged in "the lawful prevention of, or lawful attempt to prevent, the commission of a crime against United States" (5 U.S.C. section 8191(3)).

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[1] Message number three was not submitted to the Office.

[2] *James Blaine Johnson*, 33 ECAB 1187.

[3] 5 U.S.C. section 8191, *et seq*.

With respect to the possible application of section 8191(1)(A), there is no evidence in the case record that the three youths in question had committed a federal crime. The Office in its December 9, 1981 letter requested appellant to specify the "federal crime which was violated"; in his reply, appellant's attorney cited no federal crime. The "stop and frisk" reports filed by appellant in the case record tend to demonstrate that none of the youths was arrested for any crime, whether state or federal. Under these circumstances, the evidence fails to establish that appellant was engaged in "the apprehension or attempted apprehension of any person for the commission of a crime against the United States."

With respect to the possible application of section 8191(3), appellant has provided no evidence which establishes that the three youths in question were about to commit a federal crime, and that he was injured in an attempt to prevent their commission of such a crime. At most, the transcription of the phone call from postal employee William Schmier to the police (message number two) indicates that the youths may have burglarized an Elk truck; there is no indication in the record that any Postal Service vehicles were burglarized or vandalized, or that there was any imminent threat to Postal Service property or employees posed by the three youths. Accordingly, the evidence fails to establish that appellant was engaged in "the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States." [4] Appellant has failed to sustain his burden of proof.

The February 4, 1983 decision of the Office of Workers' Compensation Programs, finalized February 7, 1983, is affirmed.

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[4] Appellant testified at the December 13, 1982 hearing that, when he responded to the radio call requesting investigation (message number one), he knew that Postal Service vehicles were often parked in the area where he was going and that it was his intent to prevent the commission of a crime against these United States Postal Service vehicles. There is no objective evidence in the record which demonstrates that there was any immediate threat to federal property or federal employees posed by the three youths in question. Further, the information transmitted to appellant in message number one (there is no indication that appellant was informed of the contents of message number two prior to his injury) did not indicate that Postal Service property was being burglarized, vandalized or even threatened by the three youths. Because there is no evidence of any tangible threat to Postal Service property (no substantial evidence of any potential federal crime), it is not necessary for the Board to decide at this time whether the subjective intent of an individual police officer to prevent a federal crime could ever be sufficient, in and of itself, to bring the officer under the coverage of 5 U.S.C. section 8191(3).

In the Matter of THOMAS H. ELIAS *and* U.S. POSTAL SERVICE, POST OFFICE, Terre Haute, Ind.

Docket No. 83–1976; Submitted on the Record;
Issued April 25, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation pursuant to section 8123(d) of the Federal Employees' Compensation Act[1] on the ground that he was obstructing a medical examination.

On April 4, 1981 appellant, then a 37-year-old part-time flexible carrier, filed a claim in which he alleged that on that date he sustained lower back and left hip pain while "unloading heavy mail sacks." He stopped work that day and sought treatment from Dr. William J. Schmalz, an internist. In April 4, 6 and 13, 1981 reports on Office forms, Dr. Schmalz diagnosed "disc injury with left lower extremity radiculitis" and indicated that appellant's disability was causally related to the April 4, 1981 lifting incident.

In an April 23, 1981 letter to the Office, the employing establishment controverted appellant's claim for continuation of pay. It pointed out they noted that appellant had been observed "jogging" on either April 14 or 15, 1981, and again on April 19, 1981. The employing establishment also stated that appellant refused to be driven by his supervisors to an April 20, 1981 fitness-for-duty examination when his car broke down. On May 8, 1981 the Office directed the employing establishment to continue appellant's pay.[2]

In several reports on Office forms for the period from May 27, 1981 through August 24, 1981, Dr. Schmalz diagnosed "disc injury with radiculitis" and "hypertension." He also indicated that a causal relationship existed, and continued to find that appellant was temporarily totally disabled from work.

On August 25, 1981 appellant was examined by Dr. Arthur Lorber, a Board-certified orthopedic surgeon, in connection with a fitness-for-duty evaluation. In a September 1, 1981 report Dr. Lorber related appellant's history and the results of his examination, and found "No clinical evidence of nerve root irritation. The possibility of functional complaints cannot be excluded." He concluded that appellant was fully fit-for-duty. Dr. Schmalz subsequently submitted additional reports on Office forms dated September 4, 1981 and October 5, 1981, in which he repeated his earlier diagnoses and continued to find appellant totally disabled from work.

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[1] 5 U.S.C. section 8123(d) provides:

> "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employees."

[2] Appellant subsequently began receiving compensation for temporary total disability upon the ending of the 45-day period of continuation of pay.

On November 15, 1981 an Office medical adviser reviewed the medical evidence and noted that there was a conflict in the medical opinions of Drs. Schmalz and Lorber. He recommended that an impartial medical examination be conducted to resolve the conflict. Dr. Schmalz thereafter submitted November 9 and 30, 1981 reports on Office forms in which he repeated his earlier diagnoses of back pain and lower left extremity radiculitis.[3]

On January 15, 1982 the Office referred appellant, a statement of accepted facts and the case record, to Dr. Lee Cattell, Jr., a Board-certified orthopedic surgeon, for a February 2, 1982 impartial medical examination. In its letter to appellant of the same date, the Office notified him that his compensation would be suspended if he obstructed Dr. Cattell's examination, and quoted section 8123(d) of the Act, which provides:

> "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

In a February 8, 1982 letter to the Office with West Germany postage, appellant stated that the January 15, 1982 letter had been forwarded to him in West Germany on February 4, 1982. He noted that he had requested a neighbor to submit a change of address form for him, and stated that he was, "as always, available to submit to your examinations and of course would not obstruct such exams."[4]

On April 20, 1982 appellant submitted two change of address forms. These forms indicated that his mail was to be sent in care of his wife at 2326 Winslow Court, Bloomington, Indiana 47401. The forms were signed by appellant and bore West German postmarks. In a July 16, 1982 postcard bearing U.S. postage, appellant indicated to the Office that he had returned to Bloomington from West Germany.[5]

In an August 9, 1982 letter to appellant, the Office referred him for a second time to Dr. Cattell for an impartial medical examination. This letter also contained another notification of the consequences of obstructing the examination and quoted 5 U.S.C. section 8123(d). His appointment was scheduled for August 30, 1982. On August 29, 1982 appellant's wife wrote to the Office that while she had temporarily returned to Bloomington, her husband still resided in West Germany and was unable to make his appointment with Dr. Cattell.

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[3] On December 29, 1981 the Office requested comments from Dr. Schmalz in regard to appellant's statement that the reported jogging in April of 1981 was "used to test his progress." No response was received.

[4] The case record contains a postcard with U.S. postage changing appellant's address from 2326 Winslow Court, Bloomington, Indiana 47401 to c/o J. Pruss, Euler—Chelpinstr. 10, 89 Augsburg 10, West Germany. A date stamp on the postcard indicates that it was received by the Office on February 1, 1982. On March 17, 1982 appellant corrected his address to read "8900 Augsburg 10" rather than "89 Augsburg 10." He also stated that his address would change in 90 days. This letter was signed by appellant and displayed West German postage stamps.

[5] The signature on this postcard reads "T. H. Elias," but differs markedly from those on the April 20, 1982 postcards.

On September 8, 1982 the Office wrote to appellant, in care of his wife, and requested information about his future residence plans. In two change of address forms dated September 24, 1982, appellant changed his mailing address from 2326 to 2459 Winslow Court.[6]

In a September 28, 1982 response to an employing establishment request for information, the Office indicated that appellant resided in West Germany and was unavailable for a medical evaluation at that time. On October 5, 1982 the Office again wrote to appellant at 2459 Winslow Court seeking information about his residence. On November 1, 1982 the Office wrote to appellant requesting a current medical evaluation and stated:

> "Failure to submit the above-mentioned information will result in suspension of your compensation. You were advised by letters dated September 8, 1982 and October 5, 1982 to inform this Office of your intentions of moving back from Germany. You have failed to reply. It is assumed that you now reside in Indiana."

In a response to the September 8, 1982 letter, received by the Office on November 3, 1982, appellant's wife indicated that her husband still resided in Germany and had no definite plans. She included an October 18, 1982 report written in German from Dr. A. Simon, an internist, who diagnosed a left leg condition and concluded that appellant was totally disabled at that time.

On December 30, 1982 the employing establishment informed the Office of its belief that appellant had returned to Indiana in September. In a February 9, 1983 notation of a telephone conversation with appellant's son, an Office claims examiner noted that appellant was still in Germany. The employing establishment later submitted a February 10, 1983 statement from appellant's former supervisor who reported that he had seen appellant jogging in Bloomington on January 22, 1983.

On February 11, 1983 the Office suspended appellant's compensation, effective January 25, 1983. In a letter of the same date addressed to appellant, the Office stated:

> "Your case has been recently reviewed. You were advised by letters on several occasions that it was your responsibility to advise us when you intended to return to the States even if it was for a brief period so that a medical examination could be set up. You have

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[6] These postcards bore U.S. postage and appear to have been signed "T. Elias" by appellant's wife.

> failed to advise us of your exact whereabouts and your intentions. Therefore, your compensation has been suspended immediately and will remain suspended until you advise us in writing of your location and report for the examination which will be scheduled for you."

On February 16, 1983 appellant's wife telephoned the Office to determine why her husband's compensation had been terminated. Subsequently, on February 22, 1983 appellant submitted a letter to the Office which stated "Please schedule a medical examination on my behalf at your earliest convenience . . ." This letter listed appellant's address as 2459 Winslow Court, Bloomington, Indiana.

In a March 9, 1983 response, the Office stated:

> "As you know your compensation was suspended for failure to keep us advised of your exact whereabouts so that an impartial evaluation could be set up. You were advised that you must advise us of your whereabouts. We have your letter dated February 22, 1983 stating that you would like this office to schedule the appointment at our convenience. This statement serves no useful purpose in establishing your whereabouts. Please advise us where you currently are residing and for the approximate length of time you will be at that address."

On March 28, 1983 appellant requested that the Office provide him with certain information. In a May 4, 1983 response, the Office noted:

> "Once again be advised that your compensation was suspended for failure to cooperate with this office. You were advised to inform us of your whereabouts so that we could schedule an impartial medical exam. You reported that your correspondence address was in care of your wife then after your compensation was suspended you stated that we could schedule the exam at our convenience. You were advised on March 9, 1983 that the statement regarding the scheduling of the IME [impartial medical examination] was insufficient to establish your exact whereabouts. The fact that you are using a Winslow Court address does not establish your physical whereabouts.
>
> "Compensation will remain suspended until such time that you advise us of your whereabouts and the length of time at that residence."

In a June 3, 1983 letter decision the Office formalized its prior suspension of appellant's compensation. On June 15 and 16, 1983 appellant requested reconsideration of the Office's June 3, 1983 decision. In a June 22, 1983 response the Office concluded:

> "Again, your letter of February 22, 1983 and subsequent correspondence merely repeated what has been previously established

> on file that your mailing or correspondence address is 2459 Winslow Court, Bloomington, Indiana. You have been informed on numerous occasions that you must inform us of your physical whereabouts so that we can schedule an impartial examination and you have failed to comply. You continue to report that you are willing to be examined. However, we are unable to ascertain from the information you have provided us, as to where the exam is to be scheduled.
>
> "No further action will be considered on your request for a reconsideration until you furnish the requested information on your physical whereabouts."

In an August 22, 1983 letter to the Office, appellant requested copies of the medical evidence, and concluded "note my new address for all purposes." He listed his address as 3349 John Hinkle Place, Bloomington, Indiana 47401.

The Board finds that the Office properly suspended appellant's right to compensation pursuant to section 8123(d) of the Act.

Because of a conflict in the medical evidence, the Office twice referred appellant to Dr. Cattell. Both of these referral letters notified appellant of the consequences of obstructing the examination and quoted section 8123(d) of the Act. Appellant did not keep his appointments with Dr. Cattell and failed to supply an adequate explanation for his actions. Appellant did not respond to numerous requests by the Office for information as to his physical whereabouts for the purpose of rescheduling the impartial examination. Under these circumstances, the Office's action in suspending appellant's right to compensation, effective January 25, 1983, was entirely correct.[7]

The decisions of the Office of Workers' Compensation Programs dated February 11, 1983, June 3, 1983 and June 22, 1983 are affirmed.

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[7] See *Billy V. Lewis*, 32 ECAB 1943.

In the Matter of ROBERT KREBS *and* U.S. POSTAL SERVICE, POST OFFICE, New York, N.Y.

Docket No. 84-284; Submitted on the Record;
Issued April 26, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of $10,905.45 was not subject to waiver and was therefore recoverable by the Office at the rate of $200.00 per month.

This is the second appeal in this case. In the first appeal,[1] the Board on November 16, 1982 remanded the case to the Office of Workers' Compensation Programs for further development with regard to whether the overpayment should be waived. The Board stated in part:

> "The Office hearing representative made inadequate findings with respect to appellant's monthly expenses. He failed to individually itemize appellant's monthly expenses and to set forth the computations used to determine these expenses, nor did he consider as a monthly expense appellant's contributions to his parents' support.
>
> "On remand, the Office should issue a *de novo* decision regarding waiver of the overpayment which should include both detailed findings of fact, and applying these findings, a rationalized opinion on (1) whether recovery of the overpayment would 'defeat the purpose of [the Act]' and (2) whether recovery would be 'against equity and good conscience'. These findings should contain a computation and itemization of appellant's monthly expenses, including his contributions to his parents' support." (Citations omitted)

The facts stated in the Board's November 16, 1982 decision are hereby incorporated into this decision.

On remand, the Office requested appellant to submit evidence of his monthly expenses and notified him that this information would be used to determine whether or not to waive the overpayment. Appellant's representative thereafter submitted copies of cancelled checks, register tapes, credit card receipts, auto repair receipts, phone bills and other assorted material, including copies of statements from his checking and savings accounts.

In a March 21, 1983 decision the Office found that recovery of appellant's overpayment of $10,905.45 should not be waived, on the ground that "It would not be against equity or good conscience nor would defeat the purpose of the Act." The Office therefore directed that the overpayment be recovered from appellant's continuing compensation payments at the rate of $300.00 per month. In an accompanying memorandum dated March 18, 1983 the Office stated:

> "The claimant was directed to submit documentation of all claimed expenses.
>
> "In response, the claimant submitted 78 pages of photocopies of cancelled checks, bank statements, telephone bills, insurance bills, credit card bills, electric bills, and assorted register tapes and receipts. The documents appear to be all for expenses incurred by the claimant from December 1981 to December 1982.

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[1] 34 ECAB 260.

"They are itemized as follows:

(a) Rent	$500.00
(b) Electric	77.41
(c) Telephone (A)	56.54
(d) Telephone (B)	20.84
(e) Life Insurance	42.93
(f) Car Insurance	20.85

"These expenses total $718.67 per month.

"In addition, the claimant submitted one year (1982) of billing notices for his Master Charge and Visa cards. These bills are predominantly for hotels, restaurants, and department stores, totaling $4151.08 for the year or $345.92 per month.

"These two expenses total $1064.59 per month.

"There is no itemization for food, but the figure previously given by the claimant of $50.00 per month is reasonable in light of the number of restaurant billings on his credit cards. This addition brings his total monthly expenses to $1114.59.

"The claimant submitted his checking and saving account statements for 1982 which show he had an average monthly remaining balance in his checking account of $546.62 and a balance in his savings account of $1697.32.

"Again, with regards to support paid by the claimant to his parents, he has failed to provide any documentation, itemization or any other evidence to attest to the validity of his allegations. As such, there is no figure to be included in the itemization of his monthly expenses.

"The claimant is presently entitled to $1522.00 every 28 days, less $31.58 for a net of $1490.42 every 28 days or $19,375.46 per year or $1614.62 per month average (Note: that this includes the 3/1/83 CPI of 3.9%).

"Given his documented expenses of $1114.59 per month and his average monthly income of $1614.62, he has an income of $500.03 over his monthly expenses.

"Based on this documentated evidence it is recommended that the waiver of overpayment be denied as collection of said would not be against equity or good conscious nor would defeat the purpose of the Act.

"Furthermore, it is recommended that continuing deductions for the recovery of the said overpayment be increased to $300.00 every 28 days. This increased deduction would still leave the claimant an average monthly balance of $200.03 over expenses. It would also not affect his style of living as this was taken into consideration with the averaging in of his credit card charges."

On March 28, 1983 appellant's represtative requested reconsideration of the Office's March 21, 1983 decision. In support of his request he submitted affidavits executed by appellant's parents. In each affidavit the parent stated that appellant had given them between $300.00 and $500.00 every month depending on their needs.

In an August 17, 1983 compensation order, the Office granted appellant's request to modify the prior Office decision and stated as follows.

> "Based upon the evidence of record it is accepted that the claimant contributes some $300.00 monthly to the support of his parents. This is in addition to the accepted monthly expenses as detailed in the incorporated memorandum to the Assistant Deputy Commissioner dated March 18, 1983.
>
> "Therefore, it has been determined that modification of the March 21, 1983 decision must be and is hereby granted in that the sum of $200.00, rather than $300.00, will be withheld from continuing compensation payments, and that the decision is affirmed insofar as it is found that the circumstances of the case do not warrant waiver of recovery of the overpayment." [2]

The Board finds that the case is not in posture for decision.

In *Orba Light*,[3] the Board held that in cases involving a waiver of an overpayment of compensation, the Office must issue a decision which:

> "Includes both detailed findings of fact and, applying these findings, a rationalized opinion on (1) whether recovery of the overpayment would 'defeat the purpose of this subchapter [of the Act]' and (2) whether recovery would be 'against equity and good conscience.' "

Here, the Office made detailed findings of fact, but failed to offer adequate rationale in support of the decision. The Office's summary concluion that recovery of the overpayment "would not be against equity or good conscience nor would defeat the purpose of the Act" is not sufficiently rationalized to meet the Office's burden on this issue.

Accordingly, the case will be remanded to the Office for a *de novo* consideration of the waiver issue and for a *de novo* decision, with appropriate and detailed findings of fact and rationale in support of the conclusions.

The decisions of the Office of Workers' Compensation Programs dated March 21, 1983 and August 17, 1983 are hereby set aside; the case is remanded to the Office for further proceedings consistent with this decision.

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[2] The Board notes that the cover letter included with this decision incorrectly characterized the order as a denial of a request for modification.

[3] 33 ECAB 1270. See also *Koba H. Tillotson*, Docket No. 82-1798, issued September 9, 1982.

READEX FICHE

In the Matter of STEPHEN E. FRASER *and* U.S. POSTAL SERVICE, O'HARE AIR MAIL FACILITY, Chicago, Ill.

Docket No. 84–619; Submitted on the Record;
Issued April 26, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant has established fact of injury in the performance of duty on July 13, 1983.

Appellant, a 29-year-old postal mailhandler, filed a claim dated July 15, 1983 alleging that on July 13, 1983 at 6:50 a.m. he sustained an injury to his back "outside of employee's entrance," as a result of tripping and falling on pavement. He stopped work on July 16, 1983 and returned on July 27, 1983 in light limited duty capacity.

In support of his claim, appellant submitted a report by Dr. Fernando G. Sangalang, a general practitioner, deated July 15, 1983, who related the following history of injury:

> "Patient states, while walking out the entrance of the building at work, he tripped over some raised pavement, fell and struck his right shoulder on the ground. He rolled over on his back landing flat on the ground, injuring his left hip and right back area."

Dr. Sangalang diagnosed contusion of the low back, noted that the "expected healing time" was two to three days, and stated that currently appellant was incapable of lifting in excess of 20 pounds and bending continuously. The doctor further stated that there was no permanent disability anticipated.

In a letter dated July 25, 1983 the employing establishment's injury compensation supervisor informed the Office of Workers' Compensation Programs that it was controverting appellant's claim on the ground that "it appear[ed]" that appellant neither injured himself on the employing establishment's premises, nor while in an official duty capacity. In that regard, the supervisor stated the following:

> "On July 15, 1983, Mr. Fraser reported to our Safety Specialist, Lester Hough, that he (Mr. Fraser) was running to the building on July 13, 1983 so he would not be late in clocking in for the day. Mr. Fraser told Mr. Hough he tripped at the employees' entrance. On July 13, 1983, Mr. Fraser clocked in at 6:30 a.m. which is the same time Mr. Fraser alleges he tripped and fell.
>
> "On July 14, 1983, Mr. Fraser was one hour late. On his Form

> PS 3971, Mr. Fraser wrote, 'Yesterday, I tripped and fell and hurt my back and today I had trouble straightening up.' He requested and was given one hour of sick leave.
>
> "On July 15, 1983, Mr. Fraser filed a CA-1 claiming he was injured on July 13, 1983. On July 15, 1983, medical treatment was authorized. Mr. Fraser told the attending physician, 'While walking out of the entrance of the building at work he tripped and fell.' At 6:30 a.m. the time of the alleged injury, Mr. Fraser was clocking in to go to work and he would not be leaving the facility. Mr. Fraser was found fit for limited duties.
>
> "On July 16, 1983, Mr. Fraser phoned in requesting sick leave. Mr. Fraser then called in again on July 22, 1983. He was informed that he had insufficient sick leave to cover his absence. He then claimed C.O.P. [continuation of pay] as he was off because of an on-the-job-injury."

By letter dated August 1, 1983 the Office asked appellant to submit information concerning the facts and circumstances surrounding the alleged July 13, 1983 incident, (e.g. how and where the injury occurred, and at what time), and a detailed narrative report describing the nature of any injury arising as a result of the incident, the diagnosis and the treatment therefor, and a statement relating the diagnosed condition to his employment.

Appellant submitted an attending physcian's report and a duty status report from Dr. John J. Marrella, a general practitioner, both dated August 17, 1983. Dr. Marrella reported in both reports that he first examined appellant on July 26, 1983 for a sprain and contusion of the right lower back he sustained on July 13, 1983, that appellant was released to return to work on August 1, 1983 in a light duty capacity entailing no excessive lifting, and that he discharged appellant from further treatment on August 8, 1983 at which time he advised appellant to return to regular work. To the question of "what history of injury did employee give you?," Dr. Marrella responded "None."

By letter dated September 21, 1983 the Office advised appellant that unless he submitted the previously requested information within 15 days, his claim would be denied. The Office also requested the employing establishment to submit a statement by its safety specialist relating his knowledge of the alleged July 13, 1983 employment incident.

In a statement dated October 4, 1983 the safety specialist stated the following:

> "On July 14, 1983 I was touring the dock areas when Stephen E. Fraser approached me and said he thinks he hurt his back the day before. I asked him how did he hurt his back. He replied that he was running into the building and tripped on the sidewalk outside the employees' entrance. I then asked him why didn't he report it.

> He replied that he had been sleeping on the couch and thought the pain may have been caused by that and it would soon go away, but since the pain was still there it must have been caused by the fall the day before.
>
> "On July 15, 1983, I was summoned to first aid to discover Mr. Fraser reporting the injury due to the fall and requesting medical treatment. Mr. Fraser was sent to the Franklin Park Industrial Clinic where he was diagnosed as fit for limited duty.
>
> "Mr. Fraser didn't report back to work until July 27, 1983."

By compensation order dated October 18, 1983 the Office denied appellant's claim on the ground that the evidence of record failed to establish that appellant "was injured at the time, place, and in the manner reported."

The Board finds that the evidence establishes that on July 13, 1983 appellant tripped and fell over pavement in front of the employing establishment's entrance, as alleged.

While the burden is on a claimant to establish that he sustained an injury at the time, place, and in the manner alleged, his statement alleging that an injury occurred at a given time and manner is of great probative value and will stand unless refuted by substantial evidence. Corroboration by an eyewitness or other evidence is not necessary when the claimant's statements are consistent with the surrounding facts and circumstances and his subsequent course of action.[1] Therefore, an employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[2]

In the instant case, there are no such inconsistencies in the evidence of record as to cast serious doubt upon the validity of the claim.

Appellant has maintained that he injured his back on July 13, 1983 as a result of tripping and falling on pavement located "outside of employees' entrance." On July 15, 1983, two days following the alleged incident, appellant was treated by Dr. Sangalang, a general practitioner, for a contusion of the low back. In a report of the same date the doctor stated that appellant sustained the injury as a result of tripping and falling over some raised pavement "while walking out the entrance of the building at work." Althougth the employing establishment controverted the claim contending, *inter alia*, that appellant informed the safety specialist on July 15, 1983 that he injured himself when he tripped and fell "while running into the building . . . outside the employees' entrance," the Board notes that the fact remains unchanged; that is, that appellant tripped and fell in front of the employing establishment's entrance on July 13, 1983, thereby injuring his back.

The Board further notes that despite the Office's August 1 and September 21, 1983 requests for information concerning when, where and at what time the incident occurred and the type of injury sustained as a result, the information sought by the Office was already a part of the record. In that regard, appellant had stated on the claim form that he injured his back when he tripped and fell over pavement located at the entrance of the employing establishment on July 13, 1983. Virtually the same history was included in Dr. Sangalang's July 15, 1983 report and the safety specialist's statement. The only variation was that Dr. Sangalang reported that appellant was "walking out of entrance" or exiting, and the safety specialist stated that appellant was "running into" or entering. The Board finds that the variations in these accounts are not significant, or sufficient enough to cast serious doubt that the incident occurred on July 13, 1983 as alleged. Appellant's statement, the contemporaneous medical evidence of record and even the safety specialist's statement reveal that appellant tripped and fell over pavement in front of the employing establishment's entrance on July 13, 1983, as alleged.

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[1] *Bennie W. Butler*, 13 ECAB 156 and cases cited therein; *Ruth M. Jackson*, 30 ECAB 917.

[2] *Charles A. J. Cooley*, 15 ECAB 115; and *Joseph L. Mandes*, 15 ECAB 245.

The decision of the Office of Workers' Compensation Programs dated October 18, 1983 is reversed. The case is remanded for a determination as to whether the incident of July 13, 1983, which occurred at the time and in the manner described by appellant, constituted an injury in the performance of duty within the meaning of the Federal Employees' Compensation Act, and if so, whether he had any disability as a result.[3]

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[3] It is unclear from the record as to whether the incident occurred when appellant was reporting for duty, and whether the area where it occurred was part of the employment premises or was either owned or controlled by the employing establishment. Therefore, when determining whether appellant sustained an injury in the performance of duty the Office should determine whether or not the incident occurred on the employment premises. If not and if appellant was a "fixed premises" employee he would be under the "going and coming" rule. This rule states that off-premises injuries sustained by employees having fixed hours and place of work while going to or coming from work, are generally not compensable as they do not arise out of and in the course of the employment. See *Lillie J. Wiley*, 6 ECAB 500; *Anne R. Rebeck*, 32 ECAB 315; *Sam Bock*, 32 ECAB 1636.

In the Matter of GAETAN F. VALENZA *and* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Indianapolis, Ind.

Docket No. 83-2043; Submitted on the Record;
Issued April 26, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

This issues are: (1) whether appellant's employment-related disability due to exposure to tobacco smoke had ceased as of February 24, 1982, the date the Office of Workers' Compensation Programs terminated his compensation; and (2) whether appellant is entitled to compensation benefits for a gastrointestinal condition which he alleges was precipitated and aggravated by his medical examination by a physician to whom he was referred by the Office.

Appellant, then a 55-year-old Internal Revenue agent, filed claims on September 26, 1972 and December 2, 1972 alleging that his asthma, hypertension and circulation problems were aggravated by exposure to cigar and cigarette smoke in poorly ventilated working quarters.

In a memorandum submitted to the employing establishment, appellant included excerpts from the 1972 Surgeon General's report regarding exposure to cigarette smoke. Appellant also stated:

> "There is no question in my mind that the exposure of my lungs to cigarette smoke in the poorly ventilated office has aggravated my asthmatic condition and it is possible I might be heading for lung cancer . . . "

The case record included a November 28, 1972 medical report from Dr. Thomas P. Dugan, a Board-certified family practitioner; the doctor opined that appellant's condition of bronchial asthma, nasal allergy, hypertension and circulatory disorders was aggravated by smoke and poor ventilation encountered in his employment.

The Office referred appellant to Dr. Richard E. Brashear, a Board-certified pulmonary specialist of professorial rank. Dr. Brashear, who included a complete medical history and results of pulmonary function tests in his report, concluded that appellant's bronchial asthma could have been materially aggravated by tobacco smoke at his place of employment. An Office medical adviser who evaluated the case record on April 5, 1973 characterized Dr. Brashear's conclusion as "well-explained."

The Office accepted appellant's condition as employment related and paid compensation for temporary total disability commencing May 31, 1973.

Appellant submitted medical reports from Dr. Dugan dated January 30, 1974, July 18, 1975, January 21, 1977, December 20, 1977 and November 28, 1979, all of which stated that appellant continued to be totally disabled.

In a November 6, 1980 letter, the Office informed appellant that periodic medical reports confirming that the ongoing disability was employment related were requested, the reports to include dates of examination and treatment, history, findings, diagnosis, treatment, medication prescribed, prognosis and an opinion supported by medical rationale as to whether current disability is causally related to federal employment.

Dr. Dugan submitted a work limitations form dated December 19, 1980 in which he listed numerous limitations on physical activity and restrictions concerning exposure to fumes, cold and smoke due to appellant's chronic bronchial condition. Dr. Dugan indicated that appellant could work two to three hours daily. Dr. Dugan submitted a January 23, 1981 report which contained the following information:

> "Mr. Valenza has been a patient of mine for twenty years. Specifically he began to have problems with hypertension, respiratory difficulty, and stomach problems in 1971. Since 1971 Mr. Valenza has been seen approximately every 4 to 6 weeks for treatment for one of the above problems. For his hypertension he is on medication which is Dyazide[1] daily. His blood pressure had been as high as 190/110 but on Dyazide it becomes normal. He has also been on various minor tranquilizers because of stress situations while he was working. He has also had a balance disorder which is intermittent and is treated at those times with Ruvert. He had also had various respiratory problems with chronic cough etc., and in March, 1977 was hospitalized for tuberculosis and was treated for two years after that. Other problems have been those of an arthritic condition in the low back. Also during his working years he had many stomach complaints which required antispasmodics and antacids to control.
>
> "His major problem, however, and primary reason for disability is a respiratory condition when he becomes short of breath when he is around tobacco smoke. He had been given advice from legal counsel that there should be an air purifier in his working area. Also the nicotine exposure seemed to aggravate his hypertension. He had pulmonary function tests in 1972 which showed an impairment in his breathing.
>
> "Prognosis of this patient is much improved since his disability retirement. The respiratory problem, hypertension, stress, etc. are all better controlled since then. It is my opinion that this patient although doing fairly well at present, remains totally disabled if returned to his previous employment."

The case record was evaluated by Dr. Susan Williams, a Board-certified internist who served as an Office medical consultant. Dr. Williams stated that appellant had characteristics of both allergic and intrinsic asthma with onset in later life and a history of respiratory infections and rhinitis fitting more with intrinsic asthma and his allergic history with allergic asthma. She concluded:

> "In either case, it is certainly possible that the tobacco smoke in the air either as an allergen or more likely a nospecific irritant resulted in wheezing, i.e., aggravation of his underlying condition. Aggravation [is] only temporary since a characteristic of asthma is complete reversal without any permanent effects when [the] inciting factor (smoke in the case) is removed. [The aggravation] ceased in 12/72 when claimant retired."

The Office then prepared a statement of accepted facts and referred appellant to Dr. Ramon S. Dunkin, a Board-certified pulmonary specialist, who provided a medical history and results of his physical examination of appellant, as well as pulmonary function tests. In his September 4, 1981 report, Dr. Dunkin assessed appellant's condition as follows:

> ". . . [appellant] has mild bronchial asthma which is defined as hyperreactive or overly sensitive airways with bronchospasm triggered by many different stimuli including inhaling of allergens, inhaling of nonspecific irritants, exertion, temperature change, infection, emotional upset, etc. He apparently has improved since leaving his place of employment but still has many of the same symptoms on exposure to the stimuli mentioned above. His previous evaluation at the Cleveland Clinic would indicate that his asthma was probably initially triggered by allergy to common inhaled allergens unrelated to his work. There is no question that such conditions as asthma are frequently aggravated by exposure to fumes and smoke such as Mr. Valenza was exposed to with his work. Based on current medical evidence, I would see no reason to conclude that there had been any permanent aggravation of his condition by the smoky working conditions. I would conclude that the temporary aggravation of his condition terminated shortly after his leaving his employment in December, 1972. I would conclude from his history that his asthma problem has been a very minor one since then, never requiring hospitalization and apparently not requiring any bronchodilator therapy which is standard medication for asthma.
>
> "I understand from Mr. Valenza that the working conditions including the building and the employees where he worked have changed subsequent to his departure. I would see no reason why Mr. Valenza cannot return to his former employment. I would assume that the return to stressful work might aggravate some of his symptoms which are probably related to tension but I think it is very unlikely that they would precipitate any disease which can be blamed on the work conditions. In order to conclude that his condition would be disabling if he returned to work, I would require that he return to the working environment and demonstrate uncontrollable exacerbation of symptoms and deterioration of pulmonary function which can be related to the working conditions."

Dr. Dunkin also opined that appellant's hypertension and gastrointestinal condition could be controlled with the appropriate therapy.

Dr. Williams again evaluated the case record, stating that she concurred with Dr. Dunkin's conclusion that appellant had no disability remaining due to factors of his former federal employment. She commented, "A characteristic of asthma, which is demonstrated in this claimant, is complete reversibility with removal of the inciting factor. There certainly was aggravation with smoke but it was temporary and stopped when the claimant stopped work. He indeed could work in any environment which was well-ventilated."

Appellant then wrote to the Office claiming that Dr. Dunkin's "hard-nosed line of questioning" and "condescending attitude" precipitated attacks of diarrhea which resulted in appellant's hospitalization for diagnostic testing.

By letter dated January 7, 1983, the Office informed appellant that if he believed his stomach pains and diarrhea were caused by his evaluation by Dr. Dunkin and his accepted condition, he could submit medical evidence to substantiate the allegation.

By compensation order dated January 25, 1982, the Office denied appellant's claim for compensation effective February 24, 1982 on the ground that disability resulting from factors of employment had ceased as of July 2, 1981.

Appellant requested reconsideration by letter dated January 29, 1982, advising the Office of his intention to obtain medical evidence to support his contention that Dr. Dunkin's examination caused his stomach distress. Appellant submitted a March 10, 1982 report from Dr. Dugan:

> ". . . [appellant] since September 8, 1981 has had intermittent abdominal problems. These problems primarily consist of cramping, diarrhea and abdominal wall tenderness. He was hospitalized on September 13, 1981 for a complete G.I. evaluation and the diagnosis at that time was functional bowel syndrome or also known as spastic or irritable bowel syndrome. It has been necessary since then for him to use Imodium and antispasmodics intermittently.
>
> "My patient reminded me that on September 3, he was evaluated for disability which he describes as a very unpleasant experience. He commented that since that time he had become more nervous and upset and that this seemed to correlate with his intestinal problems."

By compensation order dated June 16, 1982, the Office denied appellant's request for reconsideration on the ground that the evidence submitted was not sufficient to warrant modification of the prior decision.

Appellant again requested reconsideration by letter dated May 21, 1983. He then submitted a newspaper clipping dated May 24, 1983.

By letter dated June 8, 1983, the Office informed appellant that his contention that his colitis was caused by Dr. Dunkin's examination had no bearing on the case and that any effects of his experience with Dr. Dunkin were not compensable.

Appellant requested reconsideration by letters dated June 15, 1983 and June 19, 1983. He then submitted the results of a cerebrovascular examination on October 27, 1982. He also submitted receipts of payments of doctor's bills and prescriptions.

By compensation order dated August 12, 1983, the Office denied appellant's claim on the ground that appellant's gastrointestinal condition was not causally related to his employment or the accepted conditions. In its findings of fact, the Office stated that "Conditions resulting from an examination required by the Office for the purpose of determining entitlement to compensation cannot be considered to be causally related to employment." The case record also contained a second compensation order also dated August 12, 1983 which denied appellant's application for review on the grounds that the evidence submitted was irrelevant, immaterial, and not sufficient to warrant review of the prior decision.

The Board finds that appellant's employment-related disability ceased as of February 24, 1982, the date the Office terminated his compensation benefits.

It is well established that once the Office accepts a claim for compensation it has the burden of establishing that appellant is no longer totally disabled or that the present disability is no longer causally related to the employment in order to terminate compensation.[1]

The Board finds that the Office met its burden with the well-reasoned and rationalized report of Dr. Dunkin. Dr. Dunkin concluded after reviewing of the case record, conducting a physical examination of appellant and performing diagnostic tests, that appellant's disability was no longer related to exposure to tobacco smoke in the course of his employment in 1972. The Office medical consultant who reviewed the case concurred with Dr. Dunkin's conclusion.

Although appellant's physician, Dr. Dugan, submitted reports stating that appellant was totally disabled, he provided no well-reasoned opinion relating the disability to appellant's employment conditions prior to retirement in 1972.[2]

With regard to appellant's contention that his gastrointestinal condition was precipitated and aggravated by Dr. Dunkin's "hard-nosed line of questioning" and "condescending attitude," the Board notes that the basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.[3]

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[1] *Glenn Gerald Gamache*, 31 ECAB 1700.

[2] The Board notes that on appeal appellant submitted a December 9, 1983 report from Dr. Dugan. However, under 20 CFR 501.2(c), the Board is precluded from considering new evidence on appeal. Thus, the December 9, 1983 report was not considered by the Board in rendering its decision.

[3] See *Glyndol N. Henderson*, 31 ECAB 989. See also *Beatrice J. Baker*, 11 ECAB 38, regarding the compensability of injury resulting from diagnostic testing.

In this case, the Office accepted appellant's condition and paid him temporary total disability compensation from 1972 to 1982. The Office referred appellant for a routine medical evaluation to determine whether or not he had employment-related residuals. Appellant alleges he was injured in the course of Dr. Dunkin's September 4, 1981 examination.

The Board finds that the evidence fails to establish that appellant's gastrointestinal condition was causally related to his September 4, 1981 medical examination by Dr. Dunkin.

The only medical evidence in support of appellant's contention was the March 10, 1982 report from Dr. Dugan, appellant's physician.[4] In that report, Dr. Dugan merely reiterated appellant's contention that his gastrointestinal problems were related to his September 4, 1981 examination; Dr. Dugan did not address the issue of causal relation and did not provide a reasoned medical opinion in support of appellant's claim. Appellant has not established that his gastrointestinal problems are related to his medical examination on September 4, 1981.

The decisions of the Office of Workers' Compensation Programs dated January 25, 1982, June 16, 1982 and August 12, 1983 are hereby affirmed.

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[4] The Board notes that appellant also submitted a newspaper clipping with his petition for reconsideration. The Board has held on numerous occasions that newspaper clippings, medical texts and excerpts of publications are of no evidentiary value in establishing a claim as they are of general application and are not determinative as to whether specific conditions were the result of the employment. See *Kenneth S. Vansick*, 31 ECAB 1132; *Sidney M. Butcher*, 31 ECAB 277.

In the Matter of OTTO M. HAGA *and* DEPARTMENT OF THE NAVY, NAVAL SECURITY GROUP ACTIVITY, Winter Harbor, Maine

Docket No. 84–589; Submitted on the Record;
Issued April 26, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant has more than a 17 percent permanent impairment of the right leg for which he received a schedule award.

On August 3, 1976, appellant, then a 56-year-old boiler plant equipment mechanic, injured his right knee when he jumped off the back of a truck. He did not stop working immediately but used intermittent periods of sick leave from February 25, 1977 through May 24, 1977. He stopped working on May 31, 1977 and has not returned.

Dr. Richard A. LaRocco, appellant's attending physician, reported on June 9, 1977 that appellant had a "probable degenerative medial meniscus" and "traumatic arthritis" of the right knee causally related to his federal employment. Dr. Rowland W. Pritchard, a Board-certified orthopedic surgeon, performed a medial meniscectomy on June 21, 1977.

A medical adviser of the Office of Workers' Compensation Programs reviewed the case record on November 2, 1977 and opined that appellant had a torn medial meniscus of the right knee causally related to his federal employment. The Office thereupon accepted the claim and paid compensation for temporary total disability from May 31, 1977 through April 21, 1981, the date the Office commenced payment of the schedule award for a 17 percent permanent impairment of the right leg.

On March 2, 1978 the Office requested Dr. Pritchard to evaluate appellant for schedule award purposes and to set forth his limitations for work due to factors of his employment. Dr. Pritchard replied on March 29, 1978 that appellant "is considered totally disabled in terms of work capacity because of the continuing problem with his right knee."

On December 6, 1979 in response to a second Office request that he evaluate appellant for schedule award purposes, Dr. Pritchard reported as follows:

> ". . . he [appellant] was still noted to have effusion of the knee with crepitation on manipulation of the patellofemoral articulation suggesting onset of patellofemoral arthritis. He still has joint line (lateral) tenderness as well in the area of the lateral meniscus. He is not capable of returning to his original job at the Winter Harbor Security Group Activity at this point in time. I think his prognosis in terms of being able to go back to that particular job ever, is poor. * * *"

Dr. Pritchard concluded that appellant "has a permanent disability of the right knee joint in the neighborhood of 20 to 25 percent as the result of the injury he sustained to his knee."

The Office medical adviser again reviewed the case record on March 11, 1980 and stated that the Office needed a more complete evaluation for schedule award purposes to include range of motion measurements and other relevant criteria. By letter dated March 14, 1980, the Office requested Dr. Pritchard to examine appellant and submit a detailed report to evaluate any permanent impairment of the right leg. Appellant informed the Office on August 18, 1980 that he had been examined by Dr. Pritchard on June 25, 1980. No report was forthcoming from the doctor, however.

By letter dated March 10, 1981, the Office referred appellant to Dr. John F. Adams, Jr., a Board-certified orthopedic surgeon, for an examination for schedule award purposes and requested that Dr. Adams correlate his findings with the criteria of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. Dr. Adams examined appellant on April 20, 1981 and reported the following on April 22, 1981:

> "Mr. Haga states that he has difficulty walking for long periods, when he sits down his knee tends to stiffen up, but he can go up and down stairs, climbing ladders bothers him a great deal, and he is unable to work in the squatting position or on his knees. He says that as the day goes on the knee tends to swell.
>
> "* * * As far as his knee is concerned he lacks 5 degrees from full extension, he can further flex to 130 degrees, there is no medial/lateral or anterior/posterior instability. He has some patellofemoral crepitus, which is not painful at the time of exam. He has a well-healed transverse scar over the medial joint line. No effusion is present at the time of exam.
>
> "He apparently has had x-rays in Dr. Pritchard's office, so I will try to get these and look them over and write an addendum to this letter.
>
> "I think, regardless of the x-ray findings, this man has a permanent impairment and loss of function to his leg of 30 percent, as a result of the loss of function in his knee, as far as extension is concerned, inability to kneel on his knee and continued pain."

The Office medical adviser reviewed the case record on May 14, 1981 and applying the criteria of the AMA *Guides* determined appellant had a 1 percent impairment of the right leg due to his lacking 5 degrees from full extension and a 7 percent impairment due to having flexion to 130 degrees. The medical adviser estimated that appellant had a 10 percent impairment due to pain and that the date of maximum improvement was April 22, 1981, the date of Dr. Adams' report. Using the combined values chart of the *Guides*, the medical adviser concluded appellant had a 17 percent impairment of the right leg.

On May 29, 1981, the Office issued appellant a schedule award for a 17 percent permanent impairment of the right leg which entitled him to 48.96 weeks of compensation for the period April 22, 1981, the date of maximum improvement, to March 30, 1982.

By letter dated June 23, 1981 appellant requested that the Office reconsider its decision on the ground he was "unable to do any work" and requested that the Office explain how the 17 percent permanent impairment was calculated. By compensation order dated August 11, 1981, the Office rejected appellant's request for reconsideration on the ground that he had submitted no medical evidence with his reconsideration request to support the existence of a greater permanent impairment of the leg. The Office informed him that his degree of disability, as opposed to permanent impairment, would be determined near the end of his schedule award.

At appellant's request a hearing was held before an Office hearing representative on July 11, 1983 at which appellant testified concerning his limitations due to his right knee condition. Appellant also testified that he was no longer receiving any compensation.

By decision dated October 5, 1983 and finalized October 7, 1983, the hearing representative determined that the medical "evidence establishes that claimant has a 17 percent permanent loss of use of the right leg." The hearing representative advised appellant to contact the district office concerning whether he was entitled to any additional compensation since his schedule award had expired.

Appellant asserts on appeal that he is "unable to perform any type of heavy work or bending," yet his compensation has been terminated.

The Board finds that the medical evidence establishes that appellant has no more than a 17 percent permanent impairment of the right leg for which he received a schedule award.

Dr. Pritchard, a Board-certified orthopedist, reported appellant had "a permanent disability of the right knee joint in the neighborhood of 20 to 25 percent," but failed to specify which factors he included in that estimate and the relative values assigned to each factor. In addition, his estimate is couched in terms of impairment of the knee as opposed to impairment of the leg, the relevant member here.[1] Although the Office requested a more complete evaluation by Dr. Pritchard for schedule award purposes, no additional report was forthcoming.

Dr. Adams, a Board-certified orthopedist, provided flexion and extension measurements and determined appellant had a 30 percent impairment of the leg. Dr. Adams, however, did not articulate how the factors he set forth equalled a 30 percent impairment of the leg, nor does it appear he used the AMA *Guides* as instructed by the Office.

The Office medical adviser properly applied the criteria of AMA *Guides* which have been adopted by the Office and approved by the Board as a standard for evaluating scheduled losses,[2] to the measurements set forth by Dr. Adams and concluded after adding a ten percent impairment for pain that appellant had 17 percent permanent impairment of the right leg.

Schedule awards under the Federal Employees' Compensation Act are paid for a permanent impairment involving the loss of use of certain members of the body, and provide for the payment of compensation for a specific number of weeks as prescribed in the statute.[3] With respect to schedule awards for the leg, the pertinent section of the Act provides that 288 weeks of compensation shall be paid for a permanent complete (100 percent) impairment of the leg.[4] Thus for a 17 percent impairment of the leg, the compensation fixed by the Act is 17 percent of 288 weeks or 48.96 weeks, the amount of appellant's award.

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[1] The Federal Employees' Compensation Act provides for payment of a schedule award for the leg, but not for the knee *per se*. See 5 U.S.C. section 8107(c).

[2] *Louis Belkin*, 32 ECAB 657.

[3] 5 U.S.C. section 8107(c).

[4] 5 U.S.C. section 8107(c)(2).

The Board notes that appellant received temporary total disability compensation until the effective date of his schedule award. The Board has stated that when a claimant is receiving disability compensation for the residuals of an employment injury up to the effective date of a schedule award, made with respect to the same injury, the Office has the burden of proving that after the expiration of the period of the award the employee no longer has disability for work.[5] In the present case, the Board notes that the Office incorrectly informed appellant in a May 10, 1982 letter that after the termination of his schedule award he had the burden to establish that his injury prevented him from performing his usual work or caused a loss of wage-earning capacity. In the present case, the Office has the obligation to resume payment of compensation for temporary total disability from the date of the expiration of the schedule award until such time that it proves appellant is no longer totally disabled.[6]

The decision of the Office of Workers' Compensation Programs dated October 5, 1983 and finalized October 7, 1983 which found that appellant had no more than a 17 percent permanent impairment of the right leg is hereby affirmed. The case is remanded to the Office, however, for resumption of temporary total disability compensation as set forth above.

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[5] *Sam Atkin*, 32 ECAB 1608; *Goldie Washington*, 32 ECAB 239.

[6] See *Goldie Washington*, *supra*; FECA Bulletin No. 84-4 issued February 24, 1984. The Office should advise appellant concerning any election of benefits to be made.

In the Matter of GEORGE E. ROTH *and* DEPARTMENT OF DEFENSE, NATIONAL SECURITY AGENCY, FORT GEORGE G. MEADE, Md.

Docket No. 83-1202; Hearing March 9, 1984;
Issued April 27, 1984

Appearances: *Martin J. Snider, Esq.*, for appellant; *Daniel T. Franklin, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's employment-related hearing loss did not result in a loss of wage-earning capacity and that therefore its prior decision to the contrary was erroneous, resulting in an overpayment of compensation.

On November 30, 1967 appellant, a 39-year-old security officer, was in a vehicular accident in the course of his employment causing an injury to his neck and spine. He worked the remainder of the day and a portion of the following day, December 1, 1967, but stopped working that afternoon. He was treated on December 1, 1967 by Dr. Max C. Frank, a general practitioner, for cervical sprain and ringing in the ears. Appellant returned to work on December 4, 1967.

Appellant stopped working on May 22, 1972 and retired on disability effective May 23, 1972.[1] The medical evidence supporting this administrative action consisted of a March 30, 1972 report by Dr. Cyrus L. Blanchard, a Board-certified otolaryngologist who was also an employing establishment physician. Dr. Blanchard reported as follows:

> "The disability is tinnitus severe and the history is as follows — Nov. 1967 [appellant] was struck from behind while standing in an intersection by a truck, and this resulted in a whiplash type of injury . . . Throughout this whole business he was plagued with a loud tinnitus 4,000 cycles per second or hertz, 95 decibels in loudness. This has persisted and aggravates him by interfering with his ability to concentrate particularly bad where it is quiet and of course his kind of employment is that of a person who is reviewing records and material and the tinnitus interferes with this and causes a great deal of disturbance."
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> * * *
>
> "Audiometric examination revealed hearing loss of 90 and complete loss of hearing in the right ear, in the left ear down to 90 db [decibels] at 4,000 with improvement up to level of 55 db at 8,000. * * *
>
> "Diagnosis: Sensorineural hearing loss for high frequencies only and in association with tinnitus aurium severe and distracting. The date of the disability onset is November 1967. The prognosis for improvement is guarded and there is no definite time schedule that we can predict at the moment."

On September 28, 1972 appellant filed a notice of recurrence of disability alleging that on March 30, 1972 he continued to experience ringing in his ears as a result of the November 30, 1967 employment injury, which "hampered [his] ability to concentrate and was a continuing handicap," thereby causing him to be "worried about [his] inability to fully perform."

In response to an Office of Workers' Compensation Programs inquiry concerning appellant's exposure to hazardous occupational noise and duties following the employment injury, the employing establishment's employee-management relations officer stated the following:

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[1] Appellant retired as an inspector.

> "During his period of service with the Office of Security, [appellant] was required to participate in firing range practice with a 38 revolver for approximately four hours twice yearly. [Appellant] left the Security organization in November 1968 when he was awarded the Congressional Fellowship. He returned . . . in September 1969 at which time he was assigned to the Office of the Inspector General and he remained there until his retirement."

The Office prepared a statement of accepted facts and submitted it, together with appellant, the case record, and a list of specific questions, to Dr. Ernest Kopstein, a Board-certified otolaryngologist, for his review and comment.

Dr. Kopstein examined and evaluated appellant on December 4, 1972. In a report dated December 13, 1972, the doctor addressed the questions posed by the Office in the following manner:

> "1. Mr. Roth does have a hearing loss, but only at frequencies above 2,000 cps. * * * A high-frequency sensorineural hearing loss such as he has is often associated with tinnitus, which he probably has. The type of hearing loss which Mr. Roth has is almost certainly due to the long exposure to the noise of firearms rather than due to the accident of November 30, 1967. Exposure to such noises over a period of many years certainly causes the type of hearing loss which he has, but I have never seen or heard of a documented case in which an accident selectively injured both ears symmetrically and only in the high-frequency ranges. * * * Although it is highly doubtful that his hearing was aggravated by the accident, it cannot be flatly stated that the tinnitus was not increased, in the light of its being a subjective phenomenon. It is common though that tinnitus is first noted by an individual years after sustaining his noise trauma. It is my opinion that the hearing loss and probably the tinnitus are unrelated to the accident which he sustained in 1967.
>
> "2. Maximum medical improvement following noise trauma would have taken place by several weeks and certainly by several months following the last exposure to rifle fire. His hearing has most likely been stable and unchanged since shortly after the last time he was on the firing range; a pre-1967 audiogram could prove this.
>
> "3. If the exposure to noise due to firearms is considered employment related then the high-frequency hearing loss this patient has is also employment related. An estimate of percentage hearing impairment based on the guidelines as set forth in paragraph 5 of your letter is 10% impairment. (If the estimation of percentage

> impairment of hearing were based on the hearing levels at the three frequencies 500, 1,000, 2,000 cps, as recommended by the American Academy of Ophthalmology and Otolaryngology, his hearing impairment would be calculated as 0%.)
>
> "4. * * * [T]he only recommendation for treatment is psychiatric consultation, advice which the patient had already been given and had already rejected the time that I saw him.
>
> "5. There are very few and uncommon work limitations imposed by his hearing impairment. * * * If it is not for psychological or emotional reasons, I do not know why this patient would be unable to continue his former occupation."

An Office medical adviser reviewed the evidence of record and concurred with Dr. Kopstein's assessment, and noted that the doctor did not prescribe any treatment. The medical adviser applied the Office's standards for evaluating hearing loss [2] to Dr. Kopstein's audiogram and determined that appellant had a 14 percent binaural hearing loss. The medical adviser pointed out that since appellant's hearing loss was "considered as due to gunfire," he had reached maximum medical improvement by January 1, 1969 since his last exposure to gunfire was in November 1968.[3] Additionally, he noted that according to the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment*, tinnitus was not a ratable impairment; therefore, the work limitations imposed by this condition were difficult to establish and consisted "of those situations in which the claimant finds he cannot function." The medical adviser pointed out that in the instant case these situations arose when appellant attempted to perform mental tasks.

Accordingly, on February 16, 1973 the Office issued appellant a schedule award for a 14 percent binuaral hearing loss for 28 weeks. The schedule award covered the period January 1, 1969 to July 15, 1969.

In a second letter, also dated February 16, 1973, the Office informed appellant that it was in the process of determining his wage-earning capacity. Accordingly, an Office loss of wage-earning capacity specialist determined that, based on medical factors, education and work background, appellant was best suited for the position of general carpentry and cabinet making. In selecting this position, the specialist took into account that at the time of the loss of wage-earning capacity determination, appellant was "doing general carpentry and cabinet making."

Applying the principles of the *Shadrick*,[4] case, the Office, by letter decision dated June 29, 1973, determined that appellant had a 24 percent wage-earning capacity, or a 76 percent loss of wage-earning capacity, based on his ability to perform general carpentry and cabinet making in which he actually earned $97.38 per week. The Office informed appellant that his new compensation rate would be effective retroactive to May 23, 1972, the date of his disability retirement.

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[2] See *Richard Beggs*, 28 ECAB 387.

[3] By letter dated January 18, 1973 appellant notified the Office that he wished to expand his claim to include his exposure to firearms.

[4] *Albert C. Shadrick*, 5 ECAB 376.

In a form letter CA-1032 dated March 30, 1976, appellant indicated that he began working as an investigator for the Office of the State's Attorney in Anne Arundel County, Annapolis, Maryland on August 5, 1975 where he was paid $192.31 per week. A subsequent form letter CA-1032 dated January 3, 1977, indicated that from January 1, 1976 to December 31, 1976 he worked as an investigator with a salary of $217.88 per week. The last form letter CA-1032 in the case record, dated February 25, 1979, indicated that appellant continued to work as an investigator with a salary of $240.00 per week.

By letter dated February 27, 1979, the Office wrote the State's Attorney's office and inquired as to the description of appellant's duties and the extent and nature of any on-the-job training.

In a letter dated March 1, 1979, the State's Attorney for Anne Arundel County stated, *inter alia*, that appellant began working for him as a special investigator in 1975; that although appellant was a trained investigator, he attended "short seminars" and a week long course while in his employ; and that he was currently undergoing training in the operation of the polygraph.

Based on this information a second loss of wage-earning capacity specialist applied the principles of the *Shadrick* [5] case, and amended appellant's loss of wage-earning capacity determination to reflect a 31 percent wage-earning capacity, or a 69 percent loss of wage-earning capacity, based on his ability to perform the position of an investigator, in which he was actually earning $240.00 per week. The specialist noted that appellant's loss of wage-earning capacity was amended because of his "on-the-job training." Appellant was informed of this amendment by letters dated May 14, 1979.

Appellant requested a hearing which was held before an Office hearing representative on January 7, 1980. Appellant contended at the hearing that his wage-earning capacity had not substantially increased based on the training he received as an investigator with the State's Attorney's office in Anne Arundel County. In support of his contention, appellant submitted an affidavit and a letter, both dated January 7, 1980, by the State's Attorney for Anne Arundel County. In his affidavit, the State's Attorney stated, *inter alia*, that he hired appellant as a special investigator in August 1975; that appellant was more than qualified for the position due to "his prior training and work experience"; that the salary he offered appellant "was determined by budgetary restraints rather than [appellant's] qualifications and ability"; that there had been no change in appellant's position, responsibilities and requirements since he was first employed; and that the salary increase appellant had received since August 1975 only reflected cost-of-living adjustments as opposed to increased wage-earning capacity. The State's Attorney explained that the seminars appellant attended were for the purpose of "reviewing investigatives techniques" and not for the advancement of his skills or capabilities "as his training and experience had already provided him with skills in excess of those required by this office."

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[5] *Id.*

In a letter of the same date the State's Attorney added that because he empathized with appellant's "physical handicap," he allowed appellant "a great deal of latitude" because he was aware that appellant would do an exceptional job for him, and that "the complexity, scope and substance of cases he worked [on at the employing establishment] cannot be compared with the cases he works here."

By a decision dated February 12, 1980, finalized February 25, 1980, the Office hearing representative vacated the May 14, 1979 decision and remanded the case for review under 5 U.S.C. section 8128(a) and for reinstatement of benefits pursuant to the June 29, 1973 decision while the review was taking place.

On remand, the district office undertook review under 5 U.S.C. section 8128(a) as directed by the hearing representative. By compensation order dated November 27, 1981, which incorporated a memorandum summarizing the evidence, the Office terminated appellant's benefits effective December 3, 1981 on the ground that "claimant is not disabled for the position held at the time of injury due to the accepted condition." In making this determination, the Office claims examiner stated the following:

> "Whether or not claimant misled the Office at the time of the initial wage-earning capacity determination and whether or not claimant failed to seek suitable employment are issues which are academic at this point. The fact is that the substantive weight of the medical evidence of record clearly shows that claimant's hearing loss and tinnitus conditions resulted from exposure to gunfire at work over a 10-year period prior to November of 1968 and that these conditions did not disable claimant for the job at the time of injury.
>
> "This conclusion is also strongly supported by the factual evidence of record which shows that claimant was not disabled for work at any time during the 10-year period of exposure nor at any time up until he retired, including a period during which he participated in a Congressional Fellowship. Said factual evidence further shows that claimant was gainfully employed for almost 5 years in a responsible position similar to that he held with the Government and that he performed very capably in that position. This fact negates

> claimant's earlier estimation of his limitations due to the injury and also belies the presence of any psychological disability.
>
> "* * * I find that the Office has in fact erroneously paid compensation for wage loss in this case solely on the basis of claimant's unsubstantiated allegations of an entirely subjective symptom, allegations which are clearly refuted by the substantive weight of the medical and factual evidence of record. On the basis of this finding I recommend the following courses of action under 5 U.S.C. section 8128:
>
> "1. A Compensation Order be entered terminating payment of compensation for wage loss immediately.
>
> "2. A review of all compensation payments made on the basis of loss of wages from May 23, 1972, be made in light of evidence showing claimant was not disabled for work and the fact he worked and made substantial earnings since May 23, 1972."

Appellant requested a hearing, which was scheduled for March 26, 1982. A second Office hearing representative reviewed the evidence of record on March 8, 1982 and recommended to the Director of the Office that the November 27, 1981 compensation order be vacated for the following reasons:

> "In this case the evidence relied upon to terminate benefits (and in effect rescind acceptance) is not new. This evidence in fact was of record when the claim was accepted and was considered at that time. It cannot therefore serve as a basis for terminating compensation at this date.
>
> "In view of this deficiency it cannot be found that the Office has met the burden imposed upon it under the law."

By compensation order dated March 8, 1982 the Director, on his own motion, vacated the Office's November 27, 1981 decision. Appellant was notified by a letter dated March 8, 1982 that his hearing had been cancelled in view of the March 8, 1982 compensation order.

In a memorandum addressed to the Associate Director of the Office dated April 8, 1982, the Assistant Regional Administrator recommended the March 8, 1982 decision be vacated and the case record assigned to a different hearing representative.

A Special Assistant to the Associate Director reviewed the evidence of record, and in a memorandum dated May 13, 1982 stated in pertinent part:

> "Since the hearing representative felt that new evidence was requisite for terminating compensation, he obviously did not consider whether the original decision may have been erroneous which is one of the conditions the ECAB has established for modifying a

> loss of wage-earning capacity determination. In that respect, the hearing representative did not fully consider whether or not the decision of November 27, 1981, was appropriate. That decision, in fairness to all parties, should not have been set aside or otherwise acted upon without the hearing requested by the claimant."

The Assistant Regional Director recommended that the March 8, 1982 decision be set aside and that a hearing be scheduled before an Office hearing representative who was not previously involved with the case.

By compensation order dated May 19, 1982 the Director, on his own motion, vacated the March 8, 1982 decision and reinstated the November 27, 1981 decision on the grounds that "all the facts and circumstances of this case were not fully considered before the decision of March 8, 1982," and therefore that decision was "premature." [6]

The Board finds that the Office in its decision of May 19, 1982 incorrectly determined that its prior decision, which found that appellant's employment-related hearing loss resulted in a loss of wage-earning capacity, was erroneous.

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of justifying such modification of an award is upon the Office.[7] The Board finds that in this case the Office has not met that burden.

On November 27, 1981 the Office terminated appellant's compensation on the ground that he was "not disabled for the position held at the time of injury due to the accepted condition." This decision was based on the premise that since appellant worked as a special investigator for the State's Attorney's office in Anne Arundel County, Annapolis, Maryland beginning in August 1975, he was capable of performing the duties of the position he occupied when injured; therefore, he had no loss of wage-earning capacity.[8] However, this determination is not supported by the evidence of record.

In this regard, the Board notes that appellant retired on disability effective May 23, 1972, based on a March 30, 1972 report by Dr. Blanchard, an employing establishment physician, who stated that appellant was disabled for work due to "tinnitus severe" at the frequency of 4,000 Hertz cycles per second — 95 decibels in loudness; that the date of onset of disability was "November 1967," the month of the employment injury; and that the tinnitus interfered with appellant's ability to concentrate, thereby preventing him from reviewing records and other documents as required by his job. The doctor further stated that appellant also had a sensorineural hearing loss in the high frequencies. In essence, appellant was found to be disabled for his former position due to his employment-related hearing loss.

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[6] A hearing was scheduled for July 20, 1982; however, appellant declined.

[7] See *Elmer Strong*, 17 ECAB 226; *Ruth C. Reinhart*, 32 ECAB 497.

[8] The test in determining loss of wage-earning capacity is whether the disability prevents claimant from performing the duties of the position he held at the time of the injury or disease. *Evelyn Gray*, 6 ECAB 88.

The Board further finds that although appellant's disability retirement was based on an employment-related hearing loss, the evidence of record does not show that he is totally disabled for all types of work, nor does he contend that he is; therefore, he does have a wage-earning capacity. However, the record does not support the Office's finding that appellant's employment with the State's Attorney's office was comparable to his position with the employment establishment. In fact, the record reveals quite the opposite. Not only was the salary incomparable to that which appellant received prior to retirement, his assignments and duties were not as complex, and appellant could basically report to work and perform his duties at his own convenience since the State's Attorney empathized with his "physical handicap", i.e., his tinnitus, and allowed him "a great deal of latitude" as a consequence. The Office has not justified modification of its loss of wage-earning capacity determination.

The decision of the Office of Workers' Compensation Programs dated November 27, 1981 is hereby reversed; the case is remanded for resumption of compensation benefits pending further development of the record as the Office deems necessary, to be followed by a *de novo* decision.[9]

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[9] See FECA Bulletin No. 84-4.

In the Matter of RUSSELL THOMASON *and* U. S. POSTAL SERVICE, POST OFFICE, Tulsa, Okla.

Docket No. 84-469; Submitted on the Record;
Issued May 10, 1984

Re: Attorney's Fee

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in approving an attorney's fee of $2,450.00.

Ronald M. McCann, Esq. of Fayetteville, Arkansas filed an application dated September 27, 1983 for approval of a fee of $4,500.00 stating that he had agreed with the claimant to a fee of 25 percent of "the accumulated back pay" which was anticipated to be approximately $18,000. Included in this September 27, 1983 application was an itemization of 24.5 hours of legal services performed before the Office in this case during the period from March 31, 1982 to September 27, 1983.

In a September 27, 1983 letter the claimant stated that he had agreed to pay the attorney, Mr. McCann, 25 percent of "the accumulated back pay," and that he felt the requested fee was reasonable and should be approved.

In a November 1, 1983 letter Mr. McCann stated that on October 27, 1983 the claimant received a check in the amount of $25,183.07 "for his accumulated back pay," and that the claimant had sent him a check for $6,295.77 (25 percent of $25,183.07) which he had placed in an escrow account awaiting approval of his fee.

By a compensation order dated November 21, 1983 the Office found that a fee of $2,450.00 was "reasonably commensurate with the actual necessary work performed by the representative while representing the claimant before this office." The compensation order determined that the time spend on necessary services was 24.5 hours, that $100.00 per hour was a reasonable charge for the accepted services, and that a contingency fee agreement could not be considered. The compensation order further noted that the claimant had not contested the reasonableness of the fee. The compensation order stated:

> "The following criteria were considered: (a) nature and complexity of the claim, (b) usefulness of the representative's service to the claimant, (c) time spent, (d) amount of compensation accrued, (e) future compensation payments, (f) the claimant's comments, (g) customary local charges for similar services, and (g) the professional qualifications of the representative."

The attorney filed this appeal, contending that a fee of $6,295.77 should have been approved.

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on the criteria set forth in 20 CFR 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.[1]

The Board finds that there was no abuse of discretion by the Office in refusing to approve an attorney's fee based upon a contingency fee agreement. The regulations governing approval of attorney's fees before the Office expressly prohibit recognition of "any contingent contract."[2]

The Board further finds that the Office acted improperly in reducing the requested fee and that the case must be remanded to the Office for further development.

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[1] *William Lee Gargus*, 25 ECAB 187.

[2] 20 CFR 10.145(e) (2).

The Board has held that where the Office proposes to reduce a requested attorney's fee, the attorney is entitled to notice of the reasons for the proposed reduction and an opportunity to respond with written comments and by affidavit prior to decision.[3]

In this case the Office did not, prior to the issuance of its decision, advise the attorney of the prohibition against contingent contracts or of its proposed finding that $100.00 per hour was a reasonable charge for the accepted services.

The decision of the Office of Workers' Compensation Programs dated November 21, 1983 is hereby set aside and the case remanded to the Office to allow the attorney an opportunity to respond to the proposed reduction of the fee he requested, to be followed by a *de novo* decision.

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[3] *Edgar Aikman, et al.*, 32 ECAB 1570.

In the Matter of ANNA M. POLIZZI *and* DEPARTMENT OF THE ARMY, TROOP SUPPORT COMMAND, St. Louis, Mo.

Docket No. 84-434; Submitted on the Record;
Issued May 11, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant sustained a displacement of a prosthesis in her left ear as a result of an employment-related injury on April 11, 1975, thereby necessitating surgery.

On April 14, 1975 appellant, a 54-year-old administrative officer, filed a claim alleging that on April 11, 1975 she sustained an injury to her knees, right hand, neck, back and ankle as a result of tripping and falling in a hole located on the employing establishment's premises. She was treated that day by Dr. Hannah Clark, for multiple contusions. Dr. Clark referred appellant to Dr. Joseph V. O'Donnell, a Board-certified internist, who reported on April 9, 1977 that appellant had minimal symptoms referable to her knees, ankles, low back and coccyx when he treated her in August 1975.

Appellant was absent from work for intermittent periods between April 11, 1975 and March 23, 1979.

The Office of Workers' Compensation Programs determined that appellant's multiple contusions resulted from the April 11, 1975 employment injury and paid medical expenses. Continuation of pay was authorized for the following days: April 16 and 17, 1975; May 1, 1975; June 3, 1975; and August 21, 1975.[1]

Appellant amended her claim to include the contention that she also struck her head on April 11, 1975, thereby causing the displacement of her left ear prosthesis, which resulted in surgery. She claimed reimbursement for medical expenses incurred as a result of the surgery, and restoration of leave for her absences from work caused by both the surgery and an aggravation of a preexisting left ear condition, i.e., for intermittent periods between April 11, 1975 and March 23, 1979, excluding the days for which continuation of pay was authorized.

Appellant submitted a medical bill from Dr. James Hennessy Jones, a Board-certified ophthalmologist, which indicated that he had treated appellant on April 26, 1975 for a subconjunctival hemorrhage of the nasal half of the left eye.

In a report dated May 4, 1977 Dr. John J. Shea, an otologist and neurologist, stated that on April 23, 1975 he had removed a small bone chip in appellant's eardrum over a total ossicular replacement prosthesis which had been inserted in a prior operation. Dr. Shea further stated that he conducted audiometric testing on appellant on July 23, 1975, that at that time he diagnosed chronic adhesive otitis in both ears, that appellant returned to his office on January 17, 1977 complaining of headaches and dizziness, and that he scheduled her for a tympanoplasty on her left ear to be performed on June 1, 1977.[2] The doctor concluded that appellant had a "bad fall" at work which injured her left ear and required continuous treatment.

On May 30, 1977 Dr. Shea performed a tympanoplasty on appellant which, he stated, was necessitated "due to a fall at work on April 11, 1975." The doctor added that the surgery was uneventful.[3]

The Office prepared a statement of accepted facts and referred it, together with appellant to Dr. Malcolm H. Stroud, a Board-certified otolaryngologist, for an examination. In a report dated August 24, 1977 Dr. Stroud stated that appellant did not give a history of a severe head injury at the time of the April 11, 1975 employment injury, that it was unlikely that a bone inserted over the total ossicular replacement prosthesis "would be shaken out of the head" by an accident of such a nature as described by appellant "in which the patient was not knocked out," and that it was "highly unlikely" that appellant fractured her skull, thereby loosening the bone chip. Dr. Stroud further stated that before he could render an opinion as to whether appellant's hearing became impaired after the fall, it was necessary for him to review audiograms made prior to and subsequent to the fall.

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[1] The Office did not authorize continuation of pay for this period of absence from work until February 4, 1980.

[2] Dr. Shea submitted copies of audiograms dated March 24 and 25, 1975, April 23, 1975, July 23, 1975, July 19, 1976 and January 17, 1977.

[3] Dr. Shea submitted operative reports to the Office which revealed that he began treating appellant for various problems in both ears, beginning in 1962, for which appellant underwent several tympanoplasties. The most recent tympanoplasty prior to the injury was performed on the left ear on February 24, 1975.

The Office provided Dr. Stroud with these audiograms, who, on January 9, 1978 concluded that he found "it difficult to relate the accident with any worsening of the hearing."

In view of the conflict in medical opinion between Dr. Shea, who supported an employment-related aggravation of appellant's left ear condition, and Dr. Stroud, who negated such a relationship, the Office prepared a statement of accepted facts and referred it, together with appellant, the case record and a list of specific questions, to Dr. Ben H. Senturia, a Board-certified otolaryngologist, for a resolution of the conflict pursuant to 5 U.S.C. section 8123(a).

Dr. Senturia examined and evaluated appellant, and in a report dated April 4, 1978, stated in part:

> "On April 11, 1975, while walking in the vicinity of the Federal Center . . ., she fell into a hole in the street, struck her head, broke her glasses, and developed severe hemorrhages of her left eye and had contusions and injuries of her legs and arms."
>
> * * *
>
> "In summary, it would appear that the patient had numerous operations on the left ear prior to the accident of April 11, 1975 and the hearing did not improve. Following the accident, a bone chip was found in the ear which must have originated from one of the previous operations and was somehow dislodged from its position, either by infection or possibly by the accident. However, the audiograms suggest that the accident had nothing to do with the dislodgement of the bone chip and loss of hearing, since the hearing loss preceded the accident. Finally, when an operation was performed which was successful in improving the status of the ossicular chain and the proper prosthesis was inserted, there was a striking improvement above that which was present even before the accident of April 11, 1975.
>
> "It is my impression that the above patient's left ear problem was not precipitated or materially aggravated by the accident of April 11, 1975. I would be unable to say whether the condition was accelerated as a result of the incident since I did not examine the patient prior to the incident and the operactive notes are not sufficiently complete to draw any conclusions.
>
> "In my opinion, the above patient's left ear problem is essentially unchanged, if not somewhat better, than the condition present prior to the accident of April 11, 1975. I do not believe that Ms. Polizzi had developed any work-related permanent impairment of her left ear as a result of her injury."

An Office medical adviser reviewed the evidence of record and concurred in the opinion of Dr. Senturia.

In a compensation order dated October 13, 1978 the Office determined appellant's claim as follows:

> "The weight of the medical evidence of record fails to establish that [appellant] has a hearing problem that is causally related (caused, accelerated, precipitated, or materially aggravated) by the injury she sustained on April 11, 1975. Therefore, a schedule award of compensation for hearing loss of the left ear is denied."[4]

Appellant requested a hearing and submitted a medical report by Dr. Shea, dated November 8, 1978, who stated that he first treated appellant in 1962 and that he had examined her "no less than two times each year" and sometimes more. The doctor further said:

> "I operated on her left ear on 2-24-75 to replace a plastic implant into a vertical position beneath the drum from which it had fallen following the prior operation. When seen on 3-24-75 in my office I observed the prosthesis to be in the proper position beneath the drum and the hearing to be improved. I next saw the patient on 4-23-75 at her insistence because of a fall she sustained on 4-11-75 in which she hit her left ear, among other things. I found her left ear drum to be bruised, and I removed 'a small bone chip' from the drum. The hearing was about the same. The hearing did subsequently go down and the plastic implant was observed to be out of position again beneath the drum. I reoperated on the left ear 6-27-77 and found the medial end to have been displaced from the oval window area and the lateral end to be displaced from the center of the drum. I replaced the plastic implant and ever since the patient has had hearing with no dislocation of the implant.
>
> "It is my opinion that Anna Polizzi's hearing loss was aggravated by the fall of 4-11-75, which required another operation to correct."

A hearing was held before an Office hearing representative on March 1, 1979. By a decision dated October 3, 1979, finalized December 26, 1979 the hearing representative affirmed the October 13, 1978 compensation order, but remanded the case for an adjudication of appellant's claim for "her consequent medical and related expenses and for time lost from work."

On remand a memorandum dated December 26, 1979 was prepared which stated the weight of the medical evidence of record revealed that appellant's ear condition was "neither caused nor materially aggravated by the April 11, 1975 employment injury"; that although the October 13, 1978 decision was affirmed, it "should be amended to replace 'hearing problem' with 'left ear condition'"; that appellant was only entitled to medical benefits and compensation for treatment relative to her multiple contusions; and that any lost time or medical expenses resulting from her left ear condition was not compensable.

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[4] The Office had to reconstruct the case following appellant's impartial medical evaluation because the record was not returned. It was therefore unsure whether appellant had filed a claim for a schedule award for a loss of hearing. It erroneously determined that she had and inserted language to that effect in its October 13, 1978 compensation order.

On February 4, 1980 the October 13, 1978 compensation order was amended in accordance with the December 26, 1979 memorandum. Appellant requested a hearing, which was held before a second Office hearing representative on October 22, 1980. Appellant testified at the hearing that she did not file a claim for a schedule award to compensate her for a loss of hearing; however, she stated that the purpose for her claim was for reinstatement of leave and reimbursement of medical, travel and "all my expenses incurred" as a result of the April 11, 1975 employment injury, and subsequent surgery.

By decision dated and finalized June 26, 1981, the hearing representative affirmed the February 4, 1980 decision which had amended and reaffirmed the Office's October 13, 1978 decision.

Appellant filed an application for review with the Board. By decision dated October 21, 1981, the Board affirmed the Office's June 26, 1981 decision.[5]

Appellant requested reconsideration before the Office and submitted a report by Dr. Shea dated September 9, 1981, who stated:

> "First of all, I do believe with a reasonble degree of medical certainty that the fall sustained by Ms. Polizzi did, among other things, cause her prosthesis to become displaced. Therefore, the surgery I performed to correct this displacement was necessitated by her accident at work. Some questions have arisen due to the length of time between the occurrence of injury and my corrective surgery. My only comment is that it was the patient, and not myself who prevented an earlier operation. Ms. Polizzi expressed her unwillingness to undergo another such operation, and it was her reluctance, and not mine, which caused the delay.
>
> "A minor issue which I think also needs clarification is the patient's hearing level before the accident, and approximately two weeks after the accident when I examined her. In my report I stated 'it was about the same.'
>
> "The point to keep in mind is that the prosthesis had been implanted in February, about two months before the fall. This is not a lot of time when discussing this type hearing device. The implantation of this device does not automatically restore hearing. It is not of the same character as an ear phone or other type aid. Often

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[5] Docket No. 81-1664.

> a year or so must pass following implantation before the patient becomes accustomed to the prosthesis and before marked improvement is shown in hearing. Therefore, the fact that she showed no significant hearing gain at the time of my examination is not remarkable since the prosthesis had only been in place approximately two months.
>
> "Any blow to the head will cause displacement of the prosthesis and I think this is what happened in Ms. Polizzi's ear."

An Office medical adviser reviewed Dr. Shea's report and noted that Dr. Clark diagnosed multiple contusions as a result of appellant's fall on April 11, 1975 and that there was no indication in her report that appellant either injured her neck or head, only the knees. The medical adviser noted that Dr. Stroud's history of the injury did not include a head injury and that Dr. Senturia concluded that appellant did not sustain an employment-related hearing loss as a result of the April 11, 1975 employment injury. The medical adviser then concluded as follows:

> "In view of the above evidence and the fact that this claimant did not suffer a severe head injury but rather suffered contusions involving her knees, it is [my] opinion that this claimant has no impairment or aggravation as a result of the fall 4/11/75. From the medical evidence in the file, it appears this claimant did not suffer any blow to the head and therefore, it appears that the report of 9/9/81 would be invalidated on that basis alone."

After conducting a merit review of appellant's claim, the Office, on June 4, 1982, denied modification of its prior decision on the grounds that Dr. Shea's opinion on causality had been previously considered; that the doctor did not have an accurate history of the injury; and that his rationale was speculative. Appellant filed an application for review to the Board. By decision dated September 3, 1982, the Board affirmed the June 4, 1982 decision on the ground that Dr. Shea's report included an inaccurate history that appellant struck her head on April 11, 1975.[6]

Appellant requested reconsideration before the Office and submitted statements from two coworkers in support of her allegation that she struck her head on April 11, 1975. The first coworker stated that she was walking beside appellant when she fell into the hole; that she assisted appellant to her feet; and that while she was doing so, appellant stated that she struck her head when she fell. The second coworker stated that appellant informed him that she had struck her head when she fell while he waited with her in the command dispensary.

After reviewing the case on the merits, the Office issued a November 7, 1983 compensation order denying modification of its prior decision on the ground that the evidence was insufficient.

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[6] Docket No. 82-1680.

In a memorandum, which was not incorporated into the compensation order, the Office claims examiner stated, *inter alia*, that "a review of the record indicates that the [claimant] did strike her head at the time of injury." In that regard, the examiner noted that Dr. Jones treated appellant for a subconjunctival hemorrhage of the nasal half of the left eye, and that Dr. Senturia noted a history of appellant striking her head. The claims examiner went on to recommend denial of the claim based on the following:

> "A review of the record indicates that claim was not denied because clmt failed to establish that she struck her head during the 4/11/75 accident but rather because the injury sustained did not aggravate her left ear condition."

The Board finds that the case is not in posture for decision and must be remanded for further development of the record.

Appellant testified at the October 22, 1980 hearing that she did not file a claim for a schedule award for a loss of hearing, but for reinstatement of her leave for "all my expenses incurred" as a result of the April 11, 1975 employment injury and subsequent surgery. The first hearing representative had previously remanded the case in her October 3, 1979 decision, finalized December 26, 1979, for this purpose. Appellant had also raised this issue prior to the first hearing when she amended her initial claim and contended that she struck her head on April 11, 1975, thereby displacing her total ossicular replacement prosthesis, necessitating surgery.

Appellant again contends on appeal that she struck her head on April 11, 1975, thereby displacing the prosthesis in the left ear, which necessitated surgery and resulted in countless expenses.

Dr. Shea, an otologist and neuro-otologist and appellant's attending physician since 1962, has consistently maintained that appellant struck her head on April 11, 1975, which displaced the prosthesis in the left ear, thereby necessitating surgery. He reported on September 9, 1981 that the fall on April 11, 1975 displaced the prosthesis that he had inserted in February 1975; that the surgery to correct the displacement was necessitated by a "blow to the head"; and that there was a delay between the date of injury and date of surgery because of appellant's "unwillingness to undergo another such operation."

The Office based its February 4, 1982 denial of modification on the Office medical adviser's premise that since appellant "did not suffer any blow to the head" as a result of the April 11, 1975 employment injury, Dr. Shea's September 9, 1981 medical report "would be invalidated on that basis alone." However, on reconsideration, the Office accepted that appellant had struck her head, based on two witnesses' statements and other medical evidence of record. Nevertheless, the Office denied modification on November 7, 1983 based on the claims examiner's memorandum stated that appellant's claim was not denied because she did not establish that she struck her head, but because she did not aggravate her left ear condition.

After the Office accepted that appellant had struck her head, a new statements of accepted facts should have been prepared and referred, together with Dr. Shea's September 8, 1981 report, back to an Office medical adviser for a conclusion as to whether the April 11, 1975 fall caused the displacement of the prosthesis resulting in surgery, lost time from work and other related expenses incurred, in light of the newly accepted factual evidence. The Board notes that the Office failed to do this.

On remand the Office should modify its statement of accepted facts to reflect the fact that in addition to her multiple contusions, appellant struck her head when she fell on April 11, 1975. The statement should be referred, together with the case record, to an Office medical adviser, for a detailed rationalized medical opinion as to whether the blow to appellant's head on April 11, 1975 displaced her prosthesis in the left ear, which necessitated surgery, thereby causing appellant to lose time from work and incur medical, travel and other related expenses. If upon reviewing the record the Office determines that a conflict in medical opinion exists, the case should be referred to an impartial medical specialist for a resolution thereof, pursuant to 5 U.S.C. section 8123(a). After this and such further development as the Office deems necessary, a *de novo* decision should be issued.

The decision of the Office of Workers' Compensation Programs dated November 7, 1983 is set aside; the case is remanded for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

In the Matter of ROOSEVELT WHITESIDE *and* DEPARTMENT OF THE NAVY, NAVAL SUPPLY DEPOT, Oakland, Calif.

Docket No. 84-505; Submitted on the Record;
Issued May 11, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issues are: (1) whether appellant is entitled to a schedule award for a permanent partial impairment of his right leg causally related to his February 26, 1944 employment injury; and (2) whether the Office of

Workers' Compensation Programs properly denied his request for a hearing.

The only decisions of the Office which are before the Board are the October 8, 1982 compensation order finding that appellant is not entitled to a schedule award, and the December 15, 1982 decision denying his request for a hearing. Since more than one year has elapsed from the date of the Office's November 24, 1967 decision finding that appellant had no loss of wage-earning capacity, to the filing of this appeal, the Board lacks jurisdiction to consider that decision.[1]

The Board finds that appellant is not entitled to a schedule award for a permanent partial impairment of his right leg causally related to his Febraury 26, 1944 employment injury.

When appellant sustained his injury on February 26, 1944, there were no statutory provisions for a schedule award. The present schedule, contained in section 8107 of the Federal Employees' Compensation Act,[2] was enacted on October 14, 1949.[3] Where the injury resulted in total and permanent loss or loss of use of a specified member, the schedule was made retroactive to injuries which occurred on and after January 1, 1940. However, where the injury resulted solely in less than total permanent loss of use of the member, the schedule was made retroactive only to injuries which occurred on and after October 14, 1948. As appellant's injury occurred in 1944 and there is no evidence that its permanent effect is a total loss of use of his right leg, a schedule award may not be made.[4]

The Board finds that the Office properly denied appellant's request for a hearing regarding its October 8, 1982 compensation order.

The 1966 amendments to the Act[5] conferred a right to a hearing within the limitations set forth in section 8124 of the Act.[6] However, section 16(b) of the 1966 statute provides that the amendment "shall not apply with respect to any injury sustained before the date of enactment," which was July 4, 1966. Thus, as the Board has pointed out, the right to a hearing provided by this amendment does not apply to a case, such as the present one, when the injury occurred prior to July 4, 1966.[7]

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[1] Section 501.3 (d) of the Board's *Rules of Procedure* (20 CFR 501.3(d)) reads, in pertinent part:

(d) *Time for filing.* (1) Except as provided in subparagraph (2), any application for review by a person residing within the United States or Canada must be filed within 90 days from the date of issuance of the final decision of the Director. . .

(2) For good cause shown, the Board may in its discretion waive a failure to file an application within the time limitations provided in subparagraph (1) but for no longer than one year from the date of issuance of the final decision of the Director.

(3) The date of filing of an application for review shall be the date upon which the application is received by the Board.

[2] 5 U.S.C. section 8107.

[3] 63 Stat. 854.

[4] *Milton J. Frank*, 17 ECAB 708; *Thomas J. McKenna*, 27 ECAB 544.

[5] 80 Stat. 257.

[6] 5 U.S.C. section 8124.

[7] *Rudolf Bermann*, 26 ECAB 354.

The Board has also pointed out that the Office has authority in the exercise of its discretion to grant a hearing in a case where the injury occurred prior to July 4, 1966.[8] In the present case the Office exercised that discretion and concluded that a hearing would serve no useful purpose. The sole issue which could have been addressed at a hearing was the applicability of the schedule award provisions to appellant's 1944 injury. The Board finds that the Office did not abuse its discretion by finding that a hearing would serve no useful purpose.

The decisions of the Office of Workers' Compensation Programs dated October 8, 1982 and December 15, 1982 are hereby affirmed.

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[8] *Richard E. Chapman*, 30 ECAB 489.

In the Matter of LINWOOD D. HOLMES *and* U. S. POSTAL SERVICE, PRINCE GEORGES MANAGEMENT SECTIONAL CENTER, Md.

Docket No. 83-1616; Hearing April 6, 1984;
Issued May 14, 1984

Appearances: *Richard W. Faucher, Esq.*, and *Linwood D. Holmes*, for appellant; and *Brenda Stovall, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant has more than a 15 percent permanent impairment of his right upper extremity causally related to factors of his federal employment, for which he received a schedule award.

On October 19, 1979 appellant, then 26-year-old letter carrier, filed a claim in which he alleged that he had sustained "biceps tenosynovitis right shoulder; impairment syndrome right shoulder" due to factors of his federal employment. He noted that he had stopped work on September 24, 1979, and claimed for repurchase of intermittent periods of leave used from February 20, 1979 through September 13, 1979. In support of his claim he submitted a February 1, 1979 report by Dr. Leonard P. Appel, a Board-certified internist of professorial rank, who diagnosed "bursitis and tendinitis of both shoulders" and concluded that "carrying a mailsack over his shoulders will tend to aggravate his condition."

Appellant was subsequently examined by Dr. Jacob G. Edelson, a Board-certified orthopedic surgeon, who referred him to Dr. Julius S.

Neviaser, also a Board-certified orthopedic surgeon. In a January 22, 1980 report Dr. Neviaser stated:

> "The diagnosis given was biceps tenosynovitis of the right shoulder, and impingement syndrome of the right shoulder. An arthrogram of the right shoulder was advised, and was performed at Washington Hospital Center on August 22, 1979. The arthrogram revealed very poor filling of the biceps sheath proximally; and on the internal rotation view the biceps sheath was not visualized; good dependent fold; no dye in the subdeltoid bursa. He was advised that surgery should be performed on the right shoulder if his symptoms persist.
>
> "On September 13, 1979, [appellant] returned to the office stating his shoulder was no better."
>
> * * *
>
> "The Four-In-One-Arthroplasty was performed by Dr. Thomas J. Neviaser, [a Board-certified orthopedic surgeon,] on September 28, 1979, at Commonwealth Doctors Hospital in Fairfax, Virginia. His hospital stay was benign, and he was discharged on October 3, 1979 . . . "

On May 3, 1980 appellant returned to work. On May 23, 1980 the Office of Workers' Compensation Programs determined that appellant had sustained biceps tenosynovitis and impingement syndrome of his right shoulder and authorized the payment of compensation for temporary total disability, repurchase of leave used for periods of disability, and medical benefits, retroactive to June 2, 1979.

In a September 29, 1980 report on an Office form, Dr. Neviaser diagnosed "chronic synovitis over the tenodesis and bone calcification in the right distal clavicle." He concluded that appellant had a 15 percent permanent impairment of the right upper extremity causally related to factors of his federal employment.

Appellant stopped work on March 6, 1981. On March 20, 1981 he claimed a recurrence of shoulder pain on March 6, 1981 and claimed compensation from that date. Appellant noted an increase of shoulder pain since his return to work and stated that further sugery was anticipated. He subsequently indicated that he had reinjured his shoulder when a door slammed shut on it when he was at work. The Office paid compensation for temporary total disability retroactive to March 2, 1981.

In an April 14, 1981 form report, Dr. Julius Neviaser diagnosed "distal clavicle impingement on the neck of the acromion." He noted that appellant had had an excision of the posterior distal portion of the right clavicle, and acromionplasty of the right acromion with exploration of the biceps tenodesis of the right shoulder performed on April 1, 1981 by Dr. Thomas Neviaser. On June 5, 1981 an Office medical adviser concluded that this surgery was causally related to appellant's accepted shoulder condition.

On July 15, 1981 Dr. Neviaser submitted a report in which he repeated his earlier diagnosis and concluded "I feel that patient has reached maximum improvement." He stated:

> "Active abduction 100 degress; passive abduction 130 degrees with pain; external rotation by the side is equal to left; internal rotation to scapular tip; pure abduction 90 degrees. [Appellant] complains of a pulling sensation in his right shoulder with motion of the shoulder. His right-sided neck pain seems to be gone since surgery."

In an October 10, 1981 report the same Office medical adviser reviewed Dr. Neviaser's report and noted that maximum improvement had been reached on July 15, 1981. He concluded that appellant had a ten percent permanent impairment of his right upper extremity.

On November 6, 1981 the Office granted appellant a schedule award for a ten percent permanent loss of use of the right arm.

On December 9, 1981 appellant was examined by Dr. Gerald D. Schuster, a Board-certified orthopedic surgeon, who diagnosed right bicipital tendinitis, right residual rotator cuff tendinitis, and early degenerative arthritis and instability of the right acromion joint. Dr. Schuster concluded that appellant had a 25 percent permanent impairment of the right upper extremity on that date and noted:

> "Gross examination of his shoulders from behind shows he's got some obvious atrophy around the region of the posterior fibers of the right deltoid. He also has increased prominence of the distal end of the right clavicle as compared with the left clavicle. There is a little bit of flattening noted in the suprasponous fossae on the right side. He's got a well-healed surgical incision which runs anteriorly, sabre-cut type, from the area of the AC joint down to the pectoral groove region. He has tenderness on pressure anteriorly over the lower 1/2 of the surgical incision close to the area of the carcoid process and then going distally along the region. Light touch does not particularly cause any marked sensation problems. He also has a lot of tenderness on pressure directly over the area of the greater tuberosity at the insertion of the supraspinatus. Range of motion actively of the right shoulder is about up to 120 degrees in a forward place. He gets to about 80 degress with his palm up in a lateral plane. With this palm down he gets up about 90 degrees laterally. Passively he can be gotten up to about 130-140 degrees in all positions with pain. External rotation with the arm at the side is about 70 degrees with pain. Internal rotation to the opposite buttock with pain. Stressing the long head of the biceps in the intratubercular groove area causes no particular pain. The patient

> has definite click sensation noted in the region of the AC joint superiorly when he goes from a full abducted position down and back again. On palpating over the shoulder joint anteriorly one can feel a popping sensation as he goes into internal and external rotation. What he is probably doing at this point is rolling the area of the subscapularis and the long head of the biceps. All sensation is intact in the hand."

On December 9, 1981 Dr. Denis R. Harris, a Board-certified orthopedic surgeon, submitted a report in which he related appellant's history and stated:

> "EXAMINATION: Patient has no obvious atrophy of the shoulder girdle muscles. Patient is hyperesthetic over the entire anterior and cephalad portion of the right shoulder. There is marked tenderness over the bicipital groove and rotator cuff anteriorly. The patient has 110 degrees of abduction in the right shoulder; 130 degrees in the left. Crepitance is felt over the anterior aspect of the glenoid humer joint on the right. Internal rotation on the right is less than the left, with a loss of three inches when he tries to reach on the posterior aspect of his back. Active abduction of the right shoulder is only 90 percent. There is a 4½ inch scar anteriorly over the deltoid-pectoral groove. This is well healed. No definite sensory deficit is found.
>
> "X-RAYS: X-rays of the right shoulder reveal the shoulder to be mildly high riding. No calcific deposit is noted at this point.
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> "COMMENT: I feel the patient has stationary and permanent injury involving the right shoulder. With the patient history that this occurred at work, I feel that it would be considered work related. His diagnosis is that of a chronic bursitis, probably rotator cuff tendinitis, with a secondary adhesive capsulitis. He should be rated at 20 percent permanent physical impairment and loss of physical function to the whole arm. There is the possibility of need for surgery in the future, but I would try to dissuade the patient from same, since in the past, it has not helped. I do not feel the patient can return to work as a postman."

In a December 14, 1981 report Dr. Guy B. Townsend, a Board-certified orthopedic surgeon, related appellant's history and complaints of persistent pain. He noted:

> "At the present time his pain is persistent and he states he is no different than before surgery. He describes limitation of motion and 'popping' of the shoulder and his shoulder seems to 'dislocate' while sleeping.
>
> "*EXAMINATION:* Of the right shoulder reveals limitation of abduction to 110 degrees. There is negative apprehension sign with

abduction and external rotation. There is tenderness all along the biceps tendon.

"*X-RAYS*: Of the right shoulder reveals absence of the distal end of the right clavicle, otherwise they are normal.

"*DIAGNOSTIC IMPRESSION:* Biceps tendinitis right shoulder, associated with limitation of motion in spite of previous biceps tendon transfer."

On December 21, 1981 Dr. Thomas Neviaser submitted a report in which he diagnosed "distal clavical impingement on the neck of the acromion, right shoulder," and noted that appellant had been seeing Dr. Schuster on referral for follow-up care. He concluded:

> "He states the shoulder is no better since the second surgery and perhaps is worse. He is here for evaluation before changing doctors to one closer to home. He states the shoulder gets caught in certain positions and this causes pain. Physical examination: Active abduction is 100 degrees on the right; 130 degrees left; passive abduction 180 degrees on right; external rotation by the side is equal to left; external rotation is 90 degrees; pure abduction is 90 degrees. Internal rotation to scapular tip on right. Slight thickening of bursa noted."

On January 17, 1982 appellant requested reconsideration of his schedule award for a ten percent permanent impairment of his right upper extremity. In a February 19, 1982 report a second Office medical adviser reviewed the medical evidence and stated the following:

> "In my considered opinion, based on ranges of motion, it would be reasonable to increase the schedule award to 15 percent impairment of right upper extremity for pain, crepitation. The shoulder joint is a joint which is used often, and it has an important function."

On March 16, 1982 the Office granted appellant an amended schedule award for an additional five percent permanent impairment of the right upper extremity for a total of 46.80 weeks of compensation.

In a September 10, 1982 form report Dr. Neviaser diagnosed "distal clavicle impingement on the neck of the acromion, right shoulder," and concluded that appellant had a "ten percent permanent disability of the right upper extremity." He noted the following ranges of motion:

> "Active abduction 180 degrees left and 90 degrees right; passive abductive 80 degrees; external rotation by the side 40-45 degrees; internal rotation to just below the scapular tip; pure abduction 90 degrees."

On November 18, 1982 appellant requested reconsideration of the amended schedule award. In support of his request he submitted a

Novmber 4, 1982 report by Dr. Elmer C. Bigley, Jr., a Board-certified orthopedic surgeon, who related appellant's history and stated:

> "The range of motion of the shoulder with regards to external rotation appears to be normal, but flexion lacks approximately three degrees and abduction about 15 degrees, extension also 15 degrees whereas internal rotation only about five degrees, but there is discomfort at all extremes, with some atrophy of the upper arm of at least a quarter of an inch on this right side. The forearms appear to be about equal. There is also some tenderness over the Teres minor major muscles, but none over the supra or infraspinatus muscles. Circulation and sensation appear to be within normal limits. The deep tendon reflexes and pulses appear to be equal and within normal limits bilaterally respectively."
>
> * * *
>
> "AP, [anterior-posterior] oblique and auxillary x-rays of the right shoulder shows the previously denoted resection of the distal end of the right clavicle, but no calcific deposits or joint space narrowing is evident. The alignment of the shoulder overall is maintained.
>
> "IMPRESSIONS: Status post-op times two right shoulder with residual."
>
> * * *
>
> "With regards to permanent impairment rating, I feel that the patient has, based on his x-ray changes, physical examination and two previous surgeries, a 30 percent impairment of this right upper extremity. Regarding disability evaluation I feel that this patient will not be able to perform any previous occupation as a mail carrier, in that he will not be able to carry a heavy bag across this shoulder, nor should he be doing any work above shoulder level and he should not be lifting more than 20 lbs otherwise. He was told that I want to check him back as per appointment in the next six weeks to see how he is progressing. He was forewarned of the possiblity of other medications or even aspiration and injection of the involved area, but I do not forsee any further surgery would help to alleviate his present complaints or residual symptoms."

In a December 16, 1982 follow-up report Dr. Bigley noted appellant's continued complaints of pain, and stated:

> "On physical examination there is still tenderness over the bicipital groove on this right side. His range of motion appears to be improving in that he now lacks only 12 degrees of abduction and extension, three degrees of internal rotation and flexion with some discomfort yet at these extremes, and he still has a $^1/_4$ inch atrophy of the right upper arm."

On March 16, 1983 the second Office medical adviser reviewed the medical evidence and stated that "the medical evidence does not indicate that the claimant has more than 15 percent impairment. As a matter of fact the medical evidence clearly indicates that the ranges of motion have improved." The medical adviser concluded that Dr. Bigley's December 16, 1982 report demonstrated that appellant's impairment had actually decreased to three percent, according to the ranges of motion values reported on that date. The adviser noted the prior value of five percent given for pain and crepitation, and assigned a one percent value for the $^1/_4$ inch atrophy reported by Dr. Bigley.

In an April 15, 1983 compensation order the Office denied appellant's request for reconsideration, after a merit review, on the ground that "The evidence submitted in support of the application is not sufficient to warrant modification of the prior decision." [1]

The Board finds that the case is not in posture for decision.

The Board notes that there are great variations in the reports of the Board-certified specialists who examined appellant as to the extent of his permanent partial impairment. In his December 9, 1981 report Dr. Schuster indicated that appellant had a 25 percent permanent impairment due to limited ranges of motion, atrophy, tenderness and crepitation. However, he did not assign specific percentage values to each of these findings. Dr. Harris also examined appellant on December 9, 1981, but indicated that appellant had only a 20 percent permanent impairment due to slightly different limited ranges of motion, as well as tenderness and crepitation. He failed to relate specific percentage values for each of his findings made on physical examination. Dr. Townsend, in his December 14, 1981 report, did not give a specific percentage of permanent impairment and merely noted persistent pain and tenderness with limited range of motion. On December 21, 1981 Dr. Thomas Neviaser reported greatly different ranges of motion, together with intermittent pain and a slight thickening of the bursa. He gave no opinion on the extent of any permanent partial impairment.

An Office medical adviser reviewed the above reports on February 19, 1982 and concluded that, "based on ranges of motion, it would be reasonable to increase the schedule award to 15 percent impairment of right upper extremity for pain, crepitation." No mention was made in this report of the atrophy found by Dr. Schuster. In addition, the medical adviser did not adequately discuss the contrary medical reports, nor did she provide any rationalized medical opinion evidence in support of her conclusion that appellant had a 15 percent permanent impairment of his right upper extremity.

On September 10, 1982 Dr. Julius Neviaser subsequently reported improved ranges of motion and concluded that appellant had a ten percent permanent impairment of his right upper extremity. Dr. Bigley reported vastly different but improving ranges of motion in his November 4, 1982 and December 16, 1982 reports and concluded that, based on the ranges of motion together with findings of tenderness and atrophy, appellant had a 30 percent permanent impairment. He did not include specific percentage values in his report. A second Office medical adviser reviewed this evidence on March 16, 1982 and concluded that, based on Dr. Bigley's reported ranges of motion, appellant had no more than a 15 percent permanent impairment, and appeared to be improving. However, the Board notes that the medical adviser did not comment regarding Dr. Bigley's estimate of a 30 percent impairment.

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[1] Appellant subsequently submitted additional reports from Dr. Bigley. However, the Board notes that this evidence may not be considered on this appeal because it was not before the Office at the time of its decisions. See 20 CFR 501.2(c).

Accordingly, the case will be remanded to the Office for the referral of appellant, together with a statement of accepted facts and the entire case record, to an appropriate Board-certified specialist for examination and evaluation. The Office should request the specialist to provide a well-reasoned medical opinion as to the date of maximum improvemnent and the extent of appellant's permanent partial impairment of his right upper extremity. The specialist should assign specific percentage values to any findings such as pain, crepitation or atrophy. After such further development as it may deem necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated April 15, 1983 is hereby set aside; the case is remanded to the Office for further proceedings consistent with this decision.

In the Matter of KENNETH DEERMAN *and* DEPARTMENT OF THE ARMY, MATERIAL READINESS COMMAND, REDSTONE ARSENAL, Ala.

Docket No. 84–375; Submitted on the Record;
Issued May 14, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the proper rate of pay was used in calculating appellant's compensation.

This is appellant's second appeal. In a decision and order dated January 28, 1983 the Board found that the development of cataracts in appellant's left and right eyes was causally related to his exposure to radiation during the course of his federal employment.[1] This history of the case is set forth in that decision.

On remand, an Office of Workers' Compensation Programs' medical adviser reviewed the medical evidence of record and concluded that appellant had a 100 percent impairment of both eyes. The date of maximum improvement was designated as January 16, 1981.

An Office claims examiner reviewed appellant's case record to determine the appropriate rate of pay. He noted that appellant's cataract condition was first diagnosed on November 22, 1976,[2] and that appellant underwent cataract extraction surgery for his right eye on September 24, 1980 and on his left eye on November 6, 1980. Leave records provided by the employing establishment indicate that appellant first lost time from work due to the accepted cataract condition during the period beginning September 24, 1980, the time of his first cataract surgery. Therefore, the claims examiner used appellant's pay rate effective as of September 24, 1980, the date his disabilty due to the accepted condition began, as the basis for computing his compensation benefits.

By letter decision dated September 7, 1983 the Office informed appellant that he was entitled to 320 weeks of compensation for a 100 percent permanent loss of vision in both right and left eyes. The period of award extended from January 16, 1981 to March 5, 1987.

On appeal, appellant contends that the schedule award issued on September 7, 1983 should have been based on his higher rate of pay on January 16, 1981, the date of maximum improvement, rather than the lower September 24, 1980 pay rate.

The Board in *Clarence D. Glenn*[3] held that in all situations under the Federal Employees' Compensation Act, including those involving a schedule award, compensation is to be based on the pay rate as determined under 5 U.S.C. section 8101(4), the pay rate at the time of the injury, or the pay rate at the time disability begins or the pay rate at the time compensable disability recurs if recurrence begins more than 6 months after the employee resumes regular full-time employment, which ever is greater. Disability, as defined in the *Glenn* case, means incapacity to work because of the employment injury.

In the instant case the Office, in determining the amount of compensation payable under the schedule award to which appellant became entitled on January 16, 1981, properly used the pay rate in effect on September 24, 1980. His pay rate on that date, the date commencing a period of disability for work, was the highest rate which satisfied the terms of section 8101(4) as of January 16, 1981, when he became entitled to an award.

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[1] 34 ECAB 641.

[2] He was exposed to employment radiation during the period September 1966 to January 1976.

[3] 29 ECAB 779.

The decision of the Office of Workers' Compensation Programs dated September 7, 1983 is hereby affirmed.

In the Matter of THOMAS H. CAPPS *and* DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

Docket No. 84–173; Submitted on Record;
Issued May 15, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that under Section 8106(b) of the Federal Employees' Compensation Act appellant forfeited his right to compensation for the period of April 18, 1978 through December 19, 1980 because he knowingly failed to report to the Office employment earnings he had from July 1, 1979 to March 31, 1980.

Appellant, then a 44-year-old electrician, filed a claim on September 28, 1976 alleging that on September 17, 1976 he injured his "lower back" when he lifted an approximately 45-pound "AC-DC differential voltmeter." Dr. L. M. Terry, an employing establishment physician, diagnosed "herniated nucleus pulposus." On February 4, 1983, appellant underwent a left hemilaminectomy of L4-5 and L5-S1 and removal of L5 disc by Dr. Joseph T. McFadden, a Board-certified neurosurgeon.

The Office accepted appellant's claim and began paying appellant compensation for temporary total disability on November 4, 1977.

On March 28, 1977, the Office stated the following to appellant:

> "You will be paid each four weeks at the regular payment rate shown above, provided you comply with the instructions set forth on the back of this letter. Read the instructions carefully. They explain your responsibility for seeking work suitable to your disabled condition, and for reporting to this Office regarding employment.
>
> "In order to avoid an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you return to work. Also, advise us immediately of any change in address or of any change in the status of your dependents." (Emphasis in original)

In letters dated March 19, 1979 and November 25, 1980, the Office informed appellant that he must report all employment, including self-employment, for the preceding 12 months. In replies dated April 5, 1979 and December 19, 1980, appellant answered "none" to the Office's direction to list employers in the preceding 12 months and did not list any self-employment. On April 18, 1980, appellant again failed to list any employers in response to the following Office instructions:

> "We also require information concerning any employment or earnings you have received from ____________ through the present time and number of dependents you claim. You must account for the entire time, including periods of self-employment or unemployment."

In an employing establishment investigative report dated March 27, 1981, the following was reported by a special agent:

> "When queried regarding his financial gains other than compensation payments, CAPPS advised that shortly after his Jan. 1979 change in residency, he was contacted by a friend, James Richard JACKSON, who at the time was having difficulties in his jointly owned business, Outer Banks Auto and Marine Supply, Inc., P. O. Box 537, Manteo, N. C. CAPPS stated that JACKSON was unable to hire someone to assist him in answering telephone calls, and contacting debtors. CAPPS explained that at the time JACKSON was anticipating bankruptcy proceedings, and that he, as a friend, agreed to assist JACKSON in that capacity, without any particular mention of payment or compensation. CAPPS acknowledged periodically receiving personal checks from JACKSON, but stated that he was neither paid regularly, nor was he aware that the payments were being reported as income to him. Accordingly, CAPPS could not provide an accurate account of money earned either during 1979 or 1980. CAPPS advised that he assisted JACKSON regularly from May through the early Fall of 1979, and thereafter assisted JACKSON only periodically and then sometimes out of his (CAPPS') residence. CAPPS advised that at the close of the calendar year 1979 and the early part of 1980, JACKSON was undergoing so many difficulties in his business that he (JACKSON) allowed him (CAPPS) to take automotive parts in fixing his (CAPPS') girl friend's car. CAPPS explained that he did not have and could not afford a personally owned vehicle. CAPPS stated that that was his only explanation for the documented $495.22 financial gain for the first quarter of 1980. CAPPS further explained that he did not receive W-2 forms for his gainful employment in 1979, and that along with the foregoing circumstances, he felt that what compensation he had gained in his assisting JACKSON in the early months of 1980 was neither reported, nor if so reported as income, of any significance to report to the Jacksonville, FL Personnel Office handling his disability/compensation payments. Acknowledging fear that his compensation

> payments would be altered or discontinued, CAPPS advised that he has neither been gainfully employed nor received any financial compensation other than his disability compensation since."

A Social Security Administration report indicates that appellant had earnings of $421.42 in the third quarter of 1979, $840.11 in the fourth quarter of 1979, and $495.22 in the first quarter of 1980.

In an undated preliminary decision, the Office found that appellant forfeited his compensation for the period of April 18, 1978 through December 19, 1980 in that he had "unreported earnings during this period."

In a letter dated December 21, 1981, appellant stated:

> "The payment I received during the period mentioned in Form CA-2201 was investigated and explained in the spring of this year to a Federal Investigator and his associate.
>
> "I admitted the wrong doing and explained in detail my error—I was not an actual employee of said company. I never worked in any physical capacity—only as a telephone solicitor introducing the new company to the community in return for much needed repair components for my vehicle which I could not afford otherwise. I apologized to the Investigator for my wrong doing and my ignorance in this matter and assumed all the facts on record were in order.
>
> "I disagree with the amount of the overpayment, and that the overpayment occurred through no fault of my own.
>
> "Please advise whether a financial statement and a hearing is necessary if this letter does not conclude a final decision."

By letter decisions dated January 20, 1982 and November 18, 1982, the Office found the following:

> "This letter is in further reference to the overpayment of compensation in the amount of $37,456.69 that was found in your case and which occurred because:
>
> > 'Compensation for the period April 18, 1978 through December 19, 1980 was forfeited in accordance with 5 U.S.C. 8106(b) for the reason you had unreported earnings during this period.'
>
> "Your case has been carefully studied and any additional evidence or arguments submitted have been given full consideration. I have determined that the preliminary finding that you were at fault in the matter of the overpayment was correct for the following reason(s): You executed form CA-1032 on April 18, 1980, April 5, 1979, and December 19, 1980 and reported no earnings. Your reply to our CA-2201 was insufficient to overcome evidence of record."

Section 8106(b) of the Act,[1] in pertinent part, states as follows:

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[1] 5 U.S.C. section 8106(b).

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. *** An employee who—
>
> (1) fails to make an affidavit or report when required; or
>
> (2) knowingly omits or understates any part of his earnings;
>
> forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."

Appellant was employed and received wages during the last two quarters of 1979 and the first quarter of 1980. It is clear from the record that the Office invoked the forfeiture provisions of section 8106(b) of the Act for the period March 19, 1978 through December 19, 1980 based on the two employment disclosure forms, dated March 19, 1979 and November 25, 1980 and signed by appellant on April 5, 1979 and December 19, 1980, respectively, and another form signed by appellant on April 18, 1980. However, only one employment disclosure form, with its 12-month past work history provision, that being the December 19, 1980 form, is proper to invoke in this case. The December 19, 1980 employment disclosure form covers the period December 19, 1979 to December 19, 1980. During this period appellant had earnings he did not report. The April 5, 1979 employment disclosure form covers the period April 5, 1978 through April 5, 1979. The record does not show that during this period, appellant had earnings, and therefore this form cannot be used as a basis for forfeiture. The form signed by appellant on April 18, 1980 is not relevant for the purpose of forfeiture of compensation for any preceding time frame because the Office left the form blank with respect to the period of its coverage.

The report signed by appellant on December 19, 1980 does not cover the entire period he worked in private employment; it covers the 12-month period commencing December 19, 1979. However, section 8106(b) of the Act, which provides for forfeiture of compensation for filing a false report with respect to any period for which the report was required, also provides for forfeiture for failing to file a report of earnings.

In this case, appellant began working in the third quarter of 1979 and did not inform the Office of this fact even though the Office on March 28, 1977 informed him he had to report his employment. Therefore, his compensation is subject to forfeiture for the period beginning on the day he began working. However, the Social Security Administration report of earnings is not specific to the date appellant began working and earning wages. Further development by the Office is necessary to determine that date. His compensation is subject to forfeiture from that date to December 19, 1980.

The decision of the Office of Workers' Compensation Programs, dated November 18, 1982, is affirmed in part and set aside in part, as outlined above. The case is remanded to the Office for further proceedings, to be followed by a *de novo* decision.

In the Matter of FREDERICK J. WILLIAMS *and* U. S. POSTAL SERVICE, POST OFFICE, Montgomery, Ala.

Docket No. 84–769; Submitted on the Record;
Issued May 16, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly declined to reimburse appellant for an examination authorized by the employing establishment.

On December 1, 1982 appellant, then a 28-year-old clerk, filed a claim for pain in his upper and lower back which he experienced on November 26, 1982 while twisting and reaching to case mail.

The employing establishment authorized treatment at Baptist Medical Center, where appellant was examined on November 26, 1982 and found to have spasms of his back muscles.

By a decision dated October 7, 1983 the Office rejected appellant's claim for reimbursement of the expense of his November 26, 1982 examination at the Baptist Medical Center on the ground that appellant had failed to discharge his burden of proving disability causally related to factors of his employment.

The Board finds that the Office acted improperly by declining to reimburse appellant for the November 26, 1982 examination.

The record shows that appellant's official supervisor, pursuant to the Office's regulations,[1] authorized an examination of appellant by Baptist Medical Center, and that such examination was undertaken on the date of the alleged injury, November 26, 1982. This created a contractual obligation, which does not involve appellant directly, to pay for the cost of this examination regardless of the action taken on the claim.[2]

The decision of the Office of Workers' Compensation Programs dated October 7, 1983 is hereby set aside and the case remanded to the Office for reimbursement to appellant for the cost of his examination at Baptist Medical Center on November 26, 1982.

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[1] 20 CFR Part 10, Subpart E.

[2] See *Walter H. Anderson*, 6 ECAB 804; *Joseph A. Ascheri*, 3 ECAB 80.

In the Matter of KEITH A. KNIGHTS *and* U. S. POSTAL SERVICE, MAIN POST OFFICE, Cleveland, Ohio

Docket No. 84–175; Hearing April 27, 1984;
Issued May 17, 1984

Appearances: *Alan J. Shapiro, Esq.*, and *Keith A. Knights*, for appellant; *Brian Peters, Esq.*, for the Director of the Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant had any disability on or after August 6, 1979 causally related to his employment injury of June 24, 1975.

On June 24, 1975 appellant, then a 21-year-old ZMT operator, filed a claim alleging he sustained injury to his abdomen and back when the chair he was sitting on "fell down from notch." He stopped work on that date and on June 26, 1975 was examined by Dr. R. J. Beargie, a physician with the United States Public Health Service, who diagnosed lumbar myositis but no positive abdominal findings. He suggested that x-rays be taken of appellant's lumbosacral spine. On July 8, 1975 Dr. Jon A. Hardacre, an orthopedist with the U. S. Public Health Service, reported that x-rays taken of appellant's spine were unremarkable and diagnosed an acute lumbar strain.

Appellant was also treated by Dr. Cesar P. Gregorio, a general practitioner with the U. S. Public Health Service, who indicated appellant was totally disabled from June 25 to August 12, 1975 due to his employment injury. On August 13, 1975 Dr. Gregorio reported that appellant was fit for duty and he returned to duty on August 12 and worked through August 14, 1975. On August 15, 1975 Dr. Gregorio found appellant not fit for duty.

By letter dated October 7, 1975 appellant sought permission from the Office of Workers' Compensation Programs to receive medical treatment from Dr. Edward Wilkerson, a Board-certified surgeon. The Office approved the request and on October 10, 1975 Dr. Wilkerson reported a diagnosis of post-traumatic low back syndrome with the possiblity of an intervertebral ruptured disc which he stated was related to appellant's employment injury. He indicated that he would repeat x-rays of appellant's lumbar spine and perform a lumbar myelogram. An x-ray report dated October 11, 1975 revealed no bony abnormalities, joint structures normal with no fracture, and joint and interpedicular spaces maintained. Dr. Wilkerson supported appellant's disability through May 27, 1976[1] when he reported that appellant could return to light-duty work on June 1, 1976 with no heavy lifting, stooping, or bending. Appellant returned to work on June 1, 1976.

Appellant received continuation of pay for the period June 25 to August 8, 1975 and compensation for periods of temporary total disability between August 9, 1975 to May 31, 1976.

Appellant alleged a recurrence of disability and stopped work on June 9, 1976. He subsequently resigned from his position with the employing establishment on June 19, 1976. In support of his claim appellant submitted the June 22, 1976 report of Dr. Wilkerson, who indicated that appellant was returned to full active duty on June 1, 1976 and recommended that he be limited to light-duty work.

Appellant did not return to work and received compensation for temporary total disability from June 21, 1976 to January 1, 1977.

On August 31, 1979 appellant submitted a claim for continuing compensation beginning August 6, 1979 alleging he was "forced to resign from administration of justice position because of back problems." In support of his claim, appellant submitted the September 6, 1979 report of Dr. Wilkerson who diagnosed chronic lumbar myofascitis and indicated his condition was due to the June 1975 employment injury. By letter dated September 20, 1979 the Office requested appellant to submit a job description of each job he held "between July 18, 1976 through the present" as well as an updated medical report.

In a letter dated February 19, 1980 appellant, through his representative, indicated he was employed between July 1976 and December 1979, as follows: July-December 1976 as law clerk earning $6,000 per year; January 1977-August 1979 as an Equal Employment Opportunity Officer monitoring hiring practices of Ohio State law enforcement agencies, earning $13,000 per year; August-October 1979 as an instructor of CETA employees at $65.00 per day. He indicated leaving his employment positions for reasons of not making enough money, too much traveling and for strain to his back.

By letter dated May 22, 1980 the Office notified appellant that the information submitted was not sufficient to make a determination of his claim and that he was not entitled to compensation based on his loss of wage-earning capacity. Appellant was advised to submit further evidence in support of his claim.

In a report dated September 18, 1981 Dr. Wilkerson stated appellant was examined September 3, 1981 for complaints of back pain. On September 16, 1981 the Office informed Dr. Wilkerson it would no longer consider payment of his bills for services because appellant's June 24, 1975 lumbosacral strain should have ceased and the causal relationship of his back problems had not been established.

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[1] Dr. Wilkerson reported that appellant was hospitalized May 13 to 22, 1976 because of persistent back pain. He indicated x-rays of appellant's lumbar spine were negative and that an orthopedic consultation recommended conservative management. Appellant was discharged with a final diagnosis of post-traumatic lumbar myofascitis.

On November 2, 1981 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. J. Richard Nolan, a Board-certified orthopedic surgeon, for examination and an opinion on the relationship of appellant's back condition to the June 1975 employment injury. In a report dated November 16, 1981 Dr. Nolan stated:

> "LOWER EXTREMITIES: The iliac crests are level, the leg length is equal. There is no atrophy of the buttock nor thigh, nor calf. Specifically in this right-handed man the left thigh measures 54.5 and the right 55.5 centimeters. The left calf measures 35.5 and the right 36.0 centimeters. There is no atrophy. The Sciatic Stretch Test is negative left and right. The Straight Leg Raising Test is 80 degrees left and right with nothing but hamstring tightness which would be normal. The motions in the hips, knees and ankles are normal and pain free. The knee jerk and ankle jerk are bilaterally present and equal. Toe power is normal. Sensation to touch and pain is normal. The circulation is normal and the BOGC Pathological Reflexes were tested and they are absent. Again you will note that this is a normal orthopedic and neurologic examination of the lower extremities.
>
> "BACK: When the patient stands erect there is no lordosis and no scoliosis. Flexion is measured at 12 centimers, 85 degrees and has a little diffuse low back pain which according to his gestures is both left and right lumbar. Extension is a full 40 degrees with slight generalized low back pain. Left and right lateral bending are fully 40 degrees without any pain at all. The Trendelenburg and the Rhomberg Tests are both negative. When the patient is prone and relaxed there is no tenderness in the cervical, thoracic or lumbar area. No tenderness in the paravertebral areas, no tenderness in the sacroiliac or sciatic areas.
>
> "X-RAYS: X-ray #2813 taken 11-16-81 shows routine four views of the lumbar spine. Then there are lateral views taken centered on L5-S1 in flexion and again in extension. On the AP view the usual five lumbar vertebrae are present, without any congenital anomalies. There is no evidence of fractures, cysts or tumors. On the lateral view usual five show no evidence of fracture or arthritis. There is no sclerosis. There is no spurring. The intervertebral discs are normally wide and particularly the discs at L4 and again at L5 are normally wide. On the left and right oblique views we see excellent views of the sacroiliac joints incidentally and good sized portions of the hip joints and these are all free of arthritis. The

pedicles are intact. The facets are free from any arthritic changes. On the lateral view in flexion and in extension we see normal dynamics here so that on extension the L5 disc and the L4 disc both open up anteriorly and on flexion they assume parallel relationships with their adjacent vertebrae. There is no instability here. Conclusions: Apparently normal lumbar spine with normal dynamics."

* * *

"CLINICAL IMPRESSIONS: My clinical impressions after examining Mr. Knights and after reviewing the x-rays taken in my office and after all of the patient's file including 24 pages that I considered to be medically significant and on which I made notes, are as follows: (1) No orthopedic pathology found. (2) I very strongly feel the presence of a social, or sociologic, or psycho-social abnormality or pathologic condition. Since I am not considered an expert in any of these fields, I think I should limit myself to pointing out what I see, so that if it is considered either important or desirable, investigation can be turned in that direction. (3) For that matter, I find no physical abnormality at all here. He has no hypertension, his musculature is good, his general physical condition is excellent and apparently his general health in the past has been very good indeed."

* * *

"ANSWERS TO QUESTIONS: The usual eight questions are asked on page 2 of your letter of November 2, 1981 and for your convenience I'll answer them.

"(1) History as given by claimant. Answer: See 'Present Illness, Chief Complaints, Past History and Regional History, above.

"(2) Findings upon examination. Answer: See 'Physical Examination' above. No objective abnormal findings at all.

"(3) Results of any x-ray. Answer: See 'X-rays' above. Absolutely normal lumbar vertebrae, normal lumbar intervertebral discs and normal sacroiliac and those portions of the hip joints which are seen are normal too. Bending films show normal dynamics of the lumbar spine. This, naturally, was also demonstrated in all the x-rays that have been on the man since 6-24-75."

* * *

"(5) Recommended course of treatment. Answer: As a matter of fact I have some suggestions along those lines:

(A) Close out, finish, terminate, somehow wind up this business about him having something wrong with his low back.

(B) Get psychologic consultation including the MMPI and others of their standard personality tests. I think you are going to find

> some problems here. As a matter of fact, I think you are going to find THE problem here.
>
> "(6) Opinion as to the relationship of conditions found to claimant's injury at work. Answer: Yes I do have an opinion. My opinion is that the patient suffered contusions, and probably some functional low back pain, the direct result of the accident of 6-24-75 which was treated, relieved and with no residual disability. I believe that he very likely reached maximum benefit by June 1, 1976 when he returned to full duty.
>
> "(7) If a preexisting condition was aggravated, etc. Answer: I do not find any preexisting conditions which are somatic in type. I believe I hear a history of social and sociologic conditions which preexisted the date 6-24-75 and which may be pertinent here. I hasten to add that I am not an authority in psycho-social problems.
>
> "(8) Completion of the attached form OWCP-5. Answer: This has been done. It reflects the patient's physical ability as I find it today, and not his actual performance.
>
> "(9) Has the acute lumbosacral strain from the injury of 6-24-75 ceased? If so when? Answer: Yes and I will accept the phrase 'acute lumbosacral strain' as the working diagnosis in this case in the year 1975, the lumbosacral strain has ceased. I believe there was gradual improvement and it seems certain that the patient had completely recovered and returned to regular duty on 6-1-76."

Dr. Nolan attached a work restriction evaluation to his medical report indicating that appellant was capable of working eight hours a day subject to the following intermittent work restrictions: eight hours sitting and walking; six hours lifting, bending, and standing; two hours squatting, climbing, twisting, and kneeling. Dr. Nolan also recommended that appellant be restricted to lifting from 20 to 50 pounds.

On January 3, 1982 an Office medical adviser reviewed Dr. Nolan's report and noted that it demonstrated no orthopedic disability.

By letter compensation order dated June 1, 1982 the Office rejected appellant's claim for compensation after August 6, 1979 finding that the medical evidence established that his injury-related disability had ceased by June 1, 1976.

In a letter dated June 28, 1982 appellant, through his attorney, requested a hearing before an Office representative. Following the hearing held on January 17, 1983 appellant, through his attorney, submitted reports dated March 18, 1983 to April 3, 1983 from St. Luke's Hospital which indicated he was diagnosed as having a herniated lumbar disc at the L5-S1 level and underwent a laminectomy discectomy at the L5-S1 level. In a report dated May 19, 1983 Dr. Curtis Smith, an orthopedic surgeon, stated that appellant's present condition was directly related to his industrial injury.

In a decision dated September 30, 1983, and finalized October 3, 1983, the Office hearing representative affirmed the June 1, 1982 Office decision. In an addendum to his decision, the hearing representative found that the additional medical evidence submitted by appellant was insufficient to warrant modification of the decision. He noted that Dr. Smith's comments addressing the causal relationship of appellant's back condition to his employment injury did not provide a rationale for relating his herniated disc condition to the injury of June 24, 1975.

The Board finds the case is not in posture for decision.

The Office referred appellant and the case record to Dr. Nolan, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion. However, there was no conflict in the medical opinion at that time requiring an impartial referral under section 8123(a) of the Federal Employees' Compensation Act.[2] Dr. Nolan's report, which found no orthopedic pathology, created a conflict with the opinion of Dr. Wilkerson, a Board-certified surgeon, who diagnosed chronic lumbar myofascitis with the possibility of a ruptured intervertebral disc causally related to the June 1975 employment injury.

Subsequent to the submission of Dr. Nolan's report, the Office received the report of Dr. Smith, an orthopedic surgeon, and hospital reports from St. Luke's hospital. Dr. Smith diagnosed a herniated intervertebral disc at L5-S1 and performed a lumbar laminectomy and discectomy on March 29, 1983. He related appellant's back condition to the 1975 employment injury; however, his form report provided no rationale for his conclusion.

On remand, the Office should request that Dr. Smith submit a narrative medical report describing appellant's back condition, the March 29, 1983 surgical procedure, and a rationalized opinion on whether the 1975 employment injury caused or aggravated the back condition. Thereafter, the Office should further develop the case record as deemed necessary and issue a *de novo* decision.

The September 30, 1983 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action in accordance with this decision of the Board.

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[2] 5 U.S.C. section 8123(a). See *Clyde M. Johnson*, 33 ECAB 731.

In the Matter of Sylvia P. Blackwell *and* Department of the Army, Aviation Research and Development Command, St. Louis, Mo.

Docket No. 84–903; Submitted on the Record;
Issued May 17, 1984

Before E. Gerald Lamboley, Michele von Kelsch,
David S. Gerson

The issue is whether appellant is barred from receiving continuation of pay on the ground that she failed to file a claim within 30 days of her injury.

On May 4, 1983 appellant, a 47-year-old secretary-stenographer, injured her right index finger when she was attempting to remove a paper jam from a photocopying machine and a coworker inadvertently closed the machine's door on her finger. She reported the injury to her supervisor the same day, and was sent to the employing establishment's medical clinic the following day, where she was referred to Dr. Jerome J. Gilden, a Board-certified orthopedic surgeon. Dr. Gilden diagnosed an avulsion chip fracture of the volar distal interphalangeal joint of the right index finger. He placed a splint on the finger to keep it immobilized for ten days. Appellant missed work from May 5 through 9, 1983 and was on light duty for the following three weeks.

Upon reporting the injury to her supervisor, appellant assisted in the completion of a number of employing establishment and Office of Workers' Compensation Programs forms concerning her injury. These included an employing establishment accident investigation report, signed by appellant's supervisor; an employing establishment record of injury report, also signed by her supervisor; and an Office form CA–16, also signed by her supervisor, which described appellant's injury and authorized Dr. Gilden to treat her. She submitted a form CA–1, notice of injury and claim for compensation, on September 15, 1983 after being requested to do so by the Office.[1]

By letter decision dated October 4, 1983, the Office denied continuation of pay on the ground that appellant's claim for continuation of pay was not filed within 30 days of the date of injury.

Appellant requested reconsideration and submitted as additional evidence copies of employing establishment records indicating continuation of pay for her absence had been authorized and paid; copies of the abovementioned employing establishment accident and injury reports; and a copy of Dr. Gilden's directions to return to light duty on May 10, 1983. She contended that she was entitled to continuation of pay because she reported her injury promptly, completed all the forms she was asked to complete, and was not told to submit a CA–1 until being requested by the Office on September 15, 1983.

By compensation order dated December 16, 1983, the Office denied appellant's request for reconsideration, finding the evidence submitted in support of the request was "immaterial and irrelevant and not sufficient to require review of the prior decision."

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[1] The Office requested this form, it stated in its letter to appellant, because it received her request for medical expenses and had no record of an injury.

The Board finds that appellant's claim for continuation of pay is barred by the time limitation provisions of 5 U.S.C. section 8118.

Section 8118[2] of the Federal Employees' Compensation Act[3] provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2)[4] of this title." The latter section provides that the time limitation is "within 30 days."

In *Robert H. Moews*,[5] the Board addressed the issue of whether a "claim" was timely filed under 5 U.S.C. section 8122 which at that time barred an employee from receiving compensation for disability if a "claim" was not filed within five years. The Board stated:

> " *** When a form CA–1 is filed, the employee is fully protected in respect to time limitation because the form contains words of claim meeting the statutory requirements. In the event the employee fails to give notice, or gives written notice without words of claim, or relies upon actual knowledge of the injury on the part of the employing establishment, in order not to forfeit his rights to disability benefits he must present *written* claim within the statutory five-year period, either by filing the form prescribed by the Bureau or by filing any paper containing words which reasonably may be construed or accepted as a claim. Notice without words of claim cannot, by any permissible construction, toll the running of the statutory period for filing written claim for disability benefits. *** "[6]

Although appellant completed or assisted in the completion of a number of documents concerning her injury on the date of injury or very soon after its occurrence, none of them contained any "words of claim" so as to constitute a "claim" within the meaning of section 8118. The CA–1 form, filed on September 15, 1983, was the first form appellant submitted containing such words of claim. As it was filed well after the 30-day period set forth in section 8122(a)(2), it is insufficient to entitle her to continuation of pay.[7]

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[2] 5 U.S.C. section 8118.

[3] 5 U.S.C. section 8101 *et seq.*

[4] 5 U.S.C. section 8122 (a)(2).

[5] 9 ECAB 692.

[6] *Id.* at 693–94 (emphasis in original). See also *Robert P. Shorrock III*, 32 ECAB 1070, and *Joseph Triolo, Jr.*, 32 ECAB 1216.

[7] The Board has found, after analyzing in detail the legislative history of section 8118, that Congress did not intend to have the "exceptional circumstances" exception to the time limitation provisions of section 8122(a), set forth in section 8122(d)(3), apply to claims for continuation of pay. See *William E. Ostertag*, 33 ECAB 1928. Thus, it is irrelevant that appellant completed all forms requested by the employing establishment and was not requested to file a CA–1 form until some four months later.

The decisions of the Office of Workers' Compensation Programs dated October 4, 1983 and December 16, 1983 are hereby affirmed.

In the Matter of LELITA M. GOMEZ, claiming as widow of IRIENO C. GOMEZ *and* DEPARTMENT OF THE AIR FORCE, CLARK AIR FORCE BASE, Philippines

Docket No. 84–768; Submitted on the Record;
Issued May 17, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the employee's death was sustained in the performance of duty.

On July 19, 1977 the employee, then a 41-year-old guard, worked from 3:00 p.m. to 11:00 p.m. At the end of his work shift he was transported by the employing establishment to one of the base entry/exit gates where he exited the employing establishment premises. He apparently accepted a ride in a privately-owned jeep, one of the locally operated transportation services which were readily available in the area. While traveling to his home, less than two kilometers from the employing establishment, the jeep in which he was riding was involved in a vehicle accident, at approximately 11:45 p.m. The employee died instantaneously.

By compensation order dated October 25, 1979 the Office of Workers' Compensation Programs rejected appellant's claim for death benefits on the basis that the fatal injury was not sustained in the performance of duty.

On January 18, 1980 appellant requested reconsideration, and, in support thereof, submitted a copy of the certificate of death and an affidavit from one of the employee's co-workers. The co-worker stated that after the employee finished his work shift the security police transported him to the entry/exit gate. He further stated that the highway on which the accident occurred was a direct travel route to the employee's home. The co-worker testified to the good moral character of the employee and stated that at the time of his death the employee was not intoxicated and that he was still in complete uniform.

By compensation order dated February 6, 1980 the Office found that the evidence submitted was either repetitious or irrelevant and not sufficient to require review of the prior decision.

On March 19, 1980 appellant filed an appeal of the Office's October

25, 1979 and February 6, 1980 decisions. The appeal was docketed as No. 80–780.

On July 24, 1980 the Director of the Office filed a motion to remand the case on the basis that two inferences could be drawn from the employing establishment's statement that "An employee is required to journey from his quarters to his place of duty, and return the journey after completion of duty." The first inference was that the employee was required, as a condition of employment, to travel directly from his residence to his duty station and return, without any deviation. The second inference was that the employee's residence ("quarters") was provided by the employing establishment. The Director pointed out that if the employee's residence was provided by the employing establishment, then the "proximity rule" may be applicable to this case. In an order granting remand dated August 25, 1980 the Board set aside the Office's October 25, 1979 and February 6, 1980 decisions and remanded the case to the Office for further development of the record, to be followed by a *de novo* decision.

On remand, the Office in a letter dated September 10, 1980 requested the employing establishment to answer the following two questions:

> "(1) Did you provide quarters?
> "(2) Did your agency control the travel to and from work in any way, such as requiring that a certain route be used, or that some incidental duty be performed during the trip?"

On January 8, 1981 the employing establishment submitted the following response:

> "(1) Quarters were not provided Mr. Gomez.
> "(2) The 3d SPS in no way controlled Mr. Gomez's travel to or from work. Transportation was provided to Mabalacat gate as it was provided to all base entry/exit points, any of which could have been used by Mr. Gomez. Mr. Gomez had the option of choosing any route to and from work and was at no time required to solely utilize Mabalacat gate.
>
> "(a) As a guard, Mr. Gomez's authority ended when his tour of duty was completed. He had no authority nor jurisdiction off-base and was not required or expected to exercise any type of police power while off-base.
>
> "(b) Similarly, he was not required to assist American personnel off-base. Any assistance rendered by Mr. Gomez would have been done strictly on a voluntary basis."

By compensation order dated June 17, 1983 the Office rejected appellant's claim on the basis that the employee's fatal injury was not sustained in the performance of duty.

On July 22, 1983 appellant filed an appeal of the Office's June 17, 1983 decision. The appeal was docketed as No. 83–1747.

In an order dated November 3, 1983 the Board remanded the case for a *de novo* decision to the Office because appellant was not advised of her right to a hearing before an Office hearing representative, as provided in 5 U.S.C. section 8124(b)(1).[1]

On remand the Office in a compensation order dated January 5, 1984 denied appellant's claim on the basis that the evidence of record did not establish that the employee's death was sustained during the performance of his official duties. Appellant was also properly notified of her rights of appeal, including a right to a hearing.

The Board finds that the employee's fatal accident did not occur in the performance of duty.

The Board has stated as a general rule that off premise injuries sustained by employees having fixed hours and place of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself which are shared by all travellers.[2]

In the present case, the employee was proceeding home after completion of his work shift. The fatal injury did not occur on the employment premises. His status at that time was that of a "fixed premises" employee with fixed hours of work who was returning home from work. He was therefore subject to the "going and coming" rule generally applicable to such employees, and his death is not compensable.

The compensation order of the Office of Workers' Compensation Programs, dated January 5, 1984, is hereby affirmed.

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[1] 5 U.S.C. section 8124(b)(1) states in pertinent part:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary. *** "

[2] *Shirley Borgoa*, 31 ECAB 222; *Gloria C. Adalian*, 26 ECAB 131; *Theodore H. Preiser*, 10 ECAB 523.

In the Matter of MANUELA B. GALANG *and* DEPARTMENT OF THE AIR FORCE, CLARK AIR FORCE BASE, Philippines

Docket No. 84–952; Submitted on the Record;
Issued May 18, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's claim is barred by the three-year time limitation provision of the Federal Employees' Compensation Act.

On November 9, 1979, appellant, then a 53-year-old former garment presser, filed a claim alleging that factors of employment had caused "cordlike, varicose veins" in both legs. In a statement submitted with her claim she related that her work required the performance of her duties "in a prolonged/continuous standing position" while she was "exposed to abnormal heat emanating from" machinery. She stated that she did not have a varicose vein condition "prior [to] and immediately [after] my employment" with the employing establishment.[1]

In a December 3, 1979 letter to the Office of Workers' Compensation Programs, appellant stated her condition was just "realized lately to be job related . . ." She submitted with the letter a copy of the report of her April 15, 1975 physical examination recommending disability retirement due to her condition of "cordlike tender veins" in the lower third of the left leg and varicose veins in both legs.

In a July 2, 1981 letter, the Office asked appellant to state exactly when she realized her employment may have caused her condition and how she came to that realization. She responded by letter of October 9, 1981 that she became aware of the causal relationship between her condition and her employment on June 15, 1978 when she was told of the causal relationship by a doctor.[2] She also stated:

> "Ever since I was . . . retired, I have been thinking, pondering, and meditating all the probable . . . causes of my ailment, since initially, prior to my employment I [was] free of any disabling ailment, and several years thereafter, also performed the duties and responsibilities of a Flatwork Ironer and Garment Presser without any health problems. It was only few months prior to my disability separation that I began to feel the force and effect of the job assigned me, the tear and wear of prolonged exposure to such aggravating work factors. Thereafter, due to such lingering illness, I have been thinking and trying to piece together all the proximate cause or causes of my ailment, but could not arrive to the most probable cause, not until I was hospitalized and was told by the attending physician that the nature of my work contributed to my disabling ailment."

By compensation order dated September 6, 1983, the Office denied appellant's claim, finding that she was aware, or reasonably should have been aware, no later than April 23, 1975, the date of her disability retirement, that her condition was employment related, and therefore, her claim was not filed within the three-year time limitation period.

The Board finds that appellant's claim is barred by the three-year time limitation provision of the Federal Employees' Compensation Act.

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[1] Appellant began working at the employing establishment in January 1951 and retired on disability on April 23, 1975.

[2] The case record contains a November 30, 1979 attending physician's report signed by Dr. L. S. Singian stating appellant was hospitalized under his care from June 15 to June 23, 1975 for treatment of her leg varicosities. Dr. Singian answered "yes" to the question on the report asking whether appellant's condition was employment related.

In a claim such as the present one based on an allegation of occupational disease, the time limitation of the Federal Employees' Compensation Act begins to run when the employee becomes aware, or reasonably should have been aware, of a possible relationship between her condition and her employment. In situations where the exposure to the implicated employment factors continues after such knowledge, the time for filing begins on the date of the employee's last exposure to such factors.[3]

The Board finds that appellant was aware or reasonably should have been aware of a possible relationship between her leg varicosities condition and factors of employment no later than April 23, 1975, the effective date of her disability retirement. This is evidenced by appellant's statement in her October 9, 1981 letter to the Office that a "few months" before her retirement, "I began to feel the force and effect of the job assigned to me, the tear and wear of prolonged exposure to such aggravating factors." Therefore, appellant's claim filed on November 9, 1979 was not filed within the three years from the date the time limitation period began to run.

The decision of the Office of Workers' Compensation Programs dated September 6, 1983 is hereby affirmed.[4]

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[3] See, e.g., *Bunyan V. Rhodes*, 32 ECAB 829.

[4] Appellant contends that she had five years within which to file a claim. However, the Federal Employees' Compensation Act was amended effective September 7, 1974 changing the period of limitations to three years for all injuries occurring on or after that date. Act of September 7, 1974, 88 Stat. 1143.

In the Matter of MARY LOUISE LIGHTFOOT *and* DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alameda, Calif.

Docket No. 84–604; Submitted on the Record;
Issued May 18, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request to subpoena witnesses for a hearing before an Office hearing representative.

On January 29, 1980 appellant, a 22-year-old data transcriber, sustained an injury to her left knee when a chair slipped from under her causing her to fall. She stopped work that day and was seen at the employing establishment dispensary. She was treated the following day by Dr. Gordon H. Johnson, Board-certified in emergency medicine, who diagnosed "contused sprained left knee," and indicated that it resulted from the January 29, 1980 employment injury. The doctor stated that appellant would be capable of returning to work on February 2, 1980.

Appellant returned to work on April 14, 1980 with work restrictions. The employing establishment paid appellant continuation of pay for the period January 30 through March 14, 1980, and she utilized sick leave for the period March 15 through April 13, 1980.

The Office of Workers' Compensation Programs determined that appellant's contused sprained left knee resulted from the January 29, 1980 employment injury; however, it informed appellant of the need to submit medical evidence for her absences from work beyond February 2, 1980 because the medical evidence of record failed to support employment-related disability beyond that date.

It appears from the record that appellant stopped working again on April 25, 1980, and has not returned.[1] She filed a claim for compensation for the period beginning April 26, 1980.

In response to the Office's request and in support of her claim for continuing compensation, appellant submitted progress notes by Dr. Richard LeClair, an orthopedist, discussing treatment she received on October 7 and December 29, 1980 and January 16, 1981. Dr. LeClair's October 7, 1980 note revealed that there was "little in objective findings," and stated "no time off work authorized." Similarly, the January 16, 1981 entry revealed that there were "no significant objective findings to justify disability" to her left knee, that after appellant was informed of this fact, she alleged back pain, and that Dr. LeClair informed her he could provide no further treatment.

A subsequent report by Dr. LeClair dated April 7, 1981 revealed, among other things, that appellant had full range of motion, that orthopedic referrals found nothing "measurable," and that appellant was capable of resuming her regular duties.

Also submitted was an attending physician's report completed for Dr. Howard Rubinoff, a Board-certified internist, dated April 7, 1981, who diagnosed contused sprained left knee, resulting from the January 29, 1980 employment injury and indicated further treatment was needed.

By compensation order dated May 22, 1981, the Office denied appellant's claim for continuing compensation after April 25, 1980 on the ground that any disability after that date was not related to the January 29, 1980 employment injury.

Appellant requested a hearing before an Office hearing representative and submitted several attending physician's reports prepared for and by Dr. LeClair, indicating that appellant had chondromalacia of the left patella, and recurrent back strain resulting from the January 29, 1980 employment injury, and that appellant was totally disabled for work.[2]

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[1] The record reveals that appellant was separated from her employment on May 2, 1980, the date her appointment expired.

Also submitted was a report by Dr. LeClair dated November 11, 1981, who after setting forth a history of the injury and the treatment administered to appellant, disagnosed "recurrent low back stress/strain, rule out herniated nucleus pulposus," and concluded that appellant's "back symptoms could be caused by the insults she received to her back and knee when she fell." On November 20, 1981 Dr. LeClair reported that appellant would be able to return to work on January 21, 1982.

By a letter dated March 23, 1982, incorporating a memorandum summarizing the evidence, the Office hearing representative determined that the case was not in posture for decision and set aside the May 22, 1981 compensation order on the grounds that the medical evidence of record did not support employment-related disability beyond February 2, 1980; and that in any event, an Office medical adviser had not reviewed the record. He therefore remanded the case record to enable the Office to prepare a statement of accepted facts and refer it, together with the case record, to an Office medical adviser, for a rationalized medical opinion as to whether appellant had any disability causally related to the January 29, 1980 employment injury, and if not, when it ceased.

Accordingly, the Office prepared a statement of accepted facts and referred it and the case record to Dr. Juon-kin K. Fong, a Board-certified orthopedic surgeon, acting as an Office consultant, for his review and comment. Dr. Fong reported that appellant had no findings of disability; that although appellant was currently complaining of back pain, she did not do so until informed that nothing more could be done for her knee; that appellant's contusion of the left knee "could very conceivably" be caused by the January 29, 1980 employment injury; but that the disability therefrom only lasted four days. Dr. Fong concluded that there was no medical rationale of record to support continuing disability beyond the four days allotted.

By letter dated November 8, 1982, the Office denied appellant continuation of pay benefits for her absence from work from February 3 to March 14, 1980 on the ground that "medical evidence does not support disability beyond 2/2/80."

By compensation order dated December 17, 1982, the Office denied appellant compensation benefits after February 2, 1980 on the ground that causal relationship between the disability claimed and the January 29, 1980 employment injury had not been established.

Appellant, through her representative, requested a hearing before an Office hearing representative and requested that the Office subpoena Dr. LeClair "to appear to give testimony regarding his medical opinion and for clarification of contradictory statements which appear" in appellant's case. Similarly, she requested that Dr. Rubinoff be subpoenaed "to clarify and testify" regarding his diagnosis of appellant's condition.

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[2] Earlier attending physician reports indicated appellant was not totally disabled for work.

By letter decision dated December 13, 1983 the Branch of Hearings and Review denied appellant's request to subpoena witnesses and explained the reason for denial, in pertinent part, as follows:

> "The medical records indicate that Ms. Lightfoot has had no findings of any disability on objective examination [beyond February 2, 1980]. This has been remarked on by . . . Ms. Lightfoot's attending physicians.
>
> "It is the employee's responsibility to submit medical evidence in support of a claim for compensation. Ms. Lightfoot could pursue her claim by arranging for the submission of medical evidence to support her claim. The issuance of a subpoena, under the circumstances of this case, is not warranted and is hereby denied."[3]

Section 8126 of the Federal Employees' Compensation Act[4] states, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles . . ." This section of the Act gives the Office discretion to grant or reject requests for subpoenas.

In the instant case, appellant's representative requested that the Office subpoena Drs. LeClair and Rubinoff, an orthopedist and a Board-certified internist, respectively, to appear at her hearing in order to give testimony regarding their respective medical opinions and to clarify their own diagnoses of appellant's condition. The Office informed appellant that the medical evidence of record revealed no evidence of continuing employment-related disability beyond February 2, 1980, as was indicated by her attending physician; that she has the burden to submit medical evidence in support of her claim; and that since she could perfect her claim by submitting the medical evidence necessary to establish a causal relationship between her disability after February 2, 1980 and the January 29, 1980 employment injury, from the same physicians for whose appearance she sought a subpoena, a subpoena was not justified in her case. The record does not show that appellant has attempted to get Drs. LeClair and Rubinoff to clarify their opinions with respect to appellant's current disability through written reports or depositions.

The function of the Board on this appeal is to determine whether the Office has abused its discretion. The Office considered appellant's request, noted the issue before the Office, and gave a proper explanation for its denial of appellant's request. The Board finds that the Office did not abuse its discretion in denying appellant's request to subpoena witnesses.[5]

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[3] A hearing had been scheduled for September 22, 1983; however, it was cancelled pending a decision regarding the issuance of subpoenas. The Office informed appellant that the hearing would be rescheduled.

[4] 5 U.S.C. section 8126. See also 20 CFR 10.133(b).

The decision of the Office of Workers' Compensation Programs dated December 13, 1983 is hereby affirmed.

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[5] *George Lanzy*, 35 ECAB.

In the Matter of JOSHUA FINK *and* DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Oakland, Calif.

Docket No. 84-724; Submitted on the Record;
Issued May 18, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant sustained an employment injury in August 1982, as alleged.

On April 18, 1983 appellant, then a 28-year-old able seaman, filed a claim alleging that he injured his low back in August 1982 while attempting to replace a range light aboard ship. Appellant explained that he delayed in filing a claim because he "did not feel there were any serious problems or complications," but alleged that he did report the incident to the captain and first officer. He stated that the pain became more noticeable, and he finally reported to the doctor on March 28, 1983.

Records from the employing establishment's dispensary indicated that appellant reported there on March 28, 1983 complaining of back pain and left leg pain and numbness. The diagnosis was low back strain.

A CT [computerized axial tomography] scan of the lumbar spine was performed on March 31, 1983 which revealed a mild bulge of the L5-S1 disc; however, there was no frank herniation. An April 11, 1983 lumbar myelogram was normal.

On May 18, 1983, First Officer Williams of the employing establishment stated that appellant had worked under his supervision until approximately December 1982; that during that time he did not hear appellant complain of a back injury; and that appellant willingly worked on overtime projects.

On June 14, 1983 the Office of Workers' Compensation Programs requested appellant to submit additional information in support of his claim. Specifically, he was asked if he reported the injury to anyone aboard ship, and if so, to submit a statement from the person to whom it was reported; to explain why he delayed seeking medical attention for approximately six months, if he was in such excruciating pain; and to submit a narrative medical report as to the relationship of his current condition and how it related to factors of his federal employment.

Appellant returned to regular duty on July 25, 1983.

Appelant's attending physician, Dr. Masao Takai, a Board-certified orthopedic surgeon, submitted an August 17, 1983 report as follows:

> "Mr Joshua Fink was initially seen at my office on March 28, 1983. This 28-year-old seaman claimed to have injured his back approximately five months prior to this visit. He stated that he was on a mast with safety belt on, and because of the stormy weather condition, his safety belt was constantly pulling causing him to [have] this pain in his low back regions. He claims to have reported this injury to his supervisor at that time. He did not seek any medical care until 3/28/83 because of the fear that he may be taken off the ship due to the back injury. He claims to have such severe pains now that he is unable to return to his ship.
>
> "When he was examined by me on March 28, 1983, he stood in a forward-bending position. His range of motion of the lumbar spine was quite limited. Straight leg raising on the left side was about 60 degrees. The contralateral side was positive. Muscle powers of the lower extremities were reasonably good.
>
> "Due to his severe symptoms in his low back pain and shooting pains to his left lower extremity, he was admitted to the Kuakini Medical Center.
>
> "A CT scan was performed and revealed a bulging disc at the L5-S1 level. Complete bed rest and physical therapy did not improve his symptoms.
>
> "On April 16, 1983, he was treated with a Chymopapain injection at the L5-S1 level. Postoperative course was generally uneventful. He responded very well to the Chymopapain injection.
>
> "From the history obtained on the first visit, Mr. Fink claims to have had a back injury at the age of 16, but did not have any problems until this particular incident."

By letter decision dated October 25, 1983 the Office found that appellant had not sustained his burden of proof in establishing fact of injury.

The Board finds that apellant has failed to establish that he in fact sustained an employment-related injury in August 1982.

As the Board has stated, an alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[1] He has the burden of establishing the occurrence of the alleged injury at the time, place, and in the manner alleged.[2]

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[1] *Walter H. Rich*, 15 ECAB 351.

In the instant case, appellant failed to state a specific date on which the alleged incident occurred. Although he reported the history of the alleged incident to his attending physician, appellant did not seek medical treatment until approximately seven months later, and did not file a claim for compensation until approximately eight months after the alleged incident. Appellant alleged that he reported the incident to the First Officer and the captain; however, he has not produced statements to corroborate his story. The only statement of file from his supervisor indicated that he had no knowledge of appellant injuring his back. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment in connection therewith may, if otherwise unexplained, cast sufficient doubt on a claimant's statements concerning the injury as to outweigh the evidentiary value of such statements in determining whether the claimant has established a *prima facie* case. Statements made by appellant in this case in explanation of his delay in filing official notice of injury and his failure to obtain medical treatment are not corroborated by those individuals who, according to appellant's own testimony, should be in a position to so corroborate. On this record the Board finds that appellant has not carried the burden imposed upon him with respect to establishing the occurrence of an injury to his back at the time and in the manner alleged.

The October 25, 1983 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[2] *Edward C. Lawrence*, 19 ECAB 442.

In the Matter of RICHARD A. WARD *and* U.S. POSTAL SERVICE, VEHICLE MAINTENANCE FACILITY, Tyler, Tex.

Docket No. 84–894; Submitted on the Record;
Issued May 21, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issues are (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing and (2) if so, whether appellant has more than a 5 percent permanent impairment of the left arm for which he received a schedule award.

By decision dated December 27, 1982, the Office of Workers' Compensation Programs granted appellant a schedule award for a 5 percent permanent impairment of the left arm causally related to an August 13, 1981 employment injury. The award was for a period of 15.6 weeks with weekly compensation based on a percentage of weekly pay of $418.52. Enclosed with the decision was a page entitled "Federal Employees' Compensation Act Appeal Rights" which informed appellant that if his injury had occurred on or after July 4, 1966 and he had not requested reconsideration of his claim, he could request a hearing before an Office representative. The Office informed appellant that "Section 8124(b)(1) of the Act provides you are entitled to a hearing only *before* reconsideration under section 8128(a)." The Office further informed appellant that if he had other evidence which he believed pertinent, he could request the Office to reconsider its decision. The Office advised that "Reconsideration may be requested at any time, whether or not a hearing has been held. Where reconsideration is initially requested, you are not entitled to a hearing." The Office also informed appellant that if he believed all available evidence had been submitted, he had the right to appeal to the Employees' Compensation Appeals Board which limited its review to the evidence of record. The Office stated that "no new evidence may be submitted to the Board."

By letter dated January 31, 1983 addressed to the Board, appellant stated he wished to file an appeal of the Office's decision and asserted the schedule award had been based on an incorrect weekly pay rate. He submitted a January 27, 1983 report from Dr. John F. Walker concerning the percentage of permanent impairment of the arm. By letter dated February 8, 1983, the Board returned appellant's letter, informed him the January 27, 1983 report by Dr. Walker was considered "new evidence" and that if he wished to have new information considered he should submit such information to the Office in conjunction with a request for reconsideration of the Office's decision.

By letter dated February 14, 1983 appellant requested reconsideration by the Office of its decision, asserting he had a 25 percent permanent impairment of the left shoulder. He submited the January 27, 1983 report by Dr. Walker and reiterated that the schedule award was based on an incorrect weekly pay rate.

In an April 19, 1983 memorandum, the Office stated that it had contacted the employing establishment and had verified that the schedule award had been based on an incorrect pay rate.

By compensation order dated April 25, 1983, the Office vacated its December 27, 1982 decision.

By decision dated June 20, 1983, the Office issued a "revised" schedule award for a five percent permanent impairment of the left arm based on a correct weekly pay rate. In an attached June 20, 1983 letter, the Office informed appellant it had also recalculated the amount of temporary total disability compensation he was due based on the correct pay rate and that he would receive an additional amount of compensation.[1]

On the reverse of the June 20, 1983 decision, the Office informed appellant that "If you disagree with the terms of this award *and* your injury occurred on or after July 4, 1966 you may, within 30 days after the date of this decision, ask for a hearing before an Office of Workers' Compensation Programs representative." In a July 5, 1983 letter the Office stated that if appellant disagreed with the Office's June 20, 1983 decision "he may again exercise his appeal rights."

In a July 14, 1983 letter, appellant stated he had "appealed it [the Office's June 20, 1983 decision] to the Washington office for a hearing, which I understand I am entitled to. A month has gone by and no answer from them."[2]

An Office worksheet in the case record shows that its Branch of Hearings and Review requested the case record from a district office of the Office on July 6, 1983. By letter dated July 15, 1983, the Branch of Hearings and Review informed appellant that upon receipt of his case file, it would undertake a preliminary review of the case and advise him of further action being taken on the case.

By letter dated August 10, 1983, the Branch of Hearings and Review informed appellant it had received his case file, would review the file to determine whether the case was in posture for a hearing and if in posture would schedule a hearing on the next available trip of a hearing representative to his area. By letter dated December 19, 1983, the Office informed appellant his hearing would be held on February 2, 1984.

On January 4, 1984, the Office issued a letter decision which denied appellant's request for a hearing. The Office stated that upon reviewing the case record it noted that it had "conducted a review under section 8128(a) of the Federal Employees' Compensation Act." The Office stated that "Section 8124(b) of the Act provides that a request for [a] hearing must be made 'before review under section 8128(a)' of the Act, and therefore you are not entitled to a hearing." The Office further stated that it had "considered the matter in relation to the issue involved and your request is hereby denied on the basis that the issue is strictly a medical one which can be pursued effectively by submitting new evidence to the district office."

Appellant appeals the Office's denial of his hearing request. He also asserts on appeal that he can no longer perform his usual work due to residuals of the employment injury.

The Board finds that the Office improperly denied appellant's request for a hearing.

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[1] Appellant had received temporary total disability compensation from October 14, 1981, through February 3, 1982 based on a percentage of a weekly pay rate of $418.52 instead of the correct rate of $431.71.

[2] The case record does not contain the hearing request letter referred to by appellant. It does contain a July 21, 1983 letter in which appellant again requested a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act[3] dealing with a claimant's entitlement to a hearing before an Office representative states that "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary . . . is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

The Office properly informed appellant in its December 27, 1982 decision that he was entitled to a hearing before reconsideration of his claim under section 8128(a).[4] The Office, however, vacated its December 27, 1982 decision on April 25, 1983. On June 20, 1983 it issued a new decision which revised the schedule award previously granted and which informed him he could request reconsideration or a hearing, or file an appeal with the Board. As the Office stated in its July 5, 1983 letter, if appellant disagreed with the Office's June 20, 1983 decision, "he may again exercise his appeal rights" of reconsideration, hearing or appeal.

The case will be remanded to the Office for the Office to offer appellant a hearing concerning the issues dealt with in the June 20, 1983 Office decision and to issue a *de novo* decision.[5] On remand, the Office should also determine whether appellant has an employment-related loss of wage-earning capacity, as he alleged.

The decision of the Office of Workers' Compensation Programs dated January 4, 1984 is hereby set aside and the case remanded to the Office for further proceedings in accordance with this decision of the Board.

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[3] 5 U.S.C. section 8124(b)(1).

[4] See *Barney L. Bailey, Jr.*, 33 ECAB 1243.

[5] Since the case is being remanded for a hearing and a *de novo* decision, the issue whether appellant has more than a 5 percent permanent impairment of the left arm is not in posture for decision by the Board. See 20 CFR section 501.2(c).

In the Matter of ERNEST N. CHERNAK *and* DEPARTMENT OF THE AIR FORCE, NORTON AIR FORCE, BASE, San Bernardino, Calif.

Docket No. 84-102; Submitted on the Record;
Issued May 25, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether appellant had any disability after March 5, 1973 causally related to factors of his federal employment.

On September 15, 1971 appellant, then a 31-year-old electronic counting machine operator, filed a claim alleging that he had sustained diabetes as a result of being assigned to a "graveyard" shift. He lost no time from work. Appellant subsequently retired due to disability on March 5, 1973, and claimed compensation commencing March 6, 1973.

In a November 4, 1974 compensation order the Office of Workers' Compensation Programs rejected appellant's claim on the ground that it was not timely filed. The Office found that he was aware of his diabetic condition and its possible aggravation by factors of his federal employment nine years prior to filing a claim.

On March 13, 1975 appellant filed an application for review by the Board. On May 20, 1975 the Director of the Office filed a motion to remand the case to the Office for further development on the issue of when time began to run, to be followed by a *de novo* decision. In a June 13, 1975 order, the Board granted the Director's motion.[1]

In an August 2, 1976 response to an Office request for a medical report Dr. Stanley H. Schneider, a Board-certified internist specializing in endocrinology and appellant's attending physician, noted his treatment of appellant from 1966 through 1973. He stated:

> "Your clinical course was characterized by numerous problems which I felt were at least in part due to irregular work habits. You found it difficult to adjust your insulin when you had to work night shifts. In addition, irregular eating habits encouraged by the difficulties of maintaining a schedule while at work seemed to account for frequent insulin reactions.
>
> "I felt that your clinical course would have been less characterized by wide swings in your blood sugar if you had been able to follow a regular program of exercise, eating meals regularly, in terms of time of the day and in terms of the number of calories at each meal. I do not think you can tolerate wide swings of food intake and also variability in the amount of exercise or muscular exertion that you do."

On January 17, 1977 an Office medical adviser reviewed Dr. Schneider's report and the medical evidence submitted by the employing establishment. He noted that appellant claimed that an employing establishment physician had told him he was a "borderline diabetic" after his preemployment physical in 1960. The adviser concluded that appellant's diabetic condition was not causally related to factors of his federal employment.

In a February 7, 1977 compensation order the Office rejected appellant's claim a second time, on the ground that a causal relationship had not been established between his diabetic condition and factors of his federal employment.

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[1] Docket No. 75-234, issued June 13, 1975.

At appellant's request, a hearing before an Office hearing representative was held on January 24, 1978. Appellant testified as to his condition and submitted four medical reports. In March 9 and 11, 1970 notes Dr. Schneider requested that appellant work one shift permanently in order to control his diabetes. Dr. Schneider subsequently noted on January 13, 1978:

> "There is no question in my mind that your working irregular hours, including night hours, was a significant factor in your inability to achieve good control of your diabetes mellitus while you were under my care in Tucson. You had frequent insulin reactions, as well as frequent episodes of hyperglycemia because of the irregularity of your food intake, exercise, and insulin required by your variable working hours."

Appellant also submitted a January 16, 1978 report by Dr. Ralph H. Mallinger, a Board-certified family practitioner, in which he stated:

> "[Appellant] was under my care for a period of approximately six months during the early 1960's at which time symptoms of lassitude, weight loss, and excessive thirst, and polyuria which led to a diagnosis of moderately severe diabetes. This illness was unable to be controlled with diet and the administration of oral medications, therefore I resorted to the use of insulin by injection, which was then reasonably effective. The patient states that at that time that he was working on the graveyard shift at a nearby air force facility as a civilian, and that I recommended he be transfered to the day shift for better initial control of his diabetes. Although records are not available to confirm this, it is likely that the above recommendation on my part was given the patient. Regular hours of work and rest are a beneficial adjunct to the early control of diabetes when it is first discovered."

On November 6, 1978 a second Office medical adviser reviewed the evidence and concluded:

> "Thus, I sincerely believe that the change in work shift is responsible for the claimant's insulin reactions but represent only temporary disability. I completely agree with [the first Office medical adviser's] report of January 17, 1977 that diabetes is not an industrial disease. Working hours would not precipitate, accelerate or aggravate this metabolic disease, except temporarily as in this case. The claimant's retirement was due to the medical recommendation and not working night shift and not because of any aggravation of the diabetes. Thus, a Compensation Order was issued February 7, 1977 rejecting the claim. Certainly I have no basis to change that Order or finding. I agree that the diabetes may have been temporarily aggravated, but

> certainly was not the cause of his retirement. The diabetes was not permanently aggravated by temporary insulin reaction."

In a January 2, 1979 decision finalized on February 2, 1979, the Office hearing representative modified the prior Office decision to accept that appellant's "working conditions caused temporary aggravation of his underlying diabetic condition." The hearing represenatative concluded that the temporary aggravation ceased on the date of his retirement on March 5, 1973, and affirmed the prior Office decision insofar as it rejected appellant's claim for compensation beginning March 6, 1973. He therefore directed the Office to determine whether appellant was entitled to any compensation for periods of disability before March 6, 1973.

On April 30, 1979 appellant requested reconsideration of the Office's January 2, 1979 decision. In support of his request he submitted a January 12, 1979 note from Dr. Schneider in which he stated that "There is no question in my mind that working the night shift aggravated the control of his diabetes mellitus, making his condition worse, causing permanent damage, healthwise." In a May 24, 1979 report a third Office medical adviser reviewed Dr. Schneider's note and concluded that it provided "no further information born out by any objective findings to support any change in previous hearing decision."

In a June 5, 1979 compensation order the Office, after a merit review, denied appellant's request for modification on the ground that "the evidence submitted in support of the application for review is found to be of a repetitious nature and not sufficient to require review of the prior decision."

On August 22, 1979 appellant filed an appeal with the Board. In a November 14, 1979 decision, the Board adopted the findings and conclusions of the hearing representative, and affirmed the January 2, 1979 and June 5, 1979 Office decisions.[2]

On June 2, 1980 appellant filed a third appeal with the Board. On October 8, 1980 the Director of the Office filed a motion to dismiss on the ground that appellant had erroneously filed an appeal rather than a timely petition for reconsideration of the Board's November 14, 1979 decision. In a November 13, 1980 order, the Board granted the Director's order and dismissed the appeal.[3]

In an October 27, 1981 letter, appellant requested reconsideration of the Office's June 5, 1979 decision. In support of his request he submitted copies of medical reports already of record, as well as a July 5, 1979 report by Dr. Schneider, an April 16, 1981 report by Dr. Mallinger, and July 29, 1981 and October 12, 1981 reports by Dr. Bryant I. Pickering, an endocrinologist. In his July 5, 1979 report Dr. Schneider related appellant's history and stated the following:

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[2] Docket No. 79-1390, issued November 14, 1979.

[3] Docket No. 80-1402, issued November 13, 1980.

> "Over the years, his major problems were of those of regulating his diabetes with frequent episodes of insulin reactions and frequent acidosis. He seemed incapable of making a transition from day shift to night shift in terms of eating his meals and adjusting his insulin schedules. From the entire time that he lived in Tucson, he was unmarried and lived alone, he ate most of his meals at fast food places. When he would oversleep after being on a night shift would frequently have insulin reaction awakening him because he did not wake up in time to have breakfast. In general, his problems were certainly complicated by attempts to shift his working from shift to shift because of his inability to make adjustments both in his eating schedule and manipulating his insulin.
>
> "I always felt that he would do much better on a regular program of one shift work whether it be morning or night so that his meals could be eaten at specific times, in specific amounts, and that his insulin could be given at specific times in specific amounts. During the entire time that I knew [appellant] this never seemed to be possible either because of the demands of his job or his inability to make the appropriate adjustments.
>
> "It is on this that I indicated that I felt working the night shift aggravated the difficulties he was having in controlling his diabetes mellitus."

In his April 16, 1981 report Dr. Mallinger noted appellant's course of treatment and concluded:

> "My records indicate that [appellant's] initial diagnosis was made through my office and that there was no previous suspicion that [appellant] did in fact have diabetes mellitus prior to being seen in my office in March, 1962. There is no indication that federal doctors had originally diagnosed [his] diabetes mellitus and had failed to notify him of such a diagnosis. That such a situation might have existed is feasible, but would be very highly unlikely. Without the aid of laboratory ancillary service, a doctor would have had to have a high index of suspicion to have diagnosed his condition at that time. He would have had to rely heavily on a patient history of weight loss of 20 pounds in one year from a weight which was approximately 10% over the ideal body weight to an observed weight of less than 10% below ideal body weight. Therefore, it appears highly likely that the initial diagnosis of [appellant's] diabetes was made through my office in March, 1962. Therefore, the federal doctors could not have been remiss in failing to notify him of such a diagnosis, when they were not aware of such diagnosis being present. Diagnostic studies were completed in my office by March 28, 1962, and [appellant] was informed of a diagnosis of moderate dia-

> betes mellitus and at that time was placed on a 2,000 calorie diabetic diet and appropriate medications for attempted control.
>
> "As mentioned above, and as you are probably aware, odd working hours in initial phases of diabetes not yet controlled do substantially aggravate the initial attempts at control of a diabetic condition. Other than increased difficulty in the initial control of diabetes, however, it is highly doubtful if odd working hours present any permanent disability from the standpoint of the diabetes."

In his July 29, 1981 and October 12, 1981 reports, Dr. Pickering related appellant's course of treatment since his disability retirement in 1973. He concluded:

> "His primary problem of diabetes is one of wide fluctuations in his blood sugars, categorizing him as a brittle diabetic. He has insulin reaction at times, totally without warning as well as high blood sugars. This has necessitated frequent visits to the hospital emergency room as well as paramedic treatment. His insulin is adjusted accordingly and varies continuously.
>
> "[Appellant's] diabetes has become increasingly difficult to manage from its onset in 1962. At that time, [appellant] had irregular hours of work, rotating shifts, and irregular hours of sleep which are not conducive to his medical condition. The changing hours of working, eating and sleeping could have conceivably promoted diabetic complications. The rotating shifts could definitely complicate diabetic management and control. Proper management and control of diabetes will forestall complications of the same.
>
> "A lack of medical attention to a diabetic condition would aggravate that condition and result in complications of the diabetes.
>
> "At this point in time, I feel [appellant] is disabled, due to his brittle diabetic condition and any kind of employment would be very difficult for him to tolerate without expecting some uncontrolled diabetic conditions. It is my opinion that this man's diabetes is very debilitating and restrictive to his ability to obtain employment or to maintain a gainful source of income."

On January 12, 1982 Dr. Jonathan F. Nordlicht, a Board-certified internist and an Office medical consultant, reviewed the evidence submitted, and concluded:

> "From the review of the medical evidence available, it appears that [appellant] developed the initial manifestations of diabetes in 1962, the control of which over subsequent years was quite variable and the condition itself referred to as brittle. As per the above discussion, the initial and later control of the condition is accomplished in part or completely by dietary modification. In [appellant's] case, because of his variable hours and shifts, it is quite conceivable that

> his inability to carefully follow the prescribed meal plan could have aggravated his diabetes. However, it is quite possible that the nature of [appellant's] diabetes itself could have been difficult to control even under improved dietary adherence as Dr. Pickering's letter states that more recently when [appellant] has been maintaining regular eating and sleeping patterns, he continues to experience multiple insulin reactions. Concerning the effects of close diabetic control and subsequent development of permanent complications, medical evidence, as discussed previously, is still controversial and does not, in my opinion, resolve this question with certainty at this time. The etiology of diabetes at this time is not completely understood; however, as noted earlier there is data suggesting a genetic factor--it is quite unlikely that [appellant's] employment caused his diabetes to occur.
>
> "In assessing this claim, my opinion would be that [appellant's] diabetes probably would have occurred independently of his employment; however, it probably was aggravated by difficulty managing the disease due to his variable working hours. This aggravation, in my opinion, would be considered to be of a temporary nature, ceasing at the time his employment ended."

In an April 27, 1982 compensation order the Office denied appellant's request for reconsideration after a merit review, on the ground that "the evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

On October 19, 1982 appellant again requested reconsideration of the Office's decision. In support of his request he submitted a July 19, 1982 report from Dr. Schneider, who stated:

> "There is no question in my mind that working the night shifts aggravated the control of his diabetes, making his condition worse, causing permanent damage in terms of his health. The specific problems that [appellant] had when he was working night shift was that he was unable to make adjustments in terms of his eating habits and insulin because of his inability evidently to understand a degree of flexibility that most other people can manage. He would frequently work a night shift of eight hours, come home, take a large dose of insulin, and promptly fall asleep because of fatigue. His friends or neighbors would frequently find him late afternoon in coma due to severe hypoglycemia. As you know, severe hypoglycemia contributes to the loss of Betz cells in the brain, and may account for some of the difficulties he has had in adjusting his schedules. On several occasions I wrote letters to the Air Force asking them to allow him to maintain one uniform shift rather than shifting from shift-to-shift which was beyond his capability."

In a March 3, 1983 report an Office medical consultant, Dr. Paul A.

Fitzgerald, a Board-certified internist specializing in endocrinology, reviewed the medical evidence and stated the following:

> "After due consideration, I first of all feel that [appellant's] diabetes mellitus was not caused by his employment by the Air Force."
>
> * * *
>
> "In reviewing the records in detail I found no evidence that the particular employment with the Air Force, at either Davis-Monthan or at Norton, aggravated his diabetes in any excessive way. It appears that even after [appellant] had been on a particular shift for a long period of time, he continued to have insulin reactions. These reactions can easily be eliminated by decreasing the dose of the insulin or by eating regular meals. I have never had any patient have recurrent insulin reactions and be unable to avoid them due to a condition of employment. The insulin reactions are quite simply avoidable if the insulin dose is decreased, and during his time of employment [appellant] appears to have been over-insulinized in terms of his ability to eat regularly to avoid hypoglycemia. The type of schedule necessary to avoid hypoglycemia is really quite simple. It requires eating lunch every day at a fairly regular time. I found no evidence that he was actually prevented from eating at the prescribed times. Therefore, it is my strong impression that [appellant's] recurrent insulin reactions are due to an inherent condition of his diabetes on insulin treatment and to his inability to eat regularly. With the help of a physician it is possible to adjust insulin dosage and meal schedules within three days of shift change and make insulin reactions extremely unlikely. [Appellant's] inability to avoid these insulin reactions thus appears to be a problem between him and his physician rather than his employer. I have many patients in my own practice and in our clinics at the University of California San Francisco who have all manner of irregular shifts, being employed in shift work of various types. None of them have applied for or been granted disability in the manner of [appellant]. I find it most telling that Doctor Pickering states that [appellant] continues to have problems with his diabetes mellitus even after leaving the Air Force. If therefore appears that even with regular hours and a potential for regular eating habits, that [appellant] continues to have problems and that this therefore was not related to his employment. His particular type of employment, that of being an electronic counting machine operator, does not appear to me of sufficient intensity or require sufficient manual labor to cause unusual fluctuations in his diabetes mellitus which might be considered job related. In fact, it is a rather benign position, on a relative scale."
>
> * * *
>
> "I can say without hesitancy that such severe insulin reactions as

> were described by [appellant] and his supervisor and fellow employees can persist over a prolonged period only if there is some inherent problem with the individual understanding their disease or with the patient's physician's management of it. It is not an inherent problem that is job related."
>
> * * *
>
> "Occasionally such severe insulin reactions may occur as to injure a patient's brain; in that case, certain disability may occur due to prolonged coma or decreased intelligence thereafter. I found no evidence in the record for me to surmise with any certainty that [appellant] has suffered brain damage from these reactions. In any event, I do not believe that the insulin reactions were caused from or aggravated by the employment *per se*. In the event that he did have brain damage due to hypoglycemia, it appears to be disease-related rather than service-related in terms of disability.
>
> "In summary, in carefully reviewing these documents, I find that there is no evidence that [appellant] is unemployable or disabled due to his diabetes. Furthermore, there is no evidence that his employment aggravated his diabetes mellitus to any significant degree."

On July 18, 1983 the Office issued a compensation order in which it denied appellant's request for reconsideration, after a merit review, on the ground that "the evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

The Board finds that the weight of the medical evidence fails to establish that appellant sustained a permanent aggravation of his diabetic condition causally related to factors of his federal employment.

The reports of Dr. Schneider, appellant's attending Board-certified internist specializing in endocrinology, either do not address the issue of permanent aggravation, or fail to provide adequate medical rationale in support of their conclusions. Dr. Schneider's statements of causal relationship contained in his January 12, 1979 and July 12, 1982 reports are speculative, and are therefore of diminished probative value. Dr. Pickering, an endocrinologist, was similarly speculative in his report, therefore, his report is also of diminished probative value.

Dr. Mallinger, a Board-certified family practitioner, in his April 16, 1981 report negated causal relationship between permanent aggravation of appellant's diabetic condition and factors of his federal employment.

The reports of Drs. Nordlicht and Fitzgerald, Board-certified in internal medicine and endocrinology, respectively, and Office medical consultants, negate causal relation. In his well-reasoned reported Dr. Nordlicht reviewed the medical evidence and concluded that factors of appellant's federal employment had temporarily aggravated the control of his diabetic condition, and that such aggravation had ceased when he retired. Similarly, Dr. Fitzgerald's thorough report negated causally related permanent aggravation. Dr. Fitzgerald reviewed the medical evidence and stated that "I found no evidence in the record for me to surmise with any certainty that [appellant] has suffered brain damage from these reactions. In any event, I do not believe that the insulin reactions were caused from or aggravated by the employment *per se.*" He therefore concluded that "there is no evidence that [appellant] is unemployable or disabled due to his diabetes. Furthermore, there is no evidence that his employment aggravated his diabetes mellitus to any significant degree."

The decision of the Office of Workers' Compensation Programs dated July 18, 1983 is hereby affirmed.

In the Matter of MARVIN W. FRIEDLAND *and* U. S. POSTAL SERVICE, POST OFFICE, Minneapolis, Minn.

Docket No. 84–784; Submitted on the Record;
Issued May 25, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellant has more than a ten percent permanent loss of use of his right leg for which he has received a schedule award.

On August 6, 1980, appellant, then a 54-year-old mail carrier, sustained an injury to his right ankle when he "hit [it] on a hamper" at work. He stopped work on August 7, 1980. He first obtained medical care on August 8, 1980 from Dr. Jos. B. Friberg, a general practitioner, who after x-rays were taken, opined that appellant had sustained a stress-related fracture of the distal end of the right tibia. Appellant was off work from August 7 through 25, 1980; he stopped work again on September 3, 1980 for an unrelated condition and has not returned.

In a July 22, 1981 letter, the Office of Workers' Compensation Programs informed appellant that his "original injury ha[d] been accepted for avulsion fracture medial malleolus right ankle only."

In a December 15, 1981 progress note, Dr. Paul G. Patterson, appellant's treating physician and an orthopedic surgeon, stated the following:

> "The [appellant] was seen for follow-up on his knees and for his fractured medial malleolus. He is still having symptoms and disability relating to both injuries . . . It would be my feeling . . . that [appellant] has a 15 percent permanent partial disability of each leg as a result of his knee problem.

> "His ankle seems to have stabilized. He still is limited in his functional capacity because of pain and because of the symptoms that he gets with locking and usage of the leg . . . The [appellant] I feel, has a disability to the leg as a result of the ankle but when combining that with the knee disability I feel that it is less than it would be if he had each injury considered alone. I would feel on the leg where he has both the knee problem and the ankle problem he has a 20 percent permanent partial disability of the leg as result of the combined problems."

In response to an Office request for an evaluation of any permanent anatomical and/or functional loss or loss of use of appellant's leg due to his work-related ankle fracture, Dr. Patterson examined appellant on February 14, 1983 and reported the following:

> "*** The [appellant] is continuing to complain of pain in his ankle and disability and loss of function on the basis of (illegible) and pain with usage. Part of the symptoms are made worse by weather, and otherwise, the symptoms are made worse by activity. He is unable to walk on uneven ground, or on a slant or slope, because this increases his pain, and limits the amount of time that he can be on his leg. There is some persistent swelling on the medial side of the ankle, but this becomes worse towards the end of the day. This is centered over the area of the medial malleolus, especially just posterior to the medial malleolus . . .
>
> "X-rays were taken today, and these show persistence of the ununited fragment off the medial side of the ankle and tip of the medial malleolus . . .
>
> "The range of motion is diminished in the ankle, with about 30 degree loss of dorsiflexion, compared to the left. He has a 50 percent loss of inversion and 15 percent loss of eversion, and about 10 degree loss of plantar flexion, compared to the opposite ankle. It is my feeling that [appellant] has a 20 percent permanent partial disability of his ankle . . . "

An Office medical adviser reviewed this report and stated that the figures provided by Dr. Patterson were "not acceptable for OWCP purposes" since they were not in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment.*

In a July 5, 1983 response to the Office's request for clarification of appellant's impairment, Dr. Patterson stated the following:

> "*** The [appellant] has plantar flexion of 45 on the right and 55 on the left, which gives him a 10 degree loss, and therefore, a 4 percent disability. On dorsiflexion, he has a 30 degree plantar flexion deformity and he has no dorsiflexion beyond that. On the normal left side he only goes up to zero or slight above. So, therefore, he has

> lost 30 degrees of motion, and has a 10 percent disability. Inversion he has 10 percent, compared to 30 percent on the normal side. Therefore, this is a 20 percent loss, and 4 percent disability. Eversion is zero to 25 on the left side, giving him a 25 degree loss, and a 5 percent disability. This amounts to a total of 23 percent disability on range of motion loss.
>
> "The [appellant] is beginning to have swelling, with pain, especially when he tries to walk stairs. He has to externally rotate the leg. He cannot walk on uneven ground. He cannot walk. He has a limp, with limitation of function, and it is my feeling that that would probably add another seven percent disability to his range of motion restrictions, which would give something like 30 percent disability, based on the AMA chart."

The Office medical adviser again reported that Dr. Patterson's findings were not in accordance with evaluation guidelines in the AMA *Guides*.

On referral by the Office, Dr. Paul H. Gislason, a Board-certified orthopedic surgeon, examined appellant and the case record on September 27, 1983 and in an October 11, 1983 report stated the following:

> "When the patient is supine, the left ankle flexes 10 degrees, with 15 degrees of plantar flexion. There is one-quarter inch atrophy of the left calf. There is marked tenderness over the medial malleolus. There is swelling over the medial side of the ankle.
>
> "On the right there is 15 degrees of dorsiflexion and 20 degrees of plantar flexion.
>
> "*X-RAYS:* X-rays of the ankle were examined. These x-rays show calcification distal to the medial melleolus. This could represent an old fracture. It appears to be firmly encased in the deltoid ligament of the ankle.
>
> "All x-rays were examined and they all show the same problem.
>
> "*IMPRESSION:* This is not of any great significance. Subjective complaints are much greater than the objective findings would indicate.
>
> "On his subjective complaints and the objective findings, it would be my impression he has a ten percent disability of a permanent partial nature of the right foot and ankle."

In a December 7, 1983 report, a second Office medical adviser indicated that appellant's date of maximum improvement of his right leg was September 27, 1983. He reported the following:

> "PPI/D of [right] leg = ten percent (pain/discomfort/itch/swelling: five percent and atrophy/tenderness/swelling five percent.)"

On December 13, 1983 the Office granted appellant a schedule award for a ten percent permanent loss of the use of his right leg.

The Board finds that the case is not in posture for decision.

In his October 11, 1983 report of appellant's September 27, 1983 examination, Dr. Gislason stated that "on the right [leg] there is 15 degrees of dorsiflexion and 20 degrees of plantar flexion." He opined that appellant had a ten percent permanent impairment of the right foot and ankle. Although the Office medical adviser used September 27, 1983, the date Dr. Gislason examined appellant, as the date of maximum improvement and concurred with the doctor that appellant had ten percent loss, the medical adviser did not base the percentages of permanent partial loss of use of appellant's right leg on the figures Dr. Gislason provided. The Office medical adviser based the schedule award on the following factors: "pain/discomfort/itch/swelling [and] atrophy/tenderness/swelling." He did not assign a percentage for the loss of motion to the leg reported by Dr. Gislason and in accordance with the AMA *Guides*.

Accordingly, the aforementioned assignments should be reviewed and the extent of permanent partial loss of use of appellant's right leg recalculated, in order to determine the proper percentage. In making this redetermination of the extent of loss of motion, "specific functional impairments" should be itemized and stated in terms of percentage loss of use "of the member" in accordance with the AMA *Guide* tables. "Each impairment not covered by the *Guides* should be estimated in terms of percentage loss of use."[1]

The decision of the Office of Workers' Compensation Programs dated December 13, 1983 is set aside and the case remanded for further proceedings in accordance with this decision of the Board to be followed by a *de novo* decision.

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[1] *Richard A. Ehrlich*, 20 ECAB 246 at 249.

In the Matter of ADELA HERNANDEZ-PIRIS *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION CENTER, San Juan, P.R.

Docket No. 84-37; Submitted on the Record;
Issued May 25, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined the beginning date of appellant's schedule award for her right arm; and (2) whether appellant had any disability subsequent to December 12, 1979 causally related to either her May 11, 1978 employment injury to her left wrist or her November 26, 1978 employment injury to her right wrist.

Appellant, a 50-year-old food service worker, sustained a fracture of her left wrist on May 11, 1978 when she fell at work. She received continuation of pay from May 12 through June 27, 1978, used sick leave from June 28 to July 11, 1978 and received temporary total disability compensation from the Office of Workers' Compensation Programs from July 12 to August 21, 1978; she returned to work on August 22, 1978. By decision dated September 17, 1979 the Office issued appellant a schedule award for a 10 percent employment-related permanent loss of use of her left hand covering the period June 25 to December 12, 1979.

On November 26, 1978 appellant sustained a fracture of her right wrist when she fell at work. She received continuation of pay from November 27, 1978 to January 10, 1979, was paid compensation from January 11 to February 4, 1979 and returned to work on February 5, 1979. She claimed compensation commencing September 26, 1979 and retired on civil service disability effective January 29, 1980, due to bilateral wrist fracture.

In attending physician's reports dated January 14 and April 7, 1980 Dr. Arturri W. Sonni noted deformity of appellant's left wrist and angulation of her right wrist and concluded that she was totally disabled due to the colles fracture she sustained of each wrist.

Upon reviewing the record, an Office medical adviser stated in a September 5, 1980 report that appellant was not totally disabled but could "perform work with restricted use of right hand."

Dr. Moises Santiago-Vasallo, Board-certified in preventive medicine, stated in an October 24, 1980 report that appellant "received physiotherapy for an adequate span of time." He set forth the limitation of motion of appellant's right wrist and concluded that she had a 17 percent permanent impairment of her right upper extremity.

In an October 28, 1980 work tolerance limitations form Dr. Sonni indicated that appellant was disabled due to the employment wrist fractures she had sustained.

In a January 16, 1981 report a second Office medical adviser stated that the date of maximum improvement of appellant's right wrist was January 29, 1980, the date of her retirement. He concluded, based on Dr. Santiago-Vasallo's report, that appellant had a 17 percent permanent loss of use of her right arm.

By a February 13, 1981 decision the Office issued appellant a schedule award for a 17 percent employment-related permanent loss of use of her right arm, covering the period January 29, 1980 to February 3, 1981.

In an April 28, 1981 attending physician's report Dr. Sonni stated that appellant was totally disabled as a result of her employment injuries.

The same Office medical adviser who last reviewed the record stated in a June 25, 1981 report that partial disability seemed to be indicated and recommended that appellant be examined by an orthopedic specialist.

By letter dated May 20, 1982 the Office referred appellant together with the case record and a statement of accepted facts to Dr. Manuel Monasterio, a Board-certified orthopedic surgeon, for a current evaluation as to the extent of appellant's employment-related disability.

In a June 4, 1982 report Dr. Monasterio noted "a small spur located in the radial aspect of the distal ulna" of appellant's left wrist and "a well-consolidated fracture of the distal metaphysics of the radius with no significant residual deformity" of her right wrist. He stated that she had "practically no significant limitation of wrist motion [in either side]" and that "she complains of very severe pain and tenderness over the distal aspect of the radius but proximal to the wrist." He concluded that appellant's wrist fractures had "consolidated each with no significant deformity and I don't find any objective physical finding which would make this patient disabled for work."

In a July 16, 1982 report the same Office medical adviser stated that the orthopedic examination of appellant's wrists by Dr. Monasterio "was practically within normal limits" and that appellant should be found fit-for-duty "as of the date of [Dr. Monasterio's] examination."

By compensation order dated October 18, 1982 the Office found that appellant's claim for compensation following the expiration of the second schedule award on February 3, 1981 be denied on the ground that appellant had no employment-related disability subsequent to that date.

At appellant's request a hearing before an Office hearing representative was held on March 17, 1983.

By decision dated September 13, 1983, made final on September 22, 1983, the hearing representative found that the Office incorrectly selected January 29, 1980, the date appellant retired, as the date her right wrist reached maximum improvement as opposed to October 28, 1980 the date of the report upon which the schedule award was based. The hearing representative went on to state that appellant claimed compensation effective September 26, 1979 and that the weight of the medical evidence established that appellant had no employment-related disability subsequent to that date.

The Board finds that appellant reached maximum improvement on October 24, 1980 with respect to her right arm condition.

As the Office hearing representative properly pointed out in his September 13, 1983 decision the Office chose the incorrect date of appellant's maximum improvement. The period covered by a schedule award commences on the date that the employee reaches maximum improvement from the residuals of his employment injury. Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[1] The Office had chosen January 29, 1980, the date appellant retired on disability, as the date of maximum improvement. However, there was no medical report indicating that appellant's right arm had stabilized until Dr. Santiago-Vasallo's October 24, 1980 report in which he noted that appellant had already been given adequate treatment for her fractured right wrist and in which he set forth findings as to the range of motion of that wrist.[2] The Board therefore finds that October 24, 1980 is the proper date of maximum improvement and is the date which appellant's 17 percent schedule award for her right arm should have commenced.

Appellant claimed compensation commencing September 26, 1979. Since appellant's first schedule award for a 10 percent permanent loss of use of her left hand ended on December 12, 1979 the issue is whether she had any disability subsequent to December 12, 1979 causally related to her employment injuries. The Board notes that from December 12, 1979 to June 4, 1982, the date of Dr. Monasterio's referral examination, the only medical evidence in the record, consisting of attending physician's reports from Dr. Sonni as well as opinions from two Office medical advisers, supported the conclusion that appellant had at least a partial disability causally related to her employment injuries.

In denying compensation subsequent to September 26, 1979 the Office relied upon a June 4, 1982 report (based upon an examination of that date) from Dr. Monasterio, a Board-certified surgeon. However, Dr. Monasterio addressed appellant's condition only as of the date of his examination. The Office medical adviser who reviewed Dr. Monasterio's report concluded that appellant was fit-for-duty "as of the date of examination." The Office thus failed to properly address the issue of whether appellant had any disability subsequent to December 12, 1979 causally related to her employment injuries.

The Office should therefore refer appellant together with the case record and a statement of accepted facts either back to Dr. Monasterio or to an appropriate Board-certified specialist to determine whether appellant had any disability subsequent to December 12, 1979 causally related to either her May 11 or November 26, 1978 employment injuries.[3]

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[1] See *Randall Huffines*, 32 ECAB 134.

[2] The Office hearing representative selected October 28, 1980 as the date of maximum improvement. There is an October 28, 1980 work tolerance limitations report from Dr. Sonni who set forth appellant's physical limitations. However, it was the October 24, 1980 report from Dr. Santiago-Vasallo which established that appellant had reached maximum improvement in regard to her right arm.

[3] As already noted appellant's second schedule award should have commenced on October 24, 1980, the date of maximum improvement. Should the Office find that appellant is entitled to disability compensation subsequent to December 12, 1979 such compensation would not continue during this modified period of the schedule award. The Office would, however, be required to determine appellant's continuing entitlement to compensation when such award ended. See *Goldie Washington*, 31 ECAB 239. If appellant is entitled to disability compensation subsequent to December 12, 1979 the importance of determining the correct date of maximum improvement for the second schedule award becomes apparent. Depending upon the length of appellant's disability, an incorrect retroactive determination of appellant's maximum improvement date could deprive her of compensation to which she is entitled in light of the fact that she cannot receive both a schedule award and disability compensation concurrently. See *Marie J. Born*, 28 ECAB 89.

The September 13, 1983 decision of the Office of Workers' Compensation Programs, made final on September 23, 1983, is modified to reflect that the date appellant reached maximum improvement, and the date her 17 percent schedule award for her right arm should have commenced, was October 24, 1980. The case is set aside and remanded for further action as outlined above on the issue of appellant's entitlement to disability compensation subsequent to December 12, 1979, to be followed by a *de novo* decision.

In the Matter of EILEEN ANITA BYRNES *and* DEPARTMENT OF THE NAVY, NAVAL CIVIL ENGINEERING LABORATORY, Port Hueneme, Calif.

Docket No. 84–685; Submitted on the Record;
Issued May 25, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant's injury in a softball game constituted an injury in the performance of duty.

On July 27, 1981, appellant, then a 25-year-old secretary, was hit in the back of the head with a softball during a softball game being played with other employing establishment personnel. She did not seek immediate medical treatment, but after feeling "dizzy, lethargic, and sleepy" for two days, she went to a hospital emergency room on July 30, 1981. Skull x-rays revealed "no fractures or other abnormalities," and appellant was released from the hospital with instructions to rest.

In a statement submitted at the request of the Office of Workers' Compensation Programs, appellant related that she was playing on an employing establishment co-ed team at the time of the injury. She also summarized the medical conditions alleged due to the employment injury.[1]

The Office sent the employing establishment a questionnaire asking it whether appellant was paid for or required by it to participate in the softball game in question; what "specific benefit" the employing establishment received from appellant's participation in the game; whether other employees were "required, persuaded, or permitted" to participate in the game; whether appellant's participation in the game violated any rule or regulation; whether the injury occurred on the employing establishment premises and during appellant's working hours; and what "leadership, equipment, or facilities" it provided for the game. The questionnaire also asked the employing establishment to obtain a statement from appellant responding to similar questions.

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[1] The case record contains various medical reports concerning appellant's medical history and condition. As the Office did not make a final decision on the issue of causal relationship between appellant's condition and her employment injury, these reports are not germane to this appeal.

By letter dated August 12, 1983, the employing establishment stated:

> "The immediate supervisor of Ms. Byrnes has retired so the following information is provided based on memories of other personnel and scanty files. At the time of her injury Ms. Byrnes was not being paid for her recreational activity and no activity of this type was required of her, either as training or assigned duties.
>
> "Ms. Byrnes was never required to participate in these activities and there was no persuasion from her official superior. No benefit to the employer was derived from her participation and no other employees were required or persuaded to participate; although several other employees did participate.
>
> "So far as can be determined now, no rule or regulations of this Command were violated.
>
> "Based on memories, Ms. Byrnes was hit on the head by an object while playing softball with other NCEL [employing establishment] employees on a field located on board the Naval Construction Battalion Center, Port Hueneme. The accident happened during non-work hours. It is believed the gear used by the team was furnished by the NCEL Recreation Association."

In a memorandum dated December 1, 1983, an Office claims examiner, citing the case of *Donald C. Huebler*,[2] recommended that the Office find appellant was not engaged in the performance of duty at the time of her injury.

By compensation order dated December 15, 1983, the Office denied appellant's claim, finding that she "was not engaged in the performance of her regular duties at the time of injury."

The Board finds that the case is not in posture for decision.

The general criteria for performance of duty as it relates to recreational and social activities is set forth in *Larson* as follows:

> "Recreational or social activities are within the course of employment when (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the

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[2] 28 ECAB 17. In this case, the Board found that the appellant was not engaged in the performance of duty when injured in a softball game, even though the game was played on employing establishment premises shortly after appellant's working hours, when there was only "minimal connection of the game with the employment" (such as the printing of the game's results in an employing establishment newsletter, the photographing of players during working hours, and the printing of admission tickets for security reasons).

> activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." [3]

Larson specifically addresses the issue of athletic teams, stating that the pertinent performance of duty test involves the following criteria:

> "[O]n or off the premises and in or out of working hours; varying shades of employer initiative; differences in amount of employer contribution of money or equipment; differing quantities and types of employer benefit." [4]

Larson states that the outcome of such recreation cases turns on the "different 'mix' in the fact situation."

In *Lester W. Dustin*,[5] the Board found that the claimant who sustained a back injury in a softball game on government property after working hours was within the performance of duty when he was injured. The Board found that the employing establishment exercised such control over the Civilian Welfare Fund, which administered the softball program in all aspects, that the employing establishment was regarded controlling the recreational activity in which the claimant was injured.

In *Michael J. Kearney*,[6] the Board also found that a claimant injured in a softball game was injured in the performance of duty because the employing establishment, through the Civilian Welfare Council, exercised direct control over the softball league in which appellant participated. This was evidenced by an employing establishment regulation governing "the establishment, administration, operation, distribution, use, supervision, control, and dissolution of civilian nonappropriated funds," which financed the Council, and by a regulation requiring the installation commander to ensure the "efficient administration, financial stability, and the proper use and dissolution of civilian nonappropriated funds. . . " The employing establishment, in accordance with these regulations, had issued a directive setting forth the procedures to follow in order to establish an organization, such as a softball league, using employing establishment facilities and funds.

The record in the present case has not been sufficiently developed for a decision to be made on the issue of performance of duty. More is required than the conclusory statements in the employing establishment's August 12, 1983 letter that it derived no benefit from appellant's participation in the softball game, and it is not dispositive that she was not required, persuaded, or paid to play in the game by the employing establishment.

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[3] Larson, *Workmen's Compensation Law*, section 22.00.

[4] Larson, section 22.24.

[5] 33 ECAB 571.

[6] 34 ECAB 1380.

The Board notes that the August 12, 1983 letter stated that an "NCEL Recreation Association" furnished the equipment used by appellant's team. On remand, the Office should further develop the record to determine whether the connection between this organization and the employing establishment was such as to give the employing establishment direct control over the recreational activity, as in the cases of the organization in *Lester W. Dustin* and *Michael J. Kearney, supra*.

After such further development as is necessary, the Office should determine the "mix" in the fact situation in the case at hand of types and amount of employer "initiative," "contribution of money or equipment," and "benefit," within the meaning of the above-mentioned discussions from *Larson*.[7] The Office should then issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated December 15, 1983 is hereby set aside and the case remanded for further proceedings consistent with this decision.[8]

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[7] See text accompanying notes 3 and 4, *supra*.

[8] The Board notes that on April 26, 1984, appellant appealed from an alleged April 18, 1984 decision of the Office. Any such decision would be of no effect, as the Office has no jurisdiction over a case while the case is on appeal. See *John J. Clark*, 32 ECAB 1618.

In the Matter of RAYMOND K. THOMAS *and* U. S. POSTAL SERVICE, POST OFFICE, Dayton, Ohio

Docket No. 84–764; Hearing April 27, 1984;
Issued May 29, 1984

Appearances: *Alan J. Shipiro, Esq.*, for the appellant;
Daniel T. Franklin, Esq., for the Director, Office of
Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further merit review pursuant to 5 U.S.C. section 8128(a) was proper.

On December 29, 1976, appellant, then a 42-year-old mail carrier, filed a claim alleging that on December 27, 1976, he slipped on an icy driveway, hurting "my hip and knee which I hurt before." Appellant was examined on December 29, 1976 by Dr. Vinton Young, a general practitioner and appellant's personal physician, who diagnosed post-traumatic capsulitis of the right hip and referred him to Dr. Michael A. Jaffe, a Board-certified orthopedic surgeon.

In a January 24, 1977 report, Dr. Jaffe noted that appellant had injured his right hip in a fall in June 1976. The doctor indicated he believed the December 27, 1976 injury resulted in "an undetected fracture of the right hip."

Appellant received continuation of pay from December 29, 1976 through February 11, 1977. He was on sick and annual leave thereafter through April 5, 1977, and then went on leave without pay. The Office of Workers' Compensation Programs subsequently paid compensation for temporary total disability effective April 5, 1977.

Appellant was hospitalized for diagnostic testing from April 5 to April 11, 1977. His discharge diagnoses were diabetes mellitus, right upper extremity carpal tunnel syndrome, and arthritis related to his diabetic condition. On May 25, 1977, Dr. Jaffe performed surgical exploration of the right distal wrist scar and a release of trigger finger of the right thumb.

Dr. Robert Po, a Board-certified orthopedic surgeon who examined appellant upon referral by the Office, stated in a February 7, 1979 report that appellant's injury "resulted in enhancement of symptoms of nerve irritation due to diabetes and in the earlier manifestations of his problems." On June 26, 1979, the Office issued a schedule award for a five percent impairment of the right hand and five percent impairment of the right leg, with the award running from May 20, 1979 through a portion of November 22, 1979.[1]

Dr. Byron J. Park, a Board-certified orthopedic surgeon who examined appellant on the Office's referral, stated that appellant's pain in the right lower extremity was causally related to his employment injury, and that his right upper extremity condition was not employment related. The doctor stated this impairment was "secondary to [appellant's] long-standing diabetes, and is compatible with a peripheral diabetic polyneuropathy."

The Office determined that a conflict existed between the opinions of Drs. Po and Park and referred appellant, along with the case record and a statment of accepted facts, to Dr. Robert R. Kessler, a Board-certified orthopedic surgeon and impartial medical specialist, to resolve the conflict. In a June 30, 1982 report, Dr. Kessler stated that appellant's diabetes of "30 years plus" caused "severe impairment of function of the body as a whole," but that appellant had made "a full and complete and excellent recovery [from his December 27, 1976 employment injury] in a matter of months subsequent to the injury, giving him the benefit of having possibly sustained a nondisplaced fracture through the greater trochanter on the right side."

By compensation order dated November 9, 1982, the Office denied appellant's claim for continuing compensation, finding that "the preponderance of medical evidence of record establishes that disability due to injury had ceased."

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[1] The Office notified appellant by letter dated June 26, 1979 that his compensation had been "terminated" so payments for his schedule award could begin.

Appellant requested reconsideration and submitted a January 31, 1983 report of Dr. Berkeley Slutzker, a Board-certified internist, who stated that he had treated appellant initially in February 1975 for juvenile type (insulin dependent) diabetes mellitus and recurrent Meniere's syndrome. The doctor further stated:

> "In 1979 and again in 1980 consultant physicians have diagnosed diabetic neuropathy, aggravated by the traumatic episode.
>
> "Mr. Thomas, according to records available to me, had no evidence of diabetic neuropathy in 1975, when he was seen by me, and to the best of my knowledge never complained of the symptoms occasioning this diagnosis prior to his injury and his subsequent care by Dr. Jaffe for the associated orthopedic condition.
>
> "It is therefore my conclusion that Mr. Thomas has a peripheral neuropathy, as described above, with loss of strength and sensation in the right upper and right lower extremities, with paresthesia in these areas, and that these are a direct result and complication of injury sustained in 1976, with secondary traumatic neuropathy aggravated by subsequent surgical procedures, and that the persistent neuropathy is indeed probably diabetic, but was occasioned by injury, it not having existed prior to the injury and treatments described above.
>
> "I would diagnose in the case of Mr. Raymond Thomas: (1) highly brittle insulin dependent diabetes mellitus; (2) old injury, right wrist and right hip, with *secondary* diabetic neuropathy, which has never recovered." (Emphasis in original).

In an October 31, 1983 report, Dr. Slutzker stated that appellant's condition had not changed since his January 31, 1983 report. In an October 26, 1983 report, Dr. Young stated he had been appellant's family physician since January 1958 and that appellant had never complained of right wrist or hip problems, or of any problem with an extremity, before his employment injury. The doctor opined that appellant's right wrist and right lower extremity conditions "are entirely posttraumatic and remotely aggravated by preexisting diabetes mellitus, insulin dependent."

The case record was reviewed by Dr. Arthur K. Cieslak, a Board-certified surgeon and Office medical consultant, who stated in a November 16, 1983 report that the medical reports submitted in support of the request for reconsideration added "no new evidence," but did "bring up provocative thinking." The doctor stated that it "may be wise" to obtain the opinion of a neurologist on whether appellant's conditions are causally related to his employment injury or due to his diabetic neuropathy, retinopathy, ulcers, hypertension, Meniere's disease, or anxiety.

An Office claims examiner's memorandum dated December 22, 1983 stated that the reports of Drs. Young and Slutzker were insufficient to require reopening the case on its merits because "[n]either physician is a specialist of an appropriate area, i.e., orthopedic and neurology," and neither "provided medical reasoning nor an explanation for" his opinion.

By compensation order dated January 11, 1984, the Office denied appellant's request for reconsideration on the ground that the evidence submitted in support of the request "lacks substantial probative value."

The Board notes that the only decision before it is that of the Office dated January 11, 1984 which found that the evidence submitted in support of the request for reconsideration was insufficient to require review of the November 9, 1982 merit decision. Since more than one year has elapsed from that decision until the filing of appellant's appeal on February 2, 1984, the Board lacks jurisdiction to review that decision.[2]

The Board finds that the Office's refusal to reopen the case for a merit review was improper.

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128.[3] Accordingly, as is well-established under Board precedent,[4] the Office is required to reopen a case on its merits when such evidence or contentions are presented.[5]

In the present case, appellant submitted relevant medical evidence not previously of record sufficient to require the Office to reopen the case for reconsideration. The January 31, 1983 report of Dr. Slutzker, a Board-certified internist, expressed the doctor's opinion that appellant's "persistent neuropathy is indeed probably diabetic, but was occasioned by injury, it not having existed prior to the injury. . ." The doctor noted that appellant had no symptoms of diabetic neuropathy when he saw him in 1975 for diabetes mellitus. The report of Dr. Young, a general practitioner and appellant's personal physician, also supported causal relation.

Dr. Cieslak, a Board-certified surgeon and Office medical consultant, stated that, although the additional reports did not add "new evidence," they raised "provocative thinking," and he recommended the Office obtain an opinion from a neurologist. An Office claims examiner, however, recommended that reconsideration be denied, as neither Dr. Young nor Dr. Slutzker specialized in "an appropriate area, i.e. orthopedics and neurology," and neither provided medical rationale. The Board notes that as a Board-certified internist, Dr. Slutzker specialized in an area of medicine germane to the case, and his opinion supporting causal relationship between appellant's diabetic neuropathy and his employment injury was sufficient to require the reopening of the case on its merits.

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[2] 20 CFR section 501.3(d)(2). See *Nicholas Gatto*, 25 ECAB 300.

[3] *Eladio Joel Abrera*, 28 ECAB 401.

[4] See, e.g., *Cynthia L. Lee*, 15 ECAB 425; *Leopold J. Gunston*, 18 ECAB 149; *Billy F. Carter*, 32 ECAB 1987.

[5] The Board notes that the Office's compensation order of January 11, 1984 refused to reopen appellant's case because the additional evidence lacked "substantial probative value." As the Board has recently clarified, see *Ethel D. Curry*, 35 ECAB 737, this is not the correct test to follow in determining whether to reopen a case for reconsideration.

Following remand, the case record should be reviewed by a Board-certified neurologist, as recommended by Dr. Cieslak, for an opinion on the issue of causal relationship. After such further development as is necessary, the Office should issue a *de novo* decision on the merits of the case.

The decision of the Office of Workers' Compensation Programs dated January 11, 1984 is hereby reversed and the case remanded for further proceedings consistent with this decision.

In the Matter of ROMEO E. PENA *and* DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, Tex.

Docket No. 84–597; Submitted on the Record;
Issued May 31, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant has any disability causally related to factors of his federal employment.

On March 27, 1981 appellant, then a 35-year-old aircraft jet engine repairer supervisor, filed a claim alleging that he sustained central nervous system damage as a result of exposure to chemicals at work from 1976 to July 29, 1980. He enumerated the following chemicals used in the adjacent chemical cleaning area he believed were responsible for his condition: alkaline rust remover, alkaline permanganate, paint stripper, carbon remover, sodium hydroxide, nitric acid, hydrofluoric acid, phosphoric acid, cyanide, sodium carbonate, potassium hydroxide, MEK, acid descaler, and tetracherethene.

From December 1976 to July 29, 1980, appellant was exposed to the fumes generated from the cleaning department adjacent to his area of responsibility from eight to twelve hours per day, five to seven days a week. In July 1980 he was found medically disqualified from working in the area, due to his exposure to toxic fumes.

The employing establishment submitted a February 9, 1978 report which indicated that the annual health survey had been completed in appellant's work area. Air samples for sodium hydroxide, hydrocarbons, and cyanide were collected and all samples were below the threshold limit value for those chemicals. Air samples for sodium hydroxide (NaOH) were taken on September 25 through October 2, 1980. A report on October 6, 1980 covering the first thirteen samples, revealed ten were negative (less than 0.2 mg/1) and the last three ranged from 0.37 to 0.45 mg/1. The permissible exposure level (PEL) for NaOH is 2.0 mg/1 for an eight-hour work day. The samples did not reach one-quarter of the PEL. It was indicated that the reported levels may cause irritation to the worker, but they were far from being hazardous levels.

In a February 6, 1978 report, Dr. Frankling L. Spann, a Board-certified otolaryngologist, stated that he saw appellant on February 1, 1978 for a complaint of a tightness in his throat and some wheezing in his breathing which was intermittent and more noticeable at night. The doctor stated that appellant was recuperating from an acute respiratory infection sustained January 22 to 29, 1978. Dr. Spann diagnosed "tonsillitis, follicular, chronic, with intermittent acute exacerbation" and "epiglottitis, subacute." He recommended that after appellant's upper respiratory infection subsided he should be checked as to any reactions to inhalation of commercial solvents used in his work.

In a February 20, 1979 report, Dr. Horatio R. Aldredge, a Board-certified neurologist, stated that appellant complained of "headaches in his right temple, pounding and throbbing in character. . . beginning with a discomfort in his neck." Cervical spine films were within normal limits, cranial nerve function was intact. His strength, reflexes, sensory examination, station and gait were all normal. Dr. Aldredge opined that appellant's headaches were vascular in nature.

Appellant was hospitalized from February 26 through March 3, 1979 for localized right temporal headaches which had been present for approximately one month. A computerized axial tomography (CAT) scan of the brain with and without enhancement was negative. A transfemoral cerebral arteriogram was performed which showed no evidence of aneurysm, arterial venous malformation or tumor in the posterior fossa. Arteriograms of the carotid vessels were normal, as well as his chest x-ray. Impression at the time of discharge was "right sixth cranial nerve palsy, etiology undetermined."

Appellant was rehospitalized on March 5, 1979 because of continuing pain. In addition to the sixth nerve palsy, he had evidence of a fifth nerve involvement with paresthesias of the face and evidence of weakness of the masseters. A technetium scan was normal as well as tomograms of the sphenoid series. A biopsy of the nasopharynx and nasopharyngoscopy was negative. The discharge diagnosis was "orbital apex syndrome."

Dr. Walter F. Buell, a Board-certified neurologist, submitted the following October 5, 1979 statement, addressed to appellant:

> "*** The neurologic examination on September 17th showed very minimal change, with slight decreased skin sensitivity on the right side of the face. There was very slight flattening of the right lower face, quite minimal really.
>
> "I reviewed all of your hospital records from Methodist Hospital relative to the admissions in March and April of 1979. Aside from slight elevation of the blood sugar on glucose tolerance testing, there was really no other abnormality noted in all the various tests that were done including arteriograms, spinal fluid examination, computer scanning.
>
> "As we discussed, my final diagnosis on the case would be multiple cranial neuropathy, undetermined as to etiology. What this means is that multiple nerves to the head were affected by an as yet unknown disease process.
>
> "As we discussed, my previous experience with such cases would suggest to me that the situation will continue to gradually improve and should not recur. This is a relatively rare condition; however, and I think it will be important for you to keep in touch with your neurologist, and certainly to report any sort of new problem or change. Hopefully, this will not be necessary."

In a September 29, 1980 report, Dr. George M. Rapier, III, a Board-certified internist, diagnosed appellant's condition as "cranial nerve paralysis of the right 5th and 6th cranial nerves, exact etiology undetermined." He stated, however, that toxic central nervous system damage could not be excluded, and recommended strict avoidance of further toxic exposure.

On May 10, 1982 an Office of Workers' Compensation Programs medical adviser reviewed the case record and opined that it was possible, but unproved, that appellant's cranial nerve paralysis of the right fifth and sixth cranial nerves was causally related to factors of his federal employment. He recommended appellant be examined by an impartial neurologist in order to obtain another opinion on causal relationship.

In September 1982 the Office requested Dr. Aldredge to reexamine appellant and give a reasoned medical opinion as to whether his condition was causally related to factors of his employment. He was furnished a statement of accepted facts and the case record.

Dr. Aldredge submitted the following October 13, 1982 report:

> "I evaluated Mr. Pena on 12 October 1982. I was involved in his original treatment in February of 1979 at which point he had a painful syndrome involving loss of the right sixth nerve, third nerve, and to some extent, the fifth nerve. Following appropriate studies,

> he was given a course of anti-inflammatory agents; namely, Prednisone, which therapy resulted in a total resolution of his multiple cranial neuropathies by June of 1979. He has been off of Prednisone since June of 1979 with normal cranial nerve function although he does have some referred sensations to his right temple which may represent aberrant regeneration of sensory fibers in his fifth cranial nerve."

* * *

> "On examination, currently his mental status is normal except for a depressed affect. Cranial nerve function is entirely normal. There is no loss of sensation over his face. Eye movements are full without any evidence of sixth nerve palsy. Pupils are reactive. Fundi are normal. Other cranial nerves appear quite normal. There is no facial asymmetry. Strength, coordination, reflexes, sensory examination, station and gait are all normal. Toes are downgoing.
>
> "His neurological examination is currently within normal limits. He has no evidence of any form of cranial nerve paralysis at this time. His original condition was a painful ophthalmoplegia, a well known but poorly understood entity which has resolved entirely, which in my opinion, cannot be considered approximately related to the reported circumstances of the claimant's federal employment. In terms of recommendations as to his future management, I think most of his complaints are those of a residual depressive reaction secondary to his acute illness. Should he respond appropriately to an antidepressant medication, he should have no symptoms whatsoever and should be able to maintain completely productive activities with a full normal schedule of work. If I can be of further assistance in this matter, please do not hesitate to ask."

In November 1982 the Office referred appellant, together with the statement of accepted facts and the entire case record, to Dr. Wilbur S. Avant, Jr., a Board-certified neurologist. With respect to his November 15, 1982 evaluation of appellant, Dr. Avant concluded the following:

> "IMPRESSION: (1) Status post-fifth and sixth cranial nerve neuropathy, possibly viral in nature, with apparent aberrant regeneration resulting in sensory dysesthesias, as mentioned above, in the fifth cranial nerve on the right side, which are permanent and should not change significantly at this late juncture. (2) Intermittent neck and shoulder pain and paresthesias in the arms with clinical weakness in the C7 distribution and EMG abnormalities significant of mild to moderate C7 radiculopathy bilaterally which helps to explain some of his more recent symtoms which are not related to his previous injury. I do not find him to be unduly depressed and

> do not think he needs antidepressant medication. Although his symptoms of the cranial nerve abnormality came on while at work, I do not believe that they were related to a work injury, as well as I can determine, both from the patient and from the history. I have reviewed the 'Statement of Accepted Facts' and although he was using a number of chemicals at the time, it is highly uncommon for a cranial neuropathy to occur prior to manifestation in some of the other more sensitive peripheral nerves, such as those in the hands or feet, and most likely, his symptoms were due to a spontaneous viral or other inflammatory process which has resolved. As for his evidence of cervical radiculopathy, I suspect that this is also not related to his work status, but more likely is spontaneous, as it often is. ***"

A different Office medical adviser reviewed the record on February 21, 1983 and opined that appellant's condition was not causally related to his employment.

By compensation order dated March 25, 1983 the Office rejected appellant's claim on the basis that the medical evidence did not establish that his condition and/or disability was causally related to factors of federal employment.

In a letter dated July 20, 1983 appellant requested reconsideration and, in support thereof, submitted a May 4, 1983 report from Dr. Sally R. Cowles, a Board-certified specialist in occupational medicine of professorial rank; a November 1, 1982 report from James C. Garriott, Ph.D., a toxicologist; statements from coworkers who allegedly experienced the same or similar symptoms and medical problems; a February 20, 1979 letter indicating the existence of health violations in appellant's work area; and an excerpt from the AFLC Maintenance Certification Program Study Guide/Workbook.

Dr. Cowles examined appellant on April 21, 1983 and reported in pertinent part:

> "Based on the information Mr. Pena has presented and review of the medical records he has shown me, it would appear that Mr. Pena does indeed have some ground for suspecting a possible work-related etiology for his current condition. This impression is based on several points which may be important to this case and which do not appear to have been previously addressed.
>
> "First Mr. Pena has a long history of exposure to a variety of known neurotoxins. . . When he moved and became supervisor in 1976, he continued to be exposed to mixed solvent vapors and additionally to a variety of other chemical mists and vapors from the adjacent chemical cleaning area. Again, known neurotoxins were part of these exposures. . . as were recognized respiratory irritants . . . Exposure to organometallic compounds as a result of the

action of carbon remover on engine parts, may also have occurred and have been a factor in the development of his condition. Cresylic acid in carbon removers readily reacts with metals to form organometalloids which are recognized neurotoxins. The fact that 16 of his workers had to transfer out of the area because of medical problems related to the respiratory tract would appear to provide ample verification that chemical vapors, mists, and fumes were higher than they should have been during normal working hours, and often well above levels sampled during yearly environmental sampling of the area. The need for evacuations from the area due to solvent vapor accumulations on various occasions would also tend to confirm this impression. Another additional item supporting Mr. Pena's contention that chemical exposures were higher than they should have been is the fact that the vapor degreaser operator chose to wear a respirator while working -- a properly functioning degreaser should not produce vapor levels in the operator breathing zone sufficient to require respirator use.

"Kelly Air Force Base apparently did not have an effective respiratory protection program in effect during the period from 1976 to 1979 and Mr. Pena and his work group were not offered respiratory protection. In addition, it would appear that no effective safety program was operating, for apparently no employee education regarding the hazards of substances worked with was provided.

"Mr. Pena's respiratory complaints beginning in 1978 would appear to have been related to his work exposures, and were certainly consistent with the type of problems others working in that work area were experiencing.

"The neurologic problem Mr. Pena developed in 1979 is less clearly related, but is compatible with continuing exposure to neurotoxins in a setting in which sinus and upper respiratory irritation provided increased potential for absorption in these areas and increased likelihood of involvement of cranial nerves. Obviously such a hypothesis is impossible to prove, but should at least be considered. Even if the neurologic condition Mr. Pena developed were viral in origin, one might argue that the chronic sinus irritation caused by his work exposures was a predisposing factor.

"In summary, a toxic etiology for Mr. Pena's condition does not appear to have been convincingly ruled out, and I find it very difficult to understand how a neurologist can state categorically that it has. Mr. Pena's presentation is not typical for the usual peripheral neuropathy seen with pure solvent exposures, but on the other hand, he has had a variety of exposures in a variety of settings with a potential for interactions between mixtures of recognized neurotoxins under less than ideal circumstances. It is my impression that a toxic etiology for Mr. Pena's condition remains a distinct possi-

> bility, if not probability, but that at this point it is impossible to prove. It would also be of interest to know whether Mr. Pena has had the polypoid lesion in his right maxillary sinus investigated"

A third Office medical adviser reviewed the case record on August 28, 1983 and opined that the weight of the medical evidence indicates that the probable cause of appellant's symptom complex of unknown etiology was viral and in no way work related.

By compensation order dated October 5, 1983 the Office found that the evidence submitted was not sufficient to warrant modification of the prior decision.

The Board finds that the weight of the evidence fails to establish that appellant's condition was causally related to his employment.

An award of compensation may not be based on surmise, conjecture, or speculation. The mere fact that a disease developed during or immediately after a period of employment does not raise a presumption or inference of causal relation between the two.[1] Neither the fact that the disease became apparent during a period of employment, or the belief by appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[2]

Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that the disabling condition upon which his claim is predicated was causally related to his employment. When appellant was initially hospitalized in 1979 for complaints his condition was diagnosed as "right sixth cranial nerve palsy, etiology undetermined." The fact that the etiology of a disease is unknown or obscure does not shift the burden of proof to the Office so as to require it to disprove an employment relation.[3] Neither does the absence of a known etiology for his cranial neuropathy relieve appellant of the burden of establishing a causal relation by the weight of the evidence, which includes affirmative medical opinion based on the material facts with supporting rationale.[4] Causal relation between the disabling disease and the employment must be established in each case by affirmative evidence.

Although Dr. Cowles, Board-certified in occupational medicine, stated there was a possible relationship between appellant's condition and his work, the doctor admitted that such a hypothesis was impossible to prove.

On the other hand, Dr. Avant, a Board-certified neurologist, in a well-rationalized report, after examining appellant and the entire case record, negated causal relationship and opined that appellant's symptoms were most likely viral. Additionally, Dr. Aldredge negated causal relationship.

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[1] *Dr. Nathaniel M. West*, 22 ECAB 245.

[2] *Maximo Manadero*, 25 ECAB 65.

[3] *Arthur Benton Hauft*, 19 ECAB 351.

[4] *Dr. Nathaniel M. West*, *supra*; *Meyer Klein*, 27 ECAB 304.

The decisions of the Office of Workers' Compensation Programs, dated March 25, 1983 and October 5, 1983, are hereby affirmed.

In the Matter of STANISLAW M. LECH *and* GOVERNMENT PRINTING OFFICE, Washington, D. C.

Docket No. 83–1905; Hearing May 16, 1984;
Issued May 31, 1984

Appearances: *Marie M. Lech and Stanislaw M. Lech* for appellant; *Brenda Stovall, Esq.* for the Director, Office of Workers' Compensation Programs

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's employment-related heart condition had ceased by March 24, 1983, the date the Office of Workers' Compensation Programs terminated his compensation.

On April 12, 1966 appellant, then a 52-year-old bookbinder, filed a claim alleging angina pectoris on March 1, 1966 due to the stress of his employment.[1] He submitted the April 2, 1966 report of Dr. Charles E. Keegan, an internist, who stated appellant had been treated since March 1, 1966 for complaints of typical anginal syndrome and that his electrocardiograms were indicative of myocardial ischemia. Dr. Keegan indicated that appellant was to avoid heavy lifting, labor and an excess of emotional episodes.

On April 4, 1966 appellant underwent examination by Dr. Lester J. Dugan, a physician with the employing establishment, who reported that an electrocardiogram taken of appellant revealed "no contraindication to the employee doing full duty." He noted that chest x-rays did not reveal any cardiac enlargement.

In reports dated June 3 and 28, 1966 Dr. Keegan diagnosed coronary artery disease and indicated that appellant's electrocardiograms evidenced findings consistent with a diaphragmatic myocardial infarction - age undetermined.

By letter dated July 13, 1966 the Office of Workers' Compensation Programs (then the Bureau of Employees' Compensation) notified ap-

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[1] Specifically, appellant alleged his angina pectoris was caused by emotional stress precipitated by alleged discriminatory practices and harassment by his immediate superiors at the employing establishment. He stopped work March 1, 1966 and utilized sick leave though March 16, 1966. He worked from March 18, 1966 to May 16, 1966. He was paid leave through June 24, 1966.

READEX FICHE

pellant that Dr. Keegan's reports did not contain an opinion on the relationship of his coronary artery disease to his federal employment. He was advised to furnish further evidence in support of his claim.

On August 1, 1966 Dr. W. Proctor Harvey, a cardiologist, submitted a report in which he stated that appellant had "underlying coronary artery disease with angina pectoris, and possibly old diaphragmatic myocardial infarction." He included laboratory test results which represented "a positive test, compatible with coronary insufficiency and myocardial ischemia." Dr. Harvey noted that the episodes of angina appeared to be produced when appellant was under unusual emotional stress. He also indicated that appellant had chronic venous insufficiency of the right lower extremity. Dr. Harvey concluded by noting generally that patients who had such disability were usually able to perform some type of work in a satisfactory manner.

In a report dated September 14, 1966 Dr. Keegan stated:

> "[Appellant] has been under my care since July 1963 because of anginal syndrome, arteriosclerotic heart disaease and coronary insufficiency."
>
> * * *
>
> "While we do not propose that emotional factors are clearly causative in relation to the arteriosclerosis itself, there is serious radical conjecture that it is a factor. There is no doubt in my mind (or in the medical mind, in general) that emotional factors can precipitate anginal and coronary insufficiency or occlusion in a patient who has preexistent arteriosclerosis."

On December 13, 1966 an Office medical adviser reviewed the record and noted there was no evidence from the record or medical literature that confirmed the relationship between appellant's coronary artery disease and the factors of his federal employment. However, he stated that appellant's angina "may well be related to the stressful conditions of employment for very transient periods and has not aggravated in any way the underlying heart disease." He recommended that appellant be referred to a cardiologist for an opinion on the issue of causal relationship.

On February 13, 1967 appellant was referred, together with the case record and a statement of accepted facts, to Dr. Benjamin Manchester, a Board-certified cardiologist. In a report dated March 16, 1967 he stated as follows:

> "Mr. Lech complains of restrosternal pain and oppression, precipitated by exertion or excitement. The discomfort is described as, 'burning tightness, like a toothache and like pressure' located over the anterior chest wall, extending from the restrosternal region leftward over the precordium. The discomfort usually is of 3 to 5

minutes in duration and radiates over the shoulder and down the medial aspect of the left brachium as far as the middle third of forearm. Relief is obtained by rest or nitroglycerine. Inclement weather, hurry, anxiety and tension readily provoke this chest distress.

"He states the first episode of substernal oppression developed March 1, 1966 while walking across the street to the Government Printing Office. The substernal oppression was accompanied by choking dyspnea, diaphoresis and weakness; the pain radiated down the left arm. The discomfort waxed and waned in intensity for about three hours. He was treated at home by his personal physician, Dr. C. E. Keegan, who confined him to bed for two weeks.

"On returning to work on March 18, 1966, he found that the lifting of books weighing ten to fifteen pounds and the washing-off of the glue from these books was too strenuous and often precipitated dyspnea and substernal oppression. He was denied lighter work and he became aware of friction and tension between himself, immediate supervisor, and some co-workers.

"On May 16, 1966, following a heated discussion at work, he again developed more prolonged substernal tightness and radiation to the left shoulder and left arm. The chest discomfort was the most severe he had ever experienced and again Dr. Keegan found it necessary to confine him to bed for a more prolonged period. He has not returned to work. The stress of economic insecurity, anxiety that he may be 'blacklisted' for any other federal employment has frequently produced tension accompanied by anginal pain."

* * *

"X-ray and fluoroscopic examination of the chest reveals the pulmonary parenchyma, diaphragm and thoracic cage to be normal. The heart is enlarged; the outflow tract of the left ventricle is elongated. The aorta shows increased density and moderate tortuosity. In the left anterior—oblique view the retrocardiac space is encroached upon by the left ventricle. In the right anterior oblique view the retrosternal space is clear. The esophagus is in the midline and follows the course of the descending thoracic aorta.

"Electrocardiogram reveals the following significant findings: RATE: Atrial and ventricular 110; RHYTHM: Regular sinus rhythm; AXIS DEVIATION: normal; INTERVALS: P-R 0.17 seconds; Q-R-S 0.07 seconds; R-T 0.23 seconds.

"GRAPHIC INTERPRETATION: Bifid P waves in Leads 3, a VF; Q waves in Leads 3, a VF are prominent; inverted T waves in Lead 3, a VF; T waves isloectric or of low amplitude in Leads 2, V^1-V^6.

"INTERPRETATION: These changes indicate an old healed myocardial infarct, involving the inferior wall of the heart and an-

> terio-lateral myocardial ischemia. A double standard Master's test is positive for coronary insufficiency. The ischemic changes are more pronounced immediately after exertion and continue to be positive in the records taken 2, 3, 6, and 8 minutes after the exercise tolerance.
>
> "CLINICAL CONCLUSIONS: Mr. Lech has coronary atherosclerotic heart disease, myocardial infarction (old healed) involving the inferior wall of the left ventricle, cardiomegaly (moderate), coronary insufficiency, angina pectoris, and a Functional Classification of Grade 3C. In addition, he has varicose veins in both legs and acute coryza.
>
> "Mr. Lech's apprehension and anxiety are well-founded. Angina pectoris in a volatile person makes the host a candidate for sudden and unexpected death. Due to his foreign background and his inability to maintain rapport with his supervisor and co-workers, his symptoms and disabilities were often ignored or belittled. Tension and insecurity created a clinical setting for recurrent anginal attacks and coronary insufficiency. The use of the arms in a forward and backward thrust or in the act of lifting most readily precipitates an attack of angina pectoris. Often this chest discomfort is misinterpreted by patients and even doctors. It is, therefore, easy to understand how ordinary laymen would misinterpret such physical distress, even to the point of ignoring it.
>
> "The objective signs in the electrocardiogram noted by Drs. Keegan, Proctor Harvey, and Aris, as well as, in my office leave no room to suspect that Mr. Lech is malingering. Afflicted with such a grave disease of the heart, not readily discernible except by cardiologists, and doubted by his superiors, any normal man would soon develop anxiety, frustration, hostility and despair.
>
> "Such artery disease, however, may permit a man to lead a productive and useful life, if permitted to work at more sedentary, administrative tasks in a cordial, pleasant atmosphere. It is impossible and medically contraindicated for Mr. Lech to perform the work assigned to him during the latter months of his employment at the Government Printing Office."

On March 22, 1967 the Office medical adviser reviewed Dr. Manchester's report and concurred in his opinion.

In response to a request by the Office medical adviser to clarify his report Dr. Manchester stated in a report dated March 23, 1967, as follows:

> "The following replies to your questions are furnished in detail for the purposes of your record and information: (1) Q. Was myocardial infarction causally related to conditions? A. No.
>
> "(2) Q. Was the underlying coronary atherosclerotic heart disease

> aggravated by the employment conditions? A. In an environment of misunderstanding and irritation, an individual who has coronary atherosclerotic heart disease and angina pectoris, the episode of angina will be more frequent and more distressing.
>
> "(3) Q. If so, is aggravation continuing? A. Mr. Lech's angina pectoris occurs less often because he is not working under the unpleasant circumstances of the Government Printing Office. However, he is now insecure, and fears that his record with Civil Service Commission will prevent him from getting another job. This anxiety and insecurity are now factors that often cause angina pectoris. This is related to his circumstances as they concern his work.
>
> "(4) Q. What are the work limitations? A. Many patients with angina pectoris may lead productive lives if they are assigned sedentary activity, of an administrative nature, and the surroundings are free of hostility and misunderstanding."

On May 10, 1967 the Office accepted appellant's claim as an aggravation of his underlying coronary atherosclerotic heart disease as a result of his federal employment.

On June 9, 1967 a second Office medical adviser reviewed Dr. Manchester's reports and indicated appellant was totally unable to do any productive work.

Appellant received compensation for temporary total disability commencing June 30, 1966.

On July 10, 1968 the Office referred appellant back to Dr. Manchester for an evaluation. In a report dated August 30, 1968 Dr. Manchester noted that appellant continued to show evidence of "coronary atherosclerotic heart disease; coronary insufficiency; old healed inferior wall myocardial infarct, angina pectoris on effort and a functional classification of Grade 3C." He indicated that appellant was unable to resume his previous duties and estimated a 50 percent permanent disability.

On August 12, 1968 an Office rehabilitation adviser reviewed the record and concluded that "any ideas about this man reentering employment are purely academic and have no practical value."

On August 18, 1969 the Office referred appellant to Dr. Manchester for a cardiological evaluation. In a report dated November 19, 1969 Dr. Manchester stated:

> "Mr. Lech continues to show evidence of coronary atherosclerotic heart disease, an old healed inferior wall myocardial infarct, angina pectoris, and a functioning classification of grade 2B. His physical disability is due, primarily, to pulmonary emphysema, chronic bronchitis and bronchiectasis. Chronic venous insufficiency due to varicosities have been noted previously.
>
> "At present, Mr. Lech shows 10-15 percent partial permanent

> disability. However, he can lead a productive life involving administrative responsibilities without strenuous physical exertion.
>
> "Mr. Lech contributes to his disability. In the interim, since my reports of March 16, 1967 and August 30, 1968, Mr. Lech has done very little to improve his health and well-being. He continues to gain weight, smoke and ignore rules of moderation."

Between 1970 and 1982 the Office referred appellant for periodic examination to the United States Public Health Service. During this period appellant submitted letters to the Office indicating that he had undergone annual medical evaluations.

By letter dated November 24, 1981 the Office advised appellant to submit an updated medical report on his condition. In response to the Office's request, appellant forwarded a copy of his U.S. Public Health Service records.

On December 12, 1982 a third Office medical adviser reviewed the record and noted that there had been no Office review of the medical evidence since January 16, 1970. He noted that the accepted aggravation of appellant's heart condition should have ceased within a three-month period of the March 1, 1966 coronary incident and that his current disability was due to his preexisting arteriosclerotic heart disease.

On March 25, 1982 the Office referred appellant, together with case record and statement of accepted facts, to Dr. Baiknuth K. Singh, a Board-certified cardiologist of professorial rank. The Office requested that Dr. Singh respond to the following questions: (1) State diagnosis related preexistent and unrelated to the injury sustained on March 1, 1966; (2) Give date when aggravated disability ceased; (3) Is continuing disability related primarily to the condition sustained on March 1, 1966 or to preexisting conditions and manifestations thereof; and (4) Is continuing need for prescriptions and medical attention also primarily due to the aggravated disability or preexisting conditions. In a report dated April 9, 1982 he stated:

> "*Clinical Impression:* (1) Ischemic Heart disease with a chronic stable angina, N. Y. Heart Association Functional Classification: Class III. (2)Hypertension, mild to moderate, under control with medications. (3) Generalized obesity. (4) Probable mild chronic obstructive lung disease.
>
> "*Discussion*: Mr. Lech suffers from hypertensive cardiovascular disease complicated by severe angina. His coronary risk factors include a history of cigarette abuse for many years, chronic hypertension, obesity and positive family history for premature arteriosclerosis which is a slow progress of many years' duration before angina begins to manifest. It is therefore presumed that he must have preexisting coronary artery disease when his angina was precipitated in 1966 due to occupational stress. Obviously his angina

> has worsened over the last sixteen years despite removal from occupational stress. It is unlikely that persistence of angina is stress related, occupational or otherwise, and is probably due to progression of underlying coronary arteriosclerosis. Although his medical managment seems to be excellent, I believe there is room to try larger doses of Inderal along with calcium channel blocking agents for satisfactory control of angina. Unfortunately he has made no effort to loss his weight. I believe that if optimum medical management fails to control his angina he should have cardiac catherterization to consider coronary artery bypass surgery.
>
> "In answer to your specific questions I offer the following reply. (1) Preexisting condition: Sub-clinical coronary artery disease prior to March 1, 1966, obesity, superficial varicose veins both lower extremities and probably mild chronic obstructive lung disease. (2) I believe the temporary aggravation of angina due to stress related factors ceased many years ago following removal from occupational stress. However, it is diffcult to give an exact date. (3) His continuing disability is due to preexisting coronary artery disease and its manifestations thereof as well as obesity and poor exercise tolerance because of obesity and probable chronic obstructive lung disease. Angina is certainly a factor in his disability but it can no longer be attributed to employment-related stress. (4) I do not think that he is entitled for continuing care, prescriptions, medical attention due to employment-related stress because his stressful situation due to employment existed many years ago. He does however need close medical attention because of hypertension and severe angina due to his underlying preexisting coronary disease, but I believe this can no longer be justified on the basis of the stress he suffered 16 years ago."

On December 22, 1982 a fourth Office medical adviser reviewed Dr. Singh's report and noted that although appellant needed medical care secondary to his hypertension and angina, such treatment was no longer justified on the basis of employment-related stress. He concluded that appellant's angina was no longer aggravated by his federal employment.

By compensation order dated March 22, 1983 the Office terminated appellant's compensation effective March 24, 1983 finding that the weight of the medical evidence established that he had recovered from the effects of the accepted employment-related condition.

The Board finds that the case is not in posture for decision.

First, the questions which accompanied the statement of accepted facts and on which Dr. Singh based his opinion appear to be leading in that they requested him to state his diagnosis relative to "preexistent and unrelated" conditions to the injury sustained on March 1, 1966. In addition, the Office asked the specialist to determine "when aggravated disability ceased," implying that it had ceased. Also, it did not first determine whether the coronary incident sustained on March 1, 1966 was a myocardial infarction or an episode of angina pectoris. Second, the Board notes that Dr. Singh's report to the Office was dated April 9, 1982 even though the Multistage Treadmill Exercise Test did not take place until April 14, 1982. It would appear therefrom that the impartial specialist based his opinion in this matter on his examination of appellant and prior to the time when all test procedures were completed. Dr. Singh did not address the treadmill exercise test results. For these reasons, the case must be remanded to the Office for further development.

On remand, the Office should prepare a statement of accepted facts and refer appellant, along with the entire case record, to an appropriate Board-certified specialist for his rationalized medical opinion concerning the following: (1) Whether the coronary incident of March 1, 1966 was a myocardial infarction or angina pectoris; (2) Whether appellant's condition was caused, accelerated, precipitated, or aggravated by factors of his federal employment; (3) If related, whether the employment-related disability was temporary or permanent; and (4) If temporary, the period of employment-related disability. In evaluating the specialist's opinion the Office should recall what the Board has pointed out previously:

> "Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, where * * * the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment."[2]

The March 22, 1983 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further development in accordance with this decision, to be followed by a *de novo* decision.

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[2] *Harold W. Bradford*, 30 ECAB 85; *James L. Hearn*, 29 ECAB 278.

In the Matter of JOSEPH C. SANDERSON *and* GENERAL SERVICES ADMINISTRATION, PUBLIC BUILDINGS SERVICE, Arlington, Va.

Docket No. 84-691; Submitted on the Record;
Issued May 31, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH,
WILLIE T. C. THOMAS

The issue is whether appellant was disabled due to cardiovascular and pulmonary conditions causally related to factors of his federal employment.

On July 17, 1980 appellant, then a 63-year-old retired pipefitter, filed a claim alleging that he had developed a pulmonary and heart condition due to factors of his federal employment. Appellant's case record contains a February 28, 1979 letter from Dr. Tomas J. Hernandez, an internist with a specialty in cardiovascular diseases, in which the doctor stated the following: ". . . [appellant] has been exposed to extreme temperatures and dusty environments for the past several years and has developed marked shortness of breath and cough. He has also developed retrosternal discomfort on mild exertion." Dr. Hernandez concluded that appellant had the following problems: hypertensive cardiovascular disease, severe obstructive lung disease, and coronary artery disease. Appellant also submitted a note from Dr. George W. Ware, a Board-certified general and thoracic surgeon of professorial rank, dated March 12, 1979 which stated that appellant had been "advised to avoid high temperatures as well as low temperature environments . . . and to work no more than 40 hours weekly." He diagnosed hypertensive heart disease, hypoxemia (decreased oxygen in the lungs), abnormal electrocardiogram and abnormal function of the left ventricle.

The employing establishment submitted appellant's job descriptions, physical requirements and asbestos analysis and exposure data.

A March 24, 1980 radiological report indicated the following: "no active pulmonary disease, bilateral pleural plaques are again noted and pleural calcification is present. . . The possibility that these changes are secondary to asbestosis should be considered."

By a June 9, 1980 letter, the employing establishment informed appellant that he was relieved of all duties effective June 16, 1980 because according to the results of his annual physical, appellant was not "ready, willing and able" to perform his duties due to restrictions placed on his physical activities. The employing establishment further indicated that although no light or limited duty was available, "lower grade" positions were available.

In a June 23, 1980 form report, Dr. Ware diagnosed hypertensive cardiovascular disease, mild obstructive lung disease and coronary artery disease. He did not address causal relation or the history of injury.

Dr. Gordon W. Kelley, a general practitioner, submitted a June 30, 1980 form report which indicated that he had examined appellant on that date and diagnosed "hypertensive cardiovascular disease, right bundle branch block, left anterior hemiblock, emphysema [and] asbestosis." Dr. Kelley reported the history of injury as follows: "Patient working with asbestos since 1964 - Public Health x-rays show asbestos." Dr. Kelley indicated he believed appellant's disability was related to the history of injury as given.

In a November 24, 1980 letter, Dr. Kelley stated that he first examined appellant on April 21, 1964 and found his "chest clear." The doctor reported that subsequent Public Health reports and x-rays show the following conditions: hypertension, cardiovascular disease, right bundle branch block, left anterior hemiblock, emphysema and asbestosis. Dr. Kelley opined as follows:

> "[Appellant's] job entails working in high heat conditions with presence of much asbestos, and as my original examination of him prior to his job showed only hypertension mild, most of his health problems appear to be job related."

In a May 29, 1981 form report of a pulmonary examination and testing performed on May 18, 1981, Dr. Louis E. Steinberg, a Board-certified internist and specialist in pulmonary diseases, described appellant's health history, history of exposure and results of pulmonary function tests. The doctor diagnosed the following: "history of asbestos exposure and x-ray findings of pleural calcification, but no evidence of true asbestosis (i.e., parenchymal pulmonary disease), chronic bronchitis, and hypertensive cardiovascular disease." Dr. Steinberg commented as follows:

> "[The appellant] has no evidence to indicate true asbestosis; i.e., interstitial fibrosis. He does have pleural calcification -- which is a manifestation of asbestos exposure; however, pleural plaques generally cause no symptoms or physiological abnormalities unless they are unusually extensive. The evidence is controversial as to whether or not the presence of pleural plaques conveys an increased risk of neoplasm.
>
> "[The appellant] provides a history of chronic bronchitis not attributable to cigarette smoking. There is some evidence that asbestos miners and mill-workers can develop 'industrial bronchitis' though this is not well-established and, though possible, would be tenuous in this case.
>
> "The [appellant's] reduced exercise capacity is not due to respiratory factors but is mainly due to poor physical conditioning possibly aggravated by his cardiovascular disease given his age and general status, it is understandable that he has difficulty working under the current harsh conditions; he should, however, be able to work in a more favorable environment. Several small nodules are noted on the chest film -- probably granulomas. . ."

Dr. Steinberg stated that appellant reported his history of exposure as follows:

> "(a) *Pipefitter* for G.S.A. From 1975 to 1978 [appellant's] work was primarily as a supervisor. From 1978 to 1980 he went back to doing manual labor as a pipefitter and was assigned to the steam distribution room where temperatures were high and conditions were dusty. The patient found it increasingly difficult to work in this environment because of respiratory symptoms. Over the years the [appellant] had a high degree of asbestos exposure in his work as a pipefitter. Never told to wear a mask. [From 1963 to 1980].'
>
> "(b) *Plumber* [From 1947 to 1963]."

On October 2, 1981, Dr. Kelley submitted a form report in which he indicated appellant was able to perform light duty. The doctor stated appellant had the following exposure limitations:

> "[Appellant] should not be exposed to temperature extremes, heavy pollution, heavy lifting or strenuous pulling."

On August 25, 1982 a report of termination of disability was filed which indicated appellant had returned to work on April 12, 1982 "inspecting various buildings for cleaning deficiencies."

In a September 29, 1982 note, an Office of Workers' Compensation Programs medical adviser responded "No" to the question whether appellant's reported condition was causally related to his employment. The medical adviser further indicated that appellant had the following "unrelated" diagnoses: hypertension, coronary artery disease, hypertensive cardiovascular disease, chronic bronchitis, and right bundle branch block. He related appellant's pleural calcifications secondary to asbestos to his employment; however, the medical adviser found appellant was not disabled due to the pleural calcifications and could return to work.

In its compensation order dated March 6, 1983, the Office accepted appellant's claim for pleural calcifications but rejected his claim for compensation on the basis that the medical evidence did not establish that he was disabled due to the calcifications and the appellant has not met his burden of proof in establishing that his heart condition was causally related to his federal employment.

By compensation order dated September 22, 1983 the Office vacated its March 6, 1983 decision. In an order dated September 22, 1983 and approved on September 23, 1983, an Office hearing representative ordered the case file return to the district office for a review of the March 24, 1980 medical report and determination whether appellant was prohibited from working as of June 16, 1980 in the high temperature and dusty environment because of his accepted work-related pulmonary condition.

After review of the medical evidence, a second Office medical adviser stated in an October 13, 1983 note that "[appellant] was *not* prohibited from working as of June 1980 because of his pulmonary conditions."

By compensation order dated October 31, 1983, the Office rejected appellant's claim on the basis that (1) the medical evidence did not establish that appellant was disabled due to pleural calcification and he had no disability which would prevent him from performing his regular duties; and (2)appellant had not met his burden of proof by providing rationalized medical evidence to support a causal relationship between his heart condition and factors of his federal employment.

The Board finds that the medical evidence establishes that appellant contracted an asbestos-related condition due to factors of his federal employment, but that he is not totally disabled therefrom. The Office failed, however, to consider any loss of wage-earning capacity which may have resulted from an asbestos-related condition, as a result of inability to continue working in an environment such as that of appellant's former position.

It is a well-settled principle of workers' compensation law that if the medical evidence establishes that the residuals of an employment-related condition are such that, from a medical standpoint, they prevent the employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. The problem in the instant case is whether the residuals of the employment did, in fact, prevent appellant from continuing to perform the duties of his position. As in any other type of similar situation, this determination is primarily medical in nature and is in the realm of medical evidence.[1]

Here, the medical evidence showed that appellant did not have total disability resulting from his asbestos-related condition. Dr. Steinberg concluded that appellant had "no evidence to indicate true asbestosis; i.e., interstitial fibrosis [although] he does have pleural calcifications - which is a manifestation of asbestos exposure." Further, Dr. Steinberg did not relate appellant's "reduced exercise capacity" to respiratory factors. In his report, Dr. Kelley diagnosed hypertensive cardiovascular disease, right bundle branch block, left anterior hemiblock, emphysema, and asbestosis. He described appellant's physcial limitations including full restriction on heavy lifting and partial restriction on moderate lifting, pulling/pushing, carrying, reaching or working above the shoulder, repeated bending and climbing. The doctor did not opine whether appellant's work-related asbestosis-related condition caused these limitations. Dr. Kelley, however, added that appellant should not be exposed to temperature extremes, heavy pollution, heavy lifting, or strenuous pulling. In addition, Dr. Steinberg reported that appellant should be able to work in a "more favorable environment."

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[1] *Robert C. Pearson*, 32 ECAB 403; *Gerald Alpaugh*, 31 ECAB 58.

According to the Federal (FECA) Procedure Manual:

> "When an employee has suffered a work-related injury which results in permanent residuals there may be disability for work when medical evidence establishes that further exposure to the implicated employment conditions would endanger the employee's health, although the residuals of the injury taken alone might not be disabling. Since exposure to asbestos dust generally results in permanent and irreversible changes in the pulmonary system, in those cases where a diagnosis of asbestos-related disease occurs without disabling pulmonary impairment, or without disability due to associated symptomatology, medical evidence may be submitted which indicates that continued employment in a certain job (or certain work environment) is contraindicated. That is, a treating physician may find an individual 'disabled' for continued normal employment because his job requires (or may place him in an environment which includes) continued exposure to asbestos dust.
>
> "In these circumstances, as has been previously noted, exposure to dust levels which conform to the OSHA standard are not considered potentially injurious. However, in some cases medical evidence may be submitted which indicates that exposure to dust lower than the OSHA standard, or any exposure, is contraindicated. The employing agency will be required to certify that an individual's normal duties are conducted in an environment which conforms to the OSHA standard or, in the latter case, to the contraindicated level of exposure, or that safety regulations and devices are in place which will ensure such levels of exposure. In either case, when medical evidence of record raises the issue, resolution must be accomplished by a complete medical review by the OWCP consultant specialist.
>
> "If continued exposure at any level is contraindicated by medical evidence and if the employing agency cannot certify that the normal employment will take place in an environment that conforms to such level, the claimant will be entitled to compensation for loss of wage-earning capacity if reassignment to a safe work environment results in reduced wages or if no such work is available."[2]

The description of appellant's former position indicates that he would have sustained such exposure if he continued in that position. Thus, while the evidence shows that appellant was not totally disabled from work, it does indicate that the residuals of his employment-related condition may have prevented him from continuing his former position.

This case should be distinguished from one involving a temporary aggravation of a preexisting condition. In such a case, the underlying condition is not caused by employment factors; any aggravation of the condition by employment factors is compensable only as long as it lasts. No compensation benefits are payable after the aggravation ceases, even though the employee cannot return to his former position. However, where, as here, the condition is itself employment-related, compensation benefits may be payable if the impairment prevents the employee from engaging in the kind of work he was doing when injured.[3]

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[2] Federal (FECA) Procedure Manual, chapter 2-806, p. 63.

Given appellant's accepted pleural calcification condition, the Office should, on remand, establish (1) whether continued exposure to asbestos in appellant's normal employment is contraindicated; and (2) whether this adversely affects his wage-earning capacity.[4] Appellant should be referred, together with the case record including his job description and a statement of accepted facts, to an appropriate medical specialist for a reasoned opinion on the above-mentioned issues.

The Board finds that appellant is entitled to medical benefits under the Federal Employees' Compensation Act.[5] Even where no disability is demonstrated an employee with abnormalities in the pleural tissues due to an accepted asbestosis-related condition, as in the instant case, is entitled to the following benefits: payment of related medical expenses, a medical treatment regimen, and regular follow-up medical examinations to closely monitor for progression of the condition.[6] Therefore, the case is also remanded to the Office for a determination of the extent of entitlement to medical benefits.

The Board also finds that appellant has failed to establish that his heart condition is causally related to his federal employment.

An employee has the burden of establishing by reliable, probative and susbtantial evidence that the condition for which he seeks compensation was causally related to his employment. This burden includes the necessity of furnishing medical opinion evidence showing a cause and effect relationship, based upon a proper factual and medical background.[7]

Drs. Steinberg and Hernandez do not address causal relation in the reports they submitted with respect to appellant's hypertensive cardiovascular disease or other cardiac conditions. The first Office medical adviser concluded that appellant's hypertension, coronary artery disease, hypertensive cardiovascular disease, chronic bronchitis and right bundle branch block were all unrelated to conditions of appellant's federal employment. Dr. Kelley, a general practitioner, is the only physician to give support to the claim. In a November 24, 1980 letter, Dr. Kelley stated that since appellant's first examination in 1964 revealed only hypertension, his other health problems were therefore job related. He did not provide any medical rationale or explanation for this opinion; therefore, the statement is speculative and lacks probative value.

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[3] *Dennis L. O'Neill*, 29 ECAB 151; *James L. Hearn*, 29 ECAB 278.

[4] It is unclear from the case record whether appellant has returned to work or remains on leave without pay status.

[5] 5 U.S.C. section 8103 (a)(1).

[6] Federal (FECA) Procedure Manual, Chapter 2-806, p.59.

[7] *Paul Fiedor*, 32 ECAB 1364.

The October 31, 1983 decision of the Office of Workers' Compensation Programs is affirmed insofar as it holds that (1) appellant has not met his burden of proof in establishing that his cardiovascular condition is causally related to factors of his federal employment; and (2) appellant has a job-related asbestos-related condition. The case is remanded for further development in accordance with this decision of the Board and a *de novo* decision on the issues of medical benefits and disability due to continued asbestos exposure.

In the Matter of ERLING S. MATHISEN *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, JOHN FITZGERALD KENNEDY INTERNATIONAL AIRPORT, Jamaica, N. Y.

Docket No. 84–965; Submitted on the Record;
Issued May 31, 1984

Before MARGARET PALLANSCH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the refusal by the Office of Workers' Compensation Programs to grant appellant's request for a hearing was proper.

On October 3, 1980, appellant, a 65-year-old retired electronics technician, filed a claim asserting his heart condition, angina and hypertension were causally related to his federal employment.

By compensation order dated January 24, 1983, the Office of Workers' Compensation Programs rejected appellant's claim on the ground he "had failed to meet his burden of proof to establish by the weight of probative and substantial medical evidence that his disabling heart condition is causally related to factors of his federal employment."

On January 31, 1983, the Office received a copy of a mailgram dated Febuary 26, 1982 which appellant had previously submitted in inquiring about the status of his case.

In a mailgram dated March 28, 1983, received by the Office on March 29, 1983, appellant requested a hearing before the Office. By letter dated April 7, 1983, received by the Office on April 11, 1983, appellant submitted a copy of his hearing request and requested the Office to acknowledge it.

By letter dated July 7, 1983, the Office informed appellant that a hearing would be held on August 12, 1983. By letter decision dated July 12, 1983, however, the Office informed appellant that he was not entitled to a hearing because he had not made his hearing request within 30 days of the issuance of the January 24, 1983 decision,[1] as required by section 8124(b)(1) of the Federal Employees' Compensation Act.[2] The Office further stated that it had considered whether to offer appellant a hearing even though he was "not as a matter of right entitled to a hearing" and decided to deny his hearing request on the ground that "the issue in the case is a medical one which can be effectively addressed on reconsideration."

By letter dated July 25, 1983, appellant stated the reason for the delay in his requesting a hearing was his failure to receive the Office's January 24, 1983 decision "until near mid-February ." Appellant requested that the Office "set a new date for the hearing or reconsideration of case for I have additional evidence refuting the negative decision." By letter dated August 31, 1983 appellant requested that the Office reply to his July 25, 1983 letter and set a new date for a hearing.

The Office's Branch of Hearings and Review informed appellant on September 23, 1983 that it had recently requested his case file from the district office, and upon receipt would review the evidence of record and advise him further. By letter dated October 5, 1983, the Branch of Hearings and Review informed appellant it had received his case file, would assign it to a hearing representative and would advise him if the case were not in posture for a hearing.

The case record contains an October 3, 1983 letter addressed to the Office's Chief of the Branch of Hearings and Review in which appellant stated he wanted to appeal the Office's decision rejecting his claim for compensation.

By letter dated December 30, 1983, the Branch of Hearings and Review notified appellant that a hearing on his claim was scheduled for February 13, 1984. By letter decision dated February 1, 1984, the Office canceled the hearing on the ground that appellant was not entitled to a hearing because his hearing request had been made more than 30 days after the date of issuance of the Office's January 24, 1983 decision. The Office reiterated that it was also denying the hearing request because the issue in the case was a medical one and "could be effectively addressed on reconsideration." The Office stated that it was forwarding appellant's October 3, 1983 letter to the Employees' Compensation Appeals Board "for action on the requested appeal."

The Board received the October 3, 1983 letter on February 3, 1984.

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[1] The Board notes that the Office's decision incorrectly cited "February 26, 1983" as the date of appellant's hearing request, instead of March 29, 1983. The Office apparently misread the date and contents of the February 26, 1982 mailgram.

[2] 5 U.S.C. section 8124(b)(1).

On March 9, 1984 appellant filed an application for review of the Office's decisions and an appeal was docketed that day.

The Board finds that the refusal by the Office of appellant's request for a hearing was proper.

Appellant's request for a hearing was dated March 28, 1983 and was received by the Office on March 29, 1983, more than 30 days after the January 24, 1983 date of issuance of the Office's decision. Appellant does not have a right to a hearing, as his request was not made within the 30-day period imposed by section 8124 of the Federal Employees' Compensation Act.

The Act provides a claimant with the right to a hearing on his or her claim "on request made within 30 days after of the issuance of the decision. . ." [3] Section 8124 of the Act is unequivocal in setting forth the limitation on requests for hearings.[4] The Office did not act improperly when it canceled the hearings scheduled upon a request which was not timely filed.

Even though there is no right to, nor is the Office obligated to hold a hearing if not requested within 30 days, as pointed out in *Herbert C. Holley*,[5] the Office may within its discretionary powers grant or deny appellant's request, and must exercise its discretion.

In the present case, the Office considered whether to grant the hearing request, although the request was not timely made. It decided not to grant the hearing request since the issue in the case was a medical one which could be effectively addressed on reconsideration. The Office's refusal to grant the hearing request does not constitute an abuse of discretion.

The Board notes, however, that the Office's delays in scheduling and cancelling the hearings effectively thwarted appellant's ability to file a timely appeal on the merits of the case.[6] Since the appeal was not docketed until March 9, 1984, more than one year from the date of issuance of the Office's January 24, 1983 decision on the merits, the Board has no jurisdiction to review that decision.[7] The case will therefore, be remanded to the Office for the issuance of a *de novo* decision on the merits of the case in order to preserve appellant's right of appeal.

The decisions of the Office of Workers' Compensation Programs dated July 12, 1983 and February 1, 1984 are hereby affirmed. The case is remanded to the Office for the issuance of a *de novo* decision on the merits of the claim.

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[3] 5 U.S.C. section 8124(b)(1).

[4] *Charles E. Varrick*, 33 ECAB 1746; *Clyde Bovender*, 32 ECAB 1883.

[5] 33 ECAB 140.

[6] See *Charles E. Varrick*, *supra*.

[7] 20 CFR section 501.3(d)(2).

In the Matter of ALAN J. GINGLARDI *and* DEPARTMENT OF THE NAVY, SUPERVISOR OF SHIPBUILDING, Groton, Conn.

Docket No. 84-1002; Submitted on the Record;
Issued June 11, 1984

Before MARGARET PALLANSCH, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellant is entitled to payment for replacement of a denture damaged in an employment injury.

On June 16, 1983 appellant, a 38-year-old quality assurance specialist, filed a claim alleging that on that day he "accidentally bumped false tooth against hanging cable" during an inspection, thereby knocking his tooth "out of partial plate." He missed no time from work.

In response to an Office of Workers' Compensation Programs request for additional information concerning the facts and circumstances surrounding the June 16, 1983 employment incident and medical treatment received as a result, appellant stated:

> "[O]n 16 June 1983, while working on a . . . submarine, I was inspecting cable runs for damage, correct installation, correct size, etc. There were numerous uninstalled cables of various sizes hanging from the overhead (ceiling) waiting to be installed. While in the missile compartment back under some cable runs I was coming out of a corner I turned and ran into one of the hanging cable bundles. This knocked off my helmet and jarred my denture loose from my mouth. The denture fell to the deck (floor) which is steel and one of the teeth was broken clean from the denture. I suffered no other injury to my face, mouth, lips, eyes, nose, head or any part of my body: the false tooth of the three-tooth denture was the unique part of me that was affected.
>
> "Note: the cable bundle that I ran into . . . was a glancing blow that hurt but left no injury."

Appellant stated that immediately following the injury he placed the plate in his mouth after rinsing it off and reported the incident to his supervisor within 30 to 45 minutes after its occurrence. He further stated that the earliest appointment he could make with his dentist was June 20, 1983, and that the only inconvenience he experienced between the day of the employment incident and the date he received dental treatment was that it was necessary for him to remove his plate when eating a meal.

Appellant submitted an attending physician's report by Dr. Morris Lewis, a dentist, dated June 20, 1983, who stated that he treated appellant that day for a "fractured denture (upper): irreparable metal attachments of teeth snapped," and indicated that this did not result from the June 16, 1983 employment injury. Dr. Lewis submitted an itemized bill stating that he temporarily repaired appellant's denture (plate) at a cost of $35.00, and that he constructed a new denture at a cost of $300.00. The total amount of the bill was $335.00 and appellant requested reimbursement by the Office.

In an attending physician's report dated December 20, 1983 Dr. Lewis stated that appellant's "fractured metal attachments of removable center steel partial denture" resulted from the June 16, 1983 employment incident; that appellant suffered no disability as a result of the June 16, 1983 employment incident and could immediately resume regular work; and that he discharged appellant from treatment on November 15, 1983.

By compensation order dated January 20, 1984 the Office denied appellant's claim on the ground that he "did not sustain a personal injury within the meaning of the Federal Employees' Compensation Act."

The Board finds that appellant is not entitled to payment for replacement of his denture damaged in an employment injury.

Section 10.406 of title 20 of the Code of Federal Regulations[1] provides for furnishing repairs to and replacement of natural teeth, false teeth,[2] and other prosthetic dental devices damaged by an injury in the performance of duty. Section 8101(5) of the Federal Employees' Compensation Act,[3] and the regulations enacted for the proper administration thereof,[4] make it clear that the "damage or destruction [must be] incident to a personal injury requiring medical services." There is no provision in the Act for reimbursement for lost, damaged or destroyed personal property affected by an employment injury.[5] The Board has consistently held that artificial dentures, being removable, constitute personal property and that their loss may not be charged against the compensation fund.[6]

In the instant case, the evidence establishes that the damage was not to appellant's natural teeth,[7] "fixed" false teeth,[8] or to his jaw structure which required a change in his denture.[9] Instead, the damage was to a removeable denture which is considered the personal property of the owner. Therefore, appellant is not entitled to reimbursement for its replacement.

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[1] 20 CFR 10.406.

[2] False teeth is defined as "fixed" false teeth. See *Robert D. Burrows*, 6 ECAB 32.

[3] 5 U.S.C. section 8101(5).

[4] 20 CFR 10.409.

[5] *Clifford Frace*, 3 ECAB 138.

[6] *Id.* See also *Robert D. Burrows*, *supra*; *Walter C. Hogan*, 7 ECAB 56; *Isadore J. Berman*, 16 ECAB 217; and *Robert Schreiner*, 17 ECAB 721.

[7] *Robert Schreiner*, *supra*.

[8] *Robert D. Burrows*, *supra*.

The decision of the Office of Workers' Compensation Programs dated January 20, 1984 is hereby affirmed.

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[9] *Isadore J. Berman, supra.*

In the Matter of CHARLES E. MOORE *and* DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 84-701; Submitted on the Record;
Issued June 12, 1984

Before GEORGE E. RIVERS, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's claim for a hearing loss, allegedly sustained in his federal employment, is barred by the applicable time limitation provision of the Federal Employees' Compensation Act.

On July 23, 1964 appellant, then a 56-year-old welder, filed a claim alleging that he had sustained a hearing loss as a result of exposure to hazardous noise during his employment "over the last 6 years." He stated that he was informed of a slight hearing loss in 1958 and in July 1964 he was informed of a definite loss."

In support of his claim, appellant submitted a notice he received on July 1, 1964 which informed him that he had "a loss of hearing which may be considered compensable by the Federal Bureau of Employees' Compensation." In addition, he submitted results from employing establishment audiograms performed on November 13, 1956, March 5, 1958, and July 1, 1964.

The employing establishment submitted the following information regarding appellant's noise exposure:

> "During the construction phases, welders aboard ship are subject to intermittent high level noise sources, mostly from other trades working in adjacent areas. The noise produced by electric arc welding is characterized by broad band frequency distribution. The effect of intermittent impact noise, such as hammering, is only a small contribution to the overall exposure of welders aboard ship. The time weighted exposure is slightly above the recommended weekly

able exposure according to current hearing nonconservation criteria."

In order to determine the extent of appellant's hearing loss and its relationship to his federal employment, the Office of Workers' Compensation Programs referred appellant, together with the entire case record, to the Mason Clinic, where he was evaluated by Dr. John S. Hansel, Jr., a Board-certified otolaryngologist. The doctor submitted a copy of a September 13, 1965 audiogram which revealed "a moderately severe nerve type deafness which encroaches upon the speech tones." Dr. Hansel stated the following in an October 7, 1965 report:

> "In my opinion, the loss of hearing is due to acoustic trauma from exposure to loud noises. Romoval of exposure of this patient to loud noises will not improve his hearing. Based upon my examination of the patient and review of the file, it is my opinion that the working environment has caused and aggravated and made a significant adverse effect upon this employee's hearing. Utilizing the American Medical Association Guide for evaluating physical impairment, I find the unilateral impairment for the right ear is 20.0%, and for the left ear it is 27.5%, and binaural hearing loss is 21.2%. There is no surgical or medical treatment which will improve his hearing. I would advise that he try and utilize a hearing aid, possibly on both ears. *** There is no evidence in the history to suggest any other factors as being responsible for his hearing loss.***"

By compensation order dated November 16, 1965 the Office awarded appellant compensation for 21.2 percent loss of binaural hearing. In addition, the Office authorized appellant to obtain a hearing aid at government expense.

Appellant retired effective October 22, 1969.

On June 25, 1981 appellant telephoned the Office requesting approval for a new hearing aid because his old one was broken.

The Office authorized a new hearing aid at its expense, and referred appellant for a complete evaluation to Ms. Lynn E. Keen, a certified audiologist. With respect to her July 8, 1981 evaluation of appellant, the audiologist reported as follows:

> "The audiogram from July 8, 1981, reveals a sloping mild to severe sensorineural hearing loss bilaterally, with the pure tone averages being 43 dB for the right ear and 50 dB in the left ear. This suggests that Mr. Moore has sustained additional hearing impairment since that last evaluation on August 20, 1965, however, it would be necessary to compare the two audiograms to confirm this. Utilizing the new percentage formula for hearing impairment (based on the thresholds for 1000, 2000, and 3000 Hz), Mr. Moore sustains 49.95% loss in the right ear and 57.45% loss in the left ear.

> "Speech reception theresholds were in good agreement with pure tone results and indicated a mild loss of sensitivity for speech in both ears. Speech discrimination scores, however, were severely reduced in both ears (24% in the right and 44% in the left) even when obtained at elevated listening levels. Due to the audiometric test results a binaural hearing aid fitting with high frequency — emphasis instruments was recommended. Binaural earmold impressions were taken at this time."

On May 19, 1982 appellant filed a claim for compensation for the additional hearing loss he had sustained since the 1965 award. He stated that he first became aware of his hearing loss and its relationship to his federal employment in 1963.

The employing establishment stated on June 27, 1983 that the only recorded audiogram it had for appellant was one performed in 1956. Since it did not have an audiogram performed at approximately the time of his termination of employment it was impossible to determine whether his present hearing loss had deteriorated further since that time.

By letter decision dated November 1, 1983 the Office denied appellant's claim on the basis that it was not timely filed.

The Board finds that the case is not in posture for decision.

The Office correctly pointed out that where exposure to noise at work causes an adverse effect on an employee's hearing, every such exposure constitutes a new injury.[1] When a claim is filed for a loss of hearing, the claim covers all employment exposures which occurred up to the filing of the claim.[2] If the employee continues to be exposed to noise at work subsequent to the filling of such claim and be believes the additional exposure has caused an increase in his loss of hearing, he must file another claim for the additional injury in order to secure benefits for the increased loss.

In the instant case, the Office relied on appellant's statement that he first became aware of his hearing loss and its relationship to his employment in 1963, and applied the principle that where the employee became aware of a possible relationship between his hearing loss and his employment while still employed and his noise exposure continued thereafter, the time limitations began to run on the date of his last exposure."[3] The Office, therefore, determined that the time limitation began to run on October 22, 1969 when appellant retired. However, while appellant stated that he became aware of the relationship between his hearing loss and his employment in 1963 and the record indicates that he was aware of the relationship at least by July 1, 1964, he had timely filed a claim in 1964 and received compensation for his loss in

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[1] *Robert Goodlow*, 10 ECAB 164, 359; *Leonard E. Redway*, 28 ECAB 242.

[2] *Robert Goodloe, supra; Jesse O. Alley*, 13 ECAB 512; *Leonard E. Redway, supra*.

[3] *Alfred C. Green*, 23 ECAB 135; *George O. Bishop, Jr.*, 24 ECAB 60; *Marion H. Salerni*, 21 ECAB 300.

1965. Appellant wore a hearing aid until he broke it in 1981. At the time of the evaluation for a new hearing aid in July 1981, it was indicated by the audiologist that appellant had sustained additional hearing impairment since his last evaluation. It was the additional hearing loss for which appellant filed the claim in May 1982. On remand the Office should, therefore, make a determination as to when appellant became aware of the increased hearing loss. The time limitation should begin to run from that date to determine whether or not the claim was timely filed.

The November 1, 1983 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development, to be followed by a *de novo* decision.

In the Matter of RUSSELL W. FLAGG *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84-678; Submitted on the Record;
Issued June 13, 1984

Before MARGARET PALLANSCH, MICHELE VON KELSCH, DAVID S. GERSON

The issues are (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not "without fault" with respect to an overpayment of compensation benefits in the amount of $4,296.00, and therefore the overpayment was not subject to waiver; and (2) whether the Office, in an order dated October 18, 1983, abused its discretion in refusing to reopen appellant's case on the merits of his claim.

On June 15, 1977 appellant, a 61-year-old helper, shipfitter, filed a claim for a loss of hearing which he attributed to his employment.[1] In support of his claim appellant submitted a medical report by Dr. Gary J. Young, a Board-certified otolaryngologist, dated October 31, 1977, who stated that he initially examined appellant on September 1, 1977 for a loss of hearing in both ears "noted in the past several years" and that he performed an audiogram on appellant on October 21, 1977, which revealed "bilateral, sharply falling sensor-neural hearing loss." Dr. Young concluded that appellant had incurred a moderate noise-induced hearing loss in both ears, and noted that a smaller component of this was due to presbycusis. He further concluded that appellant's hearing would remain stationary so long as he avoided exposure to excessive noise exposure in the future and protected his ears.[2]

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[1] Appellant alleged that his loss of hearing developed during his employment in another governmental facility, which was from January 24, 1951 to approximately October 3, 1964.

Based on the clinical findings and audiogram by Dr. Young, the Office of Workers' Compensation Programs, on February 8, 1978, granted appellant a schedule award for a 31 percent bilateral (both ears) loss of hearing. This award was for 62.0 weeks and covered the period from October 21, 1977 (the date of Dr. Young's audiogram) through December 28, 1978. The first check covered the period October 21, 1977 to February 1, 1978. The bottom of the schedule award letter, which is also known as CA-181, contained the following information: "Your compensation stops when you have been paid for last day shown above in period of award."

In April 1982, appellant wrote to the Department of the Treasury and informed them that he had "received no compensation check for March — $537.00. No notice otherwise." In May 1982, in a letter addressed to the Hearing Loss Task Force, OWCP, appellant stated that he had been "receiving a check for compensation for a loss of hearing, a check for $537.00 a month. [But] for the past two months, March and April 1 did not receive a check and no notice if that was all of them. Will you please enlighten me on this matter?"

By letter dated May 25, 1982 the Office informed appellant that he had been found with fault for an overpayment of compensation in his case, in the amount of $4,296.00, which was created in his case for the following reasons:

> "Reason (1): Your received $537.00 each 4 weeks from 7/16/81 to 2/25/82. These payments were in error and made because an incorrect case file number was used in the office to pay compensation relative to another case. You started to receive compensation checks in August of 1981. You cashed the checks even though your schedule award had expired on 12/28/78 and you were aware of that fact.
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> "Reason (2): Since your schedule award expired on 12/28/78, you did not file any claim for additional compensation and did not receive any compensation for over two and one-half years after the expiration of the award, you should reasonably have been aware that compensation checks you began to receive in August 1981 were not issued for any claim or entitlement of yours. You did not attempt to find out why you were receiving compensation checks or inform this Office. The mere fact that an individual receives a check in the mail without explanation is not sufficient to entitle that person to actual use of monies received."

The Office informed appellant that he could submit any evidence refuting the amount or fact of overpayment, and supporting any contention that he was without fault in the creation of the overpayment. It also informed appellant that he was entitled to a hearing on the issues of the preliminary finding of fault, or a determination of whether or not overpayment should be waived. Moreover, the Office explained the procedures in the event he was found to be without fault in the creation of the overpayment.

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[2] Appellant retired on September 5, 1979.

By letter dated June 11, 1982 appellant, through his attorney, contended that appellant was without fault in the creation of the overpayment based on the following sequence of events: appellant received a compensation check in the summer of 1982 which perplexed him because he had not received a payment since December 1978, and the check was not accompanied by an explanation; he returned the check to the Hearing Loss Task Force, but since the check was returned to him without explanation, he "honestly believed the payment constituted some form of additional compensation for his hearing loss"; and after the payments ceased he requested an explanation as to the reason for termination on two occasions, but received none.

Appellant submitted copies of the two letters written to the Office, inquiring as to the reason he had not received any compensation benefits in March and April 1982. Appellant submitted, among other things, his latest civil service annuity check adjustment statement, savings account statements and checkbook entries for April and May 1982 from local banks, balance from Federal Credit Union as of May 13, 1982, and statement of car loan payment. Appellant enumerated his current expenses and listed his sources of income on a monthly basis. He concluded that recovery of the overpayment in his case would defeat the purpose of the Act, "that is, to provide a subsistence income to beneficiary, and/or would be against equity and good conscience"; therefore, he stated, the overpayment should be waived.

By letter decision dated July 13, 1982 the Office found that its preliminary finding that appellant was at fault in the creation of the overpayment was incorrect for the following reasons:

> "Although you stated you returned the first check and it was subsequently remailed to you no evidence to substantiate that claim was submitted. You are, however, being given the benefit of the doubt and your statement is accepted."

Nevertheless, the Office determined that the circumstances in his case did not warrant waiver of the overpayment for the following reasons:

> "The evidence you have submitted does not establish that your current income is insufficient to meet your living expenses. Although records of your savings accounts show sporadic withdrawals they also indicate that payments from this office were deposited into them. The fact that you were able to pay off the loan on your vehicle

> also indicates that your regular monthly expenses have actually been reduced. You have received actual benefit from the monies paid erroneously to you and the overpayment should be recovered."

The Office further stated that the July 13, 1982 letter represented a final decision from which he could select from several avenues of review.

Appellant filed an application for review before the Board on November 4, 1982. On January 26, 1983 the Director of the Office filed a motion requesting the Board to remand the case for further development as to whether recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act. [3] In that regard, the Director noted that on remand it would secure information from appellant concerning his assets and expenses, which was to be followed by further consideration and a *de novo* decision.

By order dated March 22, 1983, the Board granted the Director's motion to remand.[4]

In a letter dated April 15, 1983, the Office informed appellant that he could submit "additional information" to enable it to determine "whether the overpayment should be waived," together with an overpayment recovery questionnaire he was asked to complete. The Office further requested appellant to "submit a statement why you feel you should be allowed to keep money to which you are not entitled."

Appellant submitted his most recent checking account entries, and his savings account statement from the local banks and credit union. In completing the overpayment recovery questionnaire, appellant itemized his assets and liabilities. With respect to why he believed he was entitled to the incorrect payments he stated:

> "The payment had my hearing claim number on it. I sent the check back, but it was returned and I received additional checks. I wrote to the Hearing Loss Task Force in Washington for an explanation, but received none. Because I received no response, I believed I was receiving more compensation for my previous hearing loss disability since I retired."

By letter decision dated July 21, 1983 the Office informed appellant that he was at fault in the creation of the overpayment for the following reasons:

> "Since your schedule award expired on Dec. 28, 1978, you did not file any claim for additional compensation and did not receive any compensation for over $2^1/_2$ years after the expiration of the award, you should have been aware that you were not entitled to the compensation checks you began to receive in August, 1981. Your state-

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[3] 5 U.S.C. section 8101, *et seq.*

[4] Docket No. 83-200.

> ment that you returned the first check only serves to establish the fact that you knew you were not entitled to receive the compensation checks. Yet, you cashed all checks received and spent the money. The overpayment of compensation was created when you took the intitiative to endorse your name to the checks and thereby withdraw funds from the public Treasury."

Accordingly, the Office asked appellant to remit a check in the amount of $4,296.00 which would cover the period of the overpayment from July 16, 1981 to February 25, 1982.

Appellant, through his attorney, requested reconsideration, and submitted an itemization of his asset and liabilities, car loan payment statements, petition and request for dissolution of marriage and stipulations and waivers previously submitted, and final judgment of dissolution of marriage. Appellant also submitted a statement explaining why he believed he was without fault in the creation of the overpayment, stating:

> "I exhausted all means of trying to find out about these checks at the time and never once got an answer back. Even had $20.00 tele[phone] bill call to Washington -- my letters were never answered and the checks kept coming back with my claim no. on each one. I thought two things. Either the two yrs. that had elapsed or three since my last settlement and they had upped my percentage loss and a letter explaining would eventually follow or that they had made a mistake on my last claim and were making it up and a letter would follow."

By compensation order and letter, both dated October 18, 1983, the Office denied appellant's application for review on the ground the evidence submitted was of a repetitious nature and insufficient to require review of the prior decision. The Office reiterated the fact that appellant cashed checks without knowledge of why he received them; that he did not make a "significant effort" to investigate why the payments commenced, but he did when payments ceased; and that his "belief that unsolicited payments were additional compensation was not a reasonable belief." The Office also informed appellant that it had vacated its July 13, 1982 decision finding him to be without fault in the creation of the overpayment, and issued its July 21, 1983 decision finding him to be with fault.

The Federal Employees' Compensation Act, 5 U.S.C. section 8129(b) provides for waiver of an overpayment only under the following circumstatnces: "Adjustment or recovery by the U.S. may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[5]

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[5] *William W. Rodgers*, 30 ECAB 809; *Wanda L. Brown*, 33 ECAB 1133.

In determining whether an individual is "without fault," what constitutes "fault" depends on such circumstances as whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[6]

In the present case the Office applied the third standard to appellant — acceptance of a payment which the payee either knew or should have been expected to know was incorrect — in finding appellant at fault in creating the overpayment.

After a careful review of the evidence, the Board finds that the evidence establishes that appellant was not "without fault" in receiving the overpayment in issue.

Appellant received the Office's February 8, 1978 schedule award letter, also known as CA-181, granting him a schedule award for a 31 percent bilateral (both ears) loss of hearing for 62.0 weeks for the period October 21, 1977 through December 28, 1978. There was a note at the bottom of the award letter which read: "Your compensation stops when you have been paid for last day shown above in period of award." The record reveals that after the expiration of the schedule award on December 28, 1978, appellant received additional compensation for the period July 16, 1981 to February 25, 1982, which he retained, thereby creating an overpayment in the amount of $4,296.00. When notified that on overpayment in that amount had been created, appellant, through his attorney, stated that he did receive a check in the summer of 1981 which puzzled him since he had not received payment since December 1978 and the check was not supplemented with an explanation; then he returned the check to the Hearing Loss Task Force, but that it was subsequently returned to him, again without explanation; and that therefore he "honestly believed the payment constituted some form of additional compensation for his hearing loss." Appellant further stated that when these supplemental payments ceased, he wrote the Office on two occasions for an explanation as to the reason for termination, but received no reply.

The record, even after appellant's request for reconsideration of the July 21, 1983 letter decision, contains no evidence of appellant's alleged written attempts to return the supplemental payments to the Office. In retaining additional benefits, for over seven months, after he had received notification in the February 8, 1978 schedule award letter that his compensation payments would end as of December 28, 1979: "the last day . . . in period of award," coupled with the fact that he questioned entitlement to the supplemental 1981 monies since he had not received a payment since 1978 (and allegedly attemped to return it), appellant has demonstrated that he knew, or should have known, that he was not entitled to the payment received over two and one-half years after the expiration date of the original award. The Board finds that appellant was not without fault within the meaning of section 8129(b); therefore there is no basis for waiving the overpayment.

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[6] Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2-claims. Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures set forth in the Procedure Manual to be followed in handling overpayment of compensation cases.

With respect to the second issue, appellant submitted a detailed statement of his financial status, car loan payment statements, petition and request for dissolution of marriage with stipulations and waivers previously of record, and the final judgment of dissolution of marriage. He again contended that after his attempts to return the payments failed, he believed he was entitled to additional compensation.

The Board notes that to require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered.[7] Since the material appellant submitted was not relevant to the issue of whether he was not without fault in the creation of the overpayment, and he did not advance any contentions not previously considered, the Board finds that the Office properly refused to reopen the case for further merit review.

The decisions of the Office of Workers' Compensation Programs dated July 21 and October 18, 1983 are hereby affirmed

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[7] *Rogelio M. Zamora*, 28 ECAB 224.

In the Matter of GERALD W. KEOPPEL *and* DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, Utah

Docket No. 84-356; Submitted on the Record;
Issued June 18, 1984

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether the Office of Worker's Compensation Programs properly rescinded its determination that appellant had a hearing loss causally related to his exposure to noise at work.

On October 24, 1975 appellant, then 27 years old, filed a claim for a hearing loss which he attributed to his one and one-half years of employment as an aircraft armament systems mechanic. Appellant claimed both a schedule award and a loss of wage-earning capacity due to his hearing loss.

The employing establishment submitted its records regarding appellant, including results of audiograms made there on February 19, 1974, June 11, 1974, June 24, 1974 August 5, 1974, April 3, 1975, April 14, 1975 and May 30, 1975. A notation on the audiogram results and in appellant's health records indicated that he was not exposed to noise for 30 days prior to the May 30, 1975 audiogram. The employing establishment stated that appellant began working there on February 19, 1974, that he was exposed to noise levels with ear protection of 86 to 120 decibels (dBA) for about four hours per day, that he was removed from noise exposure for 44 days in 1974 and 67 days in 1975, and that he resigned effective September 24, 1975 giving the reasons that he did not want to further damage his hearing and that his coworkers resented his removals from noise exposure.

In a July 6, 1974 report accompanied by a July 3, 1974 audiogram, Dr. Lynn B. Robinson, a Board-certified otolaryngologist, stated that the employing establishment's June 11, 1974 and June 24, 1974 audiograms showed a progressive nerve-type hearing loss only in appellant's left ear, and that it was unusual to have noise damage in only one ear in the absence of unilateral noise exposure, which appellant denied. In an August 20, 1975 report, Dr. Robinson stated that appellant was examined on June 11, 1975, that he said that he was not exposed to noise for two and one-half months before this examination, that the audiogram on that date showed no significant change from one made on August 7, 1974,[1] and that appellant's hearing should be all right with adequate hearing protection.

In an October 8, 1975 report accompanied by a September 24, 1975 audiogram, Dr. Wallace A. Goates, Ph.D., an audiologist, stated that the employing establishment's audiograms made from February 19, 1974 to April 3, 1975 and his September 24, 1975 audiogram showed a significant reduction in appellant's hearing acuity, that the configurations were consistent with sensorineural hearing loss, and that sensorineural loss may be a traumatic result of prolonged exposure to loud noise. In a December 22, 1975 report Dr. Goates stated that a November 10, 1975 audiogram showed a rapid unaccounted for deterioration of speech discrimination as compared to the September 24, 1975 testing.

In a December 12, 1975 report accompanied by a September 18, 1975 audiogram, Dr. Wilford W. Beck, Jr., a Board-certified otolaryngologist, stated that appellant's left ear hearing loss was completely sensorineural, that his right ear hearing loss possibly included some conductive loss, and that further audiometric and other testing was needed.

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[1] Dr. Robinson's August 7, 1974 and June 11, 1975 audiograms were later submitted to the Office.

The Office referred appellant to Dr. Dean H. ZoBell, a Board-certified otolaryngologist, for an evaluation. In a March 12, 1976 report Dr. ZoBell noted that the results of an audiogram made for him on February 13, 1976 were of questionable validity because of a discrepancy between speech reception threshold and pure tone averages and because of the recent rather severe drop in appellant's hearing. Dr. ZoBell referred appellant to Dr. Gregory McCandless, Ph.D., an audiologist who performed audiometric testing on March 2, 1976 which included electroencephalogram (EEG) audiometry. Dr. McCandless stated that appellant appeared to have a severe rather flat sensorineural hearing loss in his right ear with a severe loss in the left ear, and that his responses were very stable and were confirmed by the EEG audiometry. In his March 12, 1976 report Dr. ZoBell concluded:

> "With review of the file and history the progression of loss has been rather rapid and does not relate directly to the usual pattern of loss that would be found with noise exposure. I feel we would have to state that the hearing loss as presented could be caused by occupational noise exposure. At the present time Mr. Keoppel would be considered to have an approximate 62.5% hearing loss on the right, a 100% hearing loss on the left, for a binaural hearing loss of 69%."

On March 30, 1976 the Office issued appellant a schedule award for a 69 percent binaural loss of hearing, with the award being paid from September 26, 1975 to May 18, 1978.

On March 14, 1977 the employing establishment rehired appellant as a messenger, waiving the hearing requirements of this position under its handicapped employee program. Appellant resigned from this position effective November 28, 1977 due to depression. In response to appellant's request for compensation for loss of wage-earning capacity, the Office advised him that he would be entitled to such compensation based on the difference between his earnings as an aircraft armament systems mechanic and those as a messenger. In response to an Office request, appellant submitted medical reports regarding his condition of depression and regarding his May 31, 1974 motorcycle accident which involved a laceration of the chin and a chipped tooth.

By a June 10, 1980 letter the Office advised appellant that a review of his file revealed there was no rationalized medical opinion that his hearing loss was causally related to his employment, and that his case record would be examined by a medical specialist.

On June 16, 1980 the Office referred the case record to Dr. James E. Tabor, a Board-certified otolaryngologist, for an opinion whether his hearing loss was causally related to his employment-related noise exposure. The Office's referral letter stated that appellant was exposed to aircraft flight line noise of up to 120 dBA for four hours per day for 111 days between February 19, 1974 and September 26, 1975, that ear protection was worn during noise exposure, that the rapidity of the progression of his hearing loss far exceeded the usual pattern found with noise exposure of this type, that appellant's hearing loss appeared to have increased after prolonged removal from noise, and that he hit his head but did not lose consciousness in a May 31, 1974 motorcycle accident.

In a June 30, 1980 report Dr. Tabor stated that appellant's audiometric testing "at no time shows a loss characteristic of noise exposure," that the increase in his hearing loss from June 1975 to March 1976 was "completely out of line for a deterioration of hearing due to noise exposure," that appellant's hearing loss was "quite severe for his history," that he could not accept the audiometric levels reported by Dr. ZoBell as reliable, and that he would not venture an opinion without testing appellant's hearing acuity.

As Dr. Tabor practices in Denver, Colorado and appellant lives in the Salt Lake City, Utah area, on September 5, 1980 the Office referred appellant, with the case record, to Dr. Whitney J. Haight, a Board-certified otolaryngologist, for an evaluation of his hearing acuity and an opinion on the causal relationship between his hearing loss and his employment-related noise exposure. The Office's referral letter contained the same information as its referral letter to Dr. Tabor.

In a September 22, 1980 report, accompanied by September 12, 1980 and September 17, 1980 audiograms, Dr. Haight stated:

> "It is my opinion that this gentleman has a sensorineural hearing loss, bilateral, as a result of exposure to excessive noise and I based my opinion on the following. With acoustic trauma type of hearing loss, one would expect no tone decay. With his last hearing test no tone decay could be demonstrated.
>
> "His hearing apparently dropped markedly from the 30 of May 1975 to Sept. 24, 1975 and there has been no apparent recovery since that time. He has had no evidence of central nervous system illnesses that would lead one to suspect central nervous system damage. He apparently has had no evidence of trauma to his head. In review of medications taken I could find none which would be slightly suspicious even of causing this hearing loss. On direct questioning, he declared that he was protected from sound with the usual protection 100% of the time when around the operating jet air engines.
>
> "It is known that with acoustic injury to the inner ear and nerve of hearing, and no other complicating factors, that many of these patients, can hear in excess of the 8,000 Hz. level, but I have been unable to locate a method of testing him for this range. With noise-induced hearing loss, the 4,000 level is affected first due to the physical resonance characteristics of the cochiea and I believe this

> is demonstrated throughout the work that has been done on him at a time when the hearing was at a level to test in a reasonable fashion. It is known and well established that as the loud sounds continue to be introduced into the ear, this drop in the 4,000 gradually spreads to the 2,000 and the 8,000 and widens the notch on the audiogram and will gradually include all of the normal speech tone area.
>
> "In summary, it is my opinion that this is a noise-induced hearing loss, reasons for same I refer you to the above paragraph, but I am unable to explain the very rapid loss in this relatively short time. It would appear to me that explanation of this would be most interesting and best settled at autopsy."

An Office medical adviser reviewed the case record and stated that Dr. Haight's audiogram showed a greater loss than that for which the schedule award was paid, but that this increased loss could not be caused by noise exposure at work.

On January 5, 1981 the Office requested Dr. Haight to submit a supplemental opinion on appellant's increased hearing loss after his noise exposure ended. In a February 4, 1981 report Dr. Haight stated that there were no audiometric findings between May 30, 1975 and September 1975, that appellant's hearing showed a marked decrease during this period, and that appellant's increased hearing loss after cessation of his noise exposure was due to further degeneration of the nerve endings (quoting a medical text as support) and due to the power introduced to the ear by appellant's hearing aid used at his very low level of hearing.

The same Office medical adviser reviewed the medical evidence and stated that a January 16, 1979 report from another Office medical adviser who is Board-certified in otolaryngology rejected Dr. Haight's rationale for attributing appellant's increased hearing loss after his noise exposure ended to the noise exposure. A copy of this January 16, 1979 report, however, is not contained in the case record.

On March 27, 1981 the Office referred appellant, with the case record, to Dr. Michael H. Stevens, a Board-certified otolaryngologist, for an evaluation of his hearing and an opinion on the causal relationship of his hearing loss to his employment-related noise exposure. The Office's referral letter contained the same information as the referral letters to Drs. Tabor and Haight.

Dr. Stevens submitted an April 2, 1981 report, accompanied by an April 14, 1981 audiogram which showed variations on multiple tests of pure tone levels and which the audiologist administering the tests considered to be of poor reliability. In his report Dr. Stevens stated that Dr. Haight had misinterpreted the medical text he quoted, explained why this text did not support Dr. Haight's opinion, and concluded that there was no evidence that a progressive sensorineural hearing loss due to noise exposure could be sustained without the noise exposure having continued. Dr. Stevens stated:

> "In May 1975, the patient had a mild amount of sensorineural hearing loss in both ears which was worse in the left ear. He developed what appears to be a rather profound hearing loss particularly in the left ear as seen on the audiogram of September 1975. The question is whether this represents the result of noise exposure or not. First of all I call your attention to the initial audiograms which were obtained in February 1974 on through April 1975. The sensorineural hearing loss I see here is of a sloping type of hearing loss. It does not have the usual configuration that we see in hearing loss secondary to noise exposure. The first time that configuration is at all evident, is in April 1975 when there is a larger loss at 4 K than at 6 K in the left ear. The right ear there is only one audiogram on April 1975, which shows the greater loss at 4 K than at 6 K. Generally the initial audiograms in a noise-induced hearing loss will show this characteristic dip . . .
>
> "Therefore, even on the initial audiograms, I would have to say that the pattern does not appear to be that of a noise-induced loss because of the following: (1) it lacks the configuration, (2) there is an asymmetrical loss between the left and right ears.
>
> "The audiograms shown in September 1975, shows profound loss in both ears. The SRT's correlate fairly well, although not completely with the pure tone averages. The discrimination is very poor which with the amount of pure tone loss is probably not an accurate representation of the actual discrimination. In other words, this probably does not represent maximum discrimination scores. This amount of hearing loss sustained over this short period of time due to noise, in my experience, does not occur except in a case of a sudden loud blast injury. I find nothing in his history to suggest a loud blast injury.
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> "The audiometric configuration does not give any indication as to what the etiology of the hearing loss is. Consequent audiograms which are probably more accurate which were performed by Dr. Geary McCandless, shows a SRT of 62 on the right with 80% speech discrimination and an SRT of 88 with a 66% speech discrimination in the left ear. These figures were confirmed by EEG audiometry which is an objective test which does not require subjective response on the part of the patient.
>
> "I would now like to systematically respond to the comments of each of the otolaryngologists as they have evaluated this patient. Dr. Lynn Robinson in July 1974, stated it is unusual to have noise damage in only one ear in the absence of unilateral noise exposure. I agree with his concern about this and this is why Dr. Parkin

obtained urinalysis, and a serology test including FTA which was negative. This is also why temporal bone tomograms as well as a CAT scan has been done which have also been negative. March 12, 1976, Dr. Dean ZoBell who saw the patient stated that with review of the history the progression of loss has been rather rapid and does [not] relate directly to the usual pattern of loss ordinarily found with noise exposure. I agree with this. He goes on to say there has been significant noise exposure, he would have to state the hearing loss presented could be caused by occupational noise exposure. I agree with the word 'could' but I think we should add, 'although it would be extremely unlikely. ' I am in agreement with the statement by Dr. James Tabor, an otolaryngologist in Denver who stated, 'the patient's audiometric testing at no time shows loss characteristic of noise exposure.' He adds, 'This is completely out of line for deterioration due to noise exposure.' He was concerned about the possibility of audiometric levels being unreliable and I would concur with that possibility except for the findings of the EEG audiometry. The patient's subsequent psychiatric history would also suggest the possibility of malingering.

"Dr. Haight saw the patient in September 1980, and he felt his hearing loss was a result of excessive noise and he bases his opinion on the fact that there was no tone decay on the reflex testing. Tone decay when it is positive is indicative of a retrocochlear lesion; however, the absence of tone decay simply means the lesion is cochlear and the etiology can be multiple including noise exposure, but certainly not only due to noise exposure. This is merely a reflection of a cochlear versus a retrocochlear lesion. The fact that we have no other explanation, however, does not necessarily force us to make the diagnosis of noise-induced hearing loss in spite of his noise exposure."

* * *

"My feeling is that this patient has sustained a sensorineural hearing loss in both ears, worse in the left ear, which is of unknown etiology. My opinion, for the previously stated reasons, is that his hearing loss is probably not due to noise."

By a compensation order dated June 30, 1981 the Office rescinded its acceptance of appellant's claim on the ground that the weight of the medical evidence established that appellant's hearing loss was not caused by noise exposure during his employment.

Appellant requested a hearing, which was held before an Office hearing representative on February 25, 1982. In his request and at the hearing appellant contended that he was exposed to more noise at work than the 444 hours indicated by the Office. Appellant, at the hearing, described his employment-related noise exposure in detail.

By a decision dated July 2, 1982 and made final on July 6, 1982 an Office hearing representative affirmed the Office's June 30, 1981 compensation order, finding that the weight of the medical evidence failed to relate appellant's hearing loss to factors of his employment.

Appellant appealed this decision to the Board, and the Director of the Office filed a motion to remand the case for referral to the same hearing representative to enable him to render a *de novo* decision containing a complete discussion of all the evidence of record. By an order dated October 27, 1982 the Board granted the Director's motion and remanded the case for further proceedings as requested.[2]

By a decision dated and made final on September 1, 1983 the same Office hearing representative, after further discussing the evidence submitted prior to the hearing, again found that the weight of the medical evidence failed to relate appellant's hearing loss to factors of his employment.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation. This holds true where, as here, the Office later decides that it erroneously accepted the claim.[3]

The Board finds that the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim, as the medical evidence fails to establish that appellant's hearing loss is not causally related to his exposure to noise in his employment.

In its efforts to determine whether appellant's hearing loss, for which it had issued a schedule award, was causally related to his exposure to noise at work, the Office referred appellant to three Board-certified otolaryngologists. The Office's referral letter to all three otolaryngologists contains an inaccurate statement underestimating the period of time during which appellant was exposed to noise.

The employing establishment indicated that appellant was exposed to noise for about four hours per day and that he was removed from noise exposure for 111 days during 1974 and 1975. It appears that the Office incorrectly used these figures in computing that appellant was exposed to noise for a total of 444 hours, the amount stated in its referral letters. The 111 days, however, are those during which he was not exposed to noise, not those during which he was so exposed. Appellant's exposure occurred during the entire period of his employment from February 19, 1974 to September 26, 1975 except for 111 days.

In addition, the Office's referral letter to these three otolaryngologists stated that appellant was exposed to aircraft flight line noise of up to 120dBA, and that hearing protection was used during exposure. This statement does not make it clear that the exposure to 120 dBA was with the use of hearing protection, as the employing establishment indicated.

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[2] Docket No. 82-1783.

[3] *James Cash, Jr.*, 31 ECAB 1110; *Jack W. West*, 30 ECAB 909.

In light of these discrepancies in the statements submitted to the otolaryngologists to whom it referred appellant or his case record, the Office did not meet its responsibility to have a proper evaluation based on an accurate history and medical background.[4]

Briefly commenting on the opinions of the three otolaryngologists to whom the Office referred appellant, the Board notes that the first one, Dr. Tabor, stated that he could not venture an opinion without examining appellant, which was geographically unfeasible. The second otolaryngologist, Dr. Haight, stated that he was unable to explain appellant's very rapid hearing loss over a short time, but concluded nonetheless that appellant's hearing loss was causally related to his exposure to noise in his employment. Dr. Haight also explained why he believed that appellant's increased hearing loss after his noise exposure ended was related to that exposure. A January 16, 1979 statement of an Office medical adviser who is Board-certified in otolaryngology was purported to have negated Dr. Haight's opinion on the progression of loss after noise exposure ends. The January 16, 1979 statement, however, is not contained in the case record, and, as it was dated over two years prior to Dr. Haight's report, apparently would not address the particular circumstances of this case or respond to Dr. Haight's theory on progression of hearing loss. The third otolaryngologist, Dr. Stevens, concluded that appellant's hearing loss was of unknown etiology and probably not related to his exposure to noise.

For all the reasons stated above, the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim.

The decision of the Office of Workers' Compensation Programs dated September 1, 1983 is reversed and the case returned to the Office.

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[4] See *Andrew G. Nastos*, 34 ECAB 519.

In the Matter of JESS L. GREEN *and* DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Okla.

Docket No. 84-332; Submitted on the Record;
Issued June 18, 1984

Before MARGARET PALLANSCH, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issues are: (1) whether appellant has more than a 50 percent permanent impairment of his right upper extremity, a 10 percent permanent impairment of his right lower extremity, and a 10 percent permanent impairment of his left lower extremity, for which he received schedule awards; (2) whether appellant was "without fault" in the creation of an overpayment of compensation; and (3) whether the Office of Workers' Compensation Programs determined appellant's loss of wage-earning capacity in accordance with the principles applicable to such a determination.

On February 1, 1973 appellant, then a 52-year-old engine disassembler, filed a claim alleging that he sustained lacerations and a puncture wound of the right hand when a hydraulic pressure hose ruptured while he was holding it on January 31, 1973. He stopped work on January 31, 1973 and entered sick leave status. He returned to limited light duty on April 9, 1973.

In support of his claim, appellant submitted February 22, 1973 Office of Workers' Compensation Programs' form reports from Dr. William B. Geb, an employing establishment osteopath, and Dr. Donald E. Butler, a Board-certified orthopedic surgeon. In his report Dr. Geb diagnosed "Laceration, contusion, and possible fuel foreign body of right hand," and causally related appellant's condition to the January 31, 1973 injury.

Dr. Geb referred appellant to Dr. Butler, who diagnosed "Hydraulic oil pressure wound right hand, fluid injury, skin loss secondary to high pressure hydraulic fluid injection injury with necrosis of subcutaneous tissue and skin." Dr. Butler noted that he had performed surgery consisting of "debridement of wound, irrigation, counter incisions to evacuate hydraulic fluid" on January 31, 1973, and "split thickness graft, debridement of wounds right hand and forearm" on February 16, 1973. He also concluded that appellant's condition was causally related to the January 31, 1973 injury. On June 13, 1973 Dr. Butler referred appellant to Dr. William J. Forrest, a Board-certified plastic surgeon of professorial rank, for follow-up care.

On June 26, 1973 the Office determined that appellant had sustained multiple injuries to his right hand on January 31, 1973 and authorized the payment of medical benefits.

In an October 12, 1973 report Dr. Forrest related appellant's history and stated that surgery was being contemplated to increase appellant's ranges of motion in the right hand. On June 6, 1974 Dr. Forrest performed a pedicle skin graft to repair appellant's hand defect. In a July 25, 1974 progress report, Dr. Forrest noted that while the hand surgery was healing well, appellant now complained of left leg swelling for which no cause could be found.

On October 1, 1974 Dr. Larry G. Anderson, a Board-certified surgeon of professorial rank, reported the following:

> "I saw [appellant], a fifty-four-year-old male, who has a venous problem involving the left leg. Apparently, approximately one year

> ago he injured his right arm and it was necessary to take a skin graft from the left anterior thigh and during that hospitalization he developed a deep vein thrombosis involving the popliteal vein with swelling from the knee to the foot. This has resolved to a certain extent but unfortunately, the valvular damage occurred and he continues to have a stasis problem when he is on his feet for long periods of time. I feel that there is really nothing effective to do about this except continue to elevate his leg every chance he gets and when he is on his feet for long periods of time there will be swelling. Support hose might prove to be helpful but at times this will cause aching.
>
> "I assured him that there was no serious current problem and that he would simply have to live with this chronic problem."

In a November 18, 1974 response to an Office request for information about appellant's left leg condition, Dr. Anderson stated:

> "In response to your letter regarding [appellant], it is my opinion that the exact cause of the deep vein thrombosis which occurred in [appellant] following his injury which necessitated a skin graft, is not clear. This problem can, of course, occur spontaneously but I would speculate that the thrombosis was perhaps related to the immobility which occurred with the injury. There is, of course, no way to be completely certain. However, I would say that the process would seem to be related to the overall injury process and immobilization which was most certainly present to some extent. Therefore, it would be my impression that it was more an indirect complication resulting from the initial injury."

On November 19, 1974 Dr. Forrest stated that appellant had reached maximum improvement and concluded that he had a 75 percent loss of his right arm. Subsequently, on April 15, 1975 Dr. Forrest reported the following:

> "[Appellant] has reached maximum improvement as of November 19, 1974. The patient has approximately 45 degrees flexion in the metacarpal phalangeal joint of all four fingers. Flexion of the distal inner phalangeal joints is between 45 and 60 degrees with the metacarpal phalangeal joint in full extension. Flexion of the metacarpal phalangeal joint limit flexion of the distal two joints. The patient has returned to his usual occupation, however, the difficulty with his leg and the thrombophlebitis has necessitated his early retirement."

On April 25, 1975 an Office medical adviser reviewed the medical evidence, and on August 4, 1975 the Office issued appellant a schedule award for a 19 percent permanent impairment of his right hand. The period of the award was to run from November 19, 1974 through October 9, 1975, for a total of 46.36 weeks of compensations.

In an August 10, 1975 letter, appellant requested a hearing before an Office hearing represenatative. On November 24, 1975 a second Office medical adviser reviewed the medical evidence and found that appellant had actually sustained a 30 percent permanent impairment of his right arm. Subsequently, on April 5, 1976 the Office issued an amended schedule award for 30 percent permanent impairment of the right upper extremity. The period of the award was to run from October 10, 1975 through September 4, 1976, for an additional 47.24 weeks of compensation. Appellant retired on July 7, 1976.

On August 23, 1977 a hearing was held, at appellant's request, before an Office hearing representative. Appellant testified as to his condition, and submitted medical reports from Drs. Forrest, Joseph J. Maril, an orthopedic surgeon, and Mark E. Landry, an employing establishment podiatrist. In his September 8, 1975 report Dr. Landry diagnosed "intractable plantar kertoma [IPK] of the left foot." He noted a history of "Insidious onset from April, 1973, subsequent to deep venous insufficiency with resultant edema affecting the patient's gait. Without further detailed investigative studies it is plausible and quite possible that the IPK is secondary to his affected limb and gait pattern."

In a September 13, 1976 report Dr. Maril related a brief history and his findings made on physical examination. He noted the following:

> "Physical findings present a 55-year-old . . . male whose complaints are referable to the above-described accident. With injury to the right upper extremity wherein he has evidence of having a massive skin graft taken from his abdomen and applied to the dorsal aspect of the right wrist extending on down to the metacarpal phalangeal joint. He has had three surgical procedures necessitated by the above accident of January 31, 1973. He complains of symptoms not only referrable to the right forearm and hand wrist but also his elbow and right shoulder due to the fact that for a long period of time it was necessary to hold his right elbow at right angle and his right shoulder close to his side during the time the skin flap was being formed to transplant to his forearm, he has therefore restriction of motion of the right shoulder girdle by some 10 degrees at the maximum point of elevation, external rotation is limited and painful also, he is able to abduct his arm to his side without difficulty. The elbow motions in flexion and extension are not limited, however there is limitation of motion in pronation and supination of the forearm on the elbow.
>
> "Measurement of both upper extremities reveal evidence of atrophy of the right arm particularly the biceps and the widest portion of the right forearm compared to the opposite arm in this right-

handed man. The widest portion of his right biceps is $11^1/_2$ inches compared to $11^1/_4$ inches on the left side, the widest portion of his right forearm just below the elbow is 11 inches bilaterally.

"Examination reveals a massive skin graft taken from his abdomen beneath his right nipple measuring 7x4 inches, additional skin transplant was then taken from the lateral aspect of his left thigh to cover the defect in his chest. He continues to have some sensitivity in both his chest and left thigh.

"The palm presents a healed incisional scar extending from an area halfway through the 2nd metacarpal shaft in curved manner to the crease of the palm onto the wrist itself and then laterally toward the base of the 5th metacarpal, there are also small scars on the medial aspect of the 2nd, 3rd and 4th fingers proximal phalangeal area which are incisional in type. The 5th finger has a flexion deformity at the proximal metacarpal interphalangeal joint with inability to extend this finger by some 20 degrees and flexion is also limited and painful but by approximately 5 degrees. He has restriction of motion of the remaining fingers, that is the index, middle and ring fingers in flexion by approximately 20 degrees and extension is limited by some 3 degrees. There is evidence of loss of soft tissue structures, muscle and other soft tissues in the upper third of the right forearm, there is healed incisional scar extending from the grafted area proximally to the middle third of the arm. The distal two-thirds of the right arm is markedly atrophied in the soft tissue structures. There is some restriction of motion in abduction of the thumb at the maximum points of these motions with evidence of some atrophy of the soft tissues between the thumb and the index finger on the dorsum of the hand. There is obvious weakness of grip of the hand, he states that during changes of weather, particularly in cold weather he has considerable pain and discomfort and the hand and forearm become cyanotic when exposed to cold temperatures. The radial pulse is intact.

"The scar on the dorsum of the hand measures 6x6 inches at its outermost portions and 3 inches at the widest portion, it is thick and presents evidence of cosmetic disfigurement. There is restriction of motion of the wrist in dorsi and palmar flexion of the hand particularly when he attempts to flex his wrist, marked restriction is evident, the patient has constant pain and discomfort.

"I feel that due to this accident so far as his ability to work is concerned he has a 65 percent permanent disability to the right forearm."

In a September 22, 1976 report Dr. Forrest related a brief history and stated:

"Physical examination reveals a marked loss of abduction and ro-

> tation of the right shoulder. There is a well-healed pedicle graft over the dorsal surface of the right hand and distal forearm. Upon flexion and extension of the fingers, it becomes obvious that the tendons are attached to the skin graft and to the surrounding tissue. The adhesions about the tendons limits flexion and extension of the fingers. Patient also has limitations of flexion of the wrist. Flexion of the wrist further impairs flexion and extension of the fingers. The extensor tendon is producing a tendinesis effect across the wrist and into the fingers. Patient has some limitation of pronation and supination. All digits of the right hand are involved. The fingers can be brought within 1 inch of the palm. There is approximately ten degrees limitation of extension of all of the digits, of the right hand. Patient only has approximately 10-15 degrees abduction of the shoulder. The pedicle graft over the dorsal surface of the hand and forearm constitutes a permanent cosmetic blemish. There are numerous well-healed scars involving the left interior chest wall. The scars extend over an area approximately 6 by 8 inches. There is a scar of the left thigh resulting from a split thickness skin graft donor site. There is chronic swelling in the left, lower extremity. Patient states that swelling is more severe with long standing and walking. The swelling limits the patient's ability to stand and walk and produces some discomfort. No further treatment is indicated. Patient presents with a permanent disability involving the loss of approximately 60% of his ability to perform ordinary manual labor. In addition to the disability, patient presents with a permanent cosmetic blemish due to the skin grafting on the dorsal surface of the right hand."

On June 9, 1978 a third Office medical adviser reviewed the evidence and concluded that appellant had sustained a 50 percent permanent impairment of his right upper extremity.

In a June 20, 1978 letter the Office notified appellant that his schedule award was being terminated, effective June 22, 1978, The Office noted that the award was supposed to have expired on September 4, 1976, but payments had continued regardless The Office therefore informed him that the resulting overpayment and any entitlement to a loss in wage-earning capacity would be determined after the hearing representative issued his decision.

On December 22, 1978 the Office hearing representative issued a decision, finalized on that date, in which he found that appellant had sustained a 50 percent permanent impairment of his right upper extremity. The hearing representative therefore remanded the case for payment of the appropriate compensation.

In a March 8, 1979 compensation order the Office determined that appellant had sustained an additional 20 percent permanent impairment of his right upper extremity, thereby entitling him to $8,292.96 for the period from September 5, 1976 through November 15, 1977. This amount was subsequently subtracted from appellant's overpayment, leaving a provisional balance still owing $4,977.25.

The Office thereafter referred appellant to Dr. Maril for a current evaluation of his arm and leg conditions. In an April 9, 1979 report Dr. Maril related a brief history and his findings made on physical examination. He reported:

> "[Appellant] indicates that he had had two embolic phenomena since his injury, the first occurring shortly before while being hospitalized related to the time of initial injury and a second occurrence in January 2, 1979 requiring hospitalization and additional treatment. The blood clots have involved both lower extremities and his lungs secondarily. His lungs presently are not causing any problem although he does have evidence now of swelling of both lower extremities particularly about the feet and ankles.
>
> "He states further he has additional difficulty now in moving his right shoulder. His right shoulder girdle is limited to abduction of only 90 degrees both voluntarily and with persuasion at this point he is unable to move his arm in elevation. External rotation is limited by 15 degrees and internal rotation by 5 degrees, this involves the shoulder girdle."
>
> * * *
>
> "It is my opinion this man's condition has changed, has deteriorated since my first examination. He has had another embolic phenomenon and takes coumadin daily to control that situation, he had residuals manifested by swelling of both ankles and feet and states he is short of breath at times, however his lung fields are clear, the heart appears to be normal.
>
> "So far as the right upper extremity is concerned it is a useless structure for performance of any skillful work for which this man has had training. He has in addition developed increased impairment of function of the right shoulder girdle as described above.
>
> "In my opinion this man is not capable of performing any type of ordinary manual labor nor is he employable. So far as the right upper extremity is concerned I feel presently that he has an 80 percent permanent impairment of the whole right arm."

On May 4, 1979 appellant filed an application for review with the Board. Susequently, on May 21, 1979 the Office referred appellant, together with a statement of accepted facts and the medical evidence of record, to Dr. John R. Stacy, a Board-certified orthopedic surgeon of professorial rank, and Dr. Edward R. Munnell, a Board-certified surgeon. In a May 31, 1979 letter the Office notified appellant that it had recalculated his overpayment, and had concluded that the correct balance remaining was $5,439.96.

In a June 11, 1979 report Dr. Stacy related appellant's history and the results of his June 8, 1979 examination. He concluded:

> "There appeared to be some question on the part of the attending surgeons following the injury as to whether he actually had a thrombophlebitis of the left lower extremity associated with skin graft and Dr. Anderson, the consultant felt that the problem was not serious and needed no definitive treatment in 1973. If there was thrombophlebitis or threatening difficulties suggesting blood clot complications in 1975 I am sure that the Veterans Admininstration would not have done the bunionectomy and there was no history of complications following the bunionectomy. He apparently had no embolic phenomenon associated with the prostatectomy in December of 1978, consequently it is quite doubtful that the lung emboli occurring in January of 1979 would have been associated with the skin graft donor procedure on the left thigh with a doubtful thrombophlebitis following three weeks later.
>
> "It is my opinion that the schedule award of a total of 50 percent partial permanent disability to the right arm is more than adequate in as much as he states that it is his feet that give him trouble and prevent him from working currently. His confusion regarding his history would suggest the possibility of an organic brain syndrome though there is not any information in the medical files presented to me regarding an organic brain syndrome. It is my opinion that his lower extremity difficulties are probably not associated with the injury of January 31, 1973 and the subsequent treatment. It is my opinion that [appellant] is not totally disabled at the present time and he states that he is able to do gardening and handle a rototiller which I am sure he can well do. He is still under the treatment of the Veterans Administration and I see no reason why he could not return to work as soon as he has ceased his coumadin medication and is released to work by the Veterans Administration."

On July 13, 1979 Dr. Munnell submitted a report in which he reviewed appellant's history and his findings made on physical and x-ray examination. He stated the following:

> "Review of the venograms performed earlier this year at the Veterans Hospital here in Oklahoma City shows evidence of chronic deep thrombophlebitis and phlebothrombosis of the left lower extremity. The deep femoral system in the thigh seems to be uninvolved.
>
> "I conclude, therefore, that this patient has chronic thrombophlebitis of the left lower extremity with a history of previous pulmonary embolus."

In an August 30, 1979 order the Board set aside the December 22, 1978 decision of the Office hearing representative, and remanded the case for further development on the issues of his schedule award, the overpayment and a possible loss of wage-earning capacity.[1]

On November 19, 1979 a fourth Office medical adviser reviewed the medical evidence and concluded that appellant had no more than a 50 percent permanent impairment of his right upper extremity. However, on the issue of the venous condition, the adviser noted that the statement of accepted facts had to be clarified and submitted, along with appellant, the medical evidence of record, and his Veterans Administration records concerning his chronic brain syndrome, to an appropriate Board-certified vascular specialist for further evaluation.

In a January 22, 1980 letter the Office referred appellant to Dr. Marvin D. Peyton, a Board-certified surgeon of professorial rank, together with the amended statement of accepted facts and the augmented medical evidence. On February 6, 1980 Dr. Peyton reported a brief history and his findings made on physical examination. He concluded:

> "On the basis of this examination, at this present time, there is no clinical evidence for deep vein thrombosis. With this patient's past history and current complaints, however, this cannot be completely ruled out without repeat venography. On the basis of my examination in the clinic today, I see no evidence for significant disability or impairment, but once more, this has not been confirmed by x-ray venography. Arterial perfusion of the lower extremities was also judged to be completely intact with palpable pulses throughout the lower extremities."

On April 2, 1980 an Office medical consultant reviewed the medical evidence and concluded that appellant had sustained "post-phlebitic syndrome of recurrent swelling, aching, recurrent phlebitis and emboli" as a result of the January 31, 1973 employment injury. He noted that this condition was directly related to appellant's hospitalization for hand surgery.

In a July 15, 1980 supplemental report Dr. Peyton submitted copies of a venogram performed on May 9, 1980. Dr. Peyton diagnosed deep venous disease with chronic changes in both legs. On September 9, 1980 the Office determined that appellant had sustained phlebitis of both legs causally related to his January 31, 1973 employment injury, and authorized the payment of medical benefits.

In a September 9, 1980 letter decision, the Office determined that appellant was at fault in the creation of the $5,439.96 overpayment balance which resulted when he accepted compensation beyond the expiration date of his schedule award.

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[1] Docket No. 79-814, issued August 30, 1979.

On October 14, 1980 Dr. Peyton submitted a work tolerance evaluation form in which he indicated that appellant could work for eight hours per day in a basically sedentary position. In a December 10, 1980 response to an Office request for additional information, Dr. Peyton concluded that appellant had reached maximum improvement for his venous condition on February 5, 1980, the date of his initial examination. In a subsequent January 21, 1981 follow-up report, Dr. Peyton indicated that appellant should spend his time either walking or with his legs elevated to a level from the dependent position.

In a March 31, 1981 report the fourth Office medical adviser reviewed the evidence and concluded that appellant had no more than a 50 percent permanent impairment of the right upper extremity, for which he received a schedule award. He also concluded that appellant had a 10 percent permanent impairment of both lower extremities due to "bilateral lower extremity venous insufficiency."

On April 14, 1981 the Office issued a compensation order in which it granted appellant schedule awards for a 10 percent permanent impairment of each lower extremity. The period of the award ran from February 5, 1980 through March 14, 1981, for a total of 57.6 weeks of compensation. The overpayment of $5,439.96 was subtracted from the award, leaving a balance of $8,084.67 which was paid to appellant.

In a June 25, 1981 compensation order the Office rejected appellant's claim for a loss of wage-earning capacity, on the ground that he "had no loss of wage-earning capacity as a result of the work injury and is barred from receipt of such compensation under the provisions of 5 U.S.C. section 8106(c)(2)." An accompanying memorandum made part of the decision by reference indicated that appellant "was provided work within the physical limitations imposed by his work injury, at no loss wages. He voluntarily chose to retire from that work."

Appellant subsequently requested reconsideration of the March 8, 1979 and June 25, 1981 Office decisions. In support of his request he submitted a July 29, 1981 report by Dr. Forrest, who noted that he examined appellant on July 27, 1981. He concluded:

> "The examination revealed a well-healed pedicle graft over the extensor surface of the right forearm and hand. The extensor tendons to the fingers and thumb were both stringing across the wrist beneath the pedicle flap. There is limitation of flexion and extension of all digits of the right hand. There is some limitation of motion of the right shoulder. No further treatment is indicated. Patient presents with a permanent disability involving the loss of 80 percent function of the right upper extremity."

On August 13, 1981 the fourth Office medical adviser reviewed Dr. Forrest's report and recommended that appellant be referred to an independent Board-certified orthopedist for an evaluation. The Office therefore referred appellant, together with a statement of accepted facts, to Dr. Carlos A. Garcia-Moral, a Board-certified orthopedic surgeon of professorial rank. In his October 12, 1981 report, Dr. Garcia-Moral related a brief history and stated the following:

> "Further examination of the upper extremity reveals active range of motion of the wrist on palmar flexion to be 25 degrees, ulnar deviation is 35 degrees, dorsiflexion is 50 degrees and radial deviation is 10 degrees. Pronation and supination are equal measuring about 75 degrees. Active range of motion of the metacarpal phalangeal joint from the index through the small fingers is 35/36 degrees, 40/70 degrees, 35/70 degrees, and 10/55 degrees. At the level of the proximal interphalangeal joint active range of motion of the index through the small finger is 10/60 degrees, 5/65 degrees, 20/65 degrees and 30/90 degrees. Active range of motion of the distal interphalangeal joint the index through the small fingers is 0/60 degrees, 0/55 degrees, 0/55 degrees and 0/55 degrees.
>
> "According to the patient he has cold intolerance and with cold weather this appears to have some hyperesthesias in the entire hand. The two-point discrimination is within normal limits at 5 mm. Key pinch on the right is $9^1/_2$ kg. and 8kg. on the left. Power grip measured by the Jamar on notches one through fives is 24-22-24-20-18 on the left. Power grip on the right is 10-28-32-24-18 kg.
>
> "It is my opinion that this patient has reached maximum medical improvement, however I am unable to determine the proper time that this maximum medical improvement was reached since he was treated by different physicians from January 19, 1973 up to the present time. His last surgical procedure was carried out in 1975."

In an October 28, 1981 report the fourth Office medical adviser reviewed Dr. Garcia-Moral's report and concluded that appellant had no more than a 44 percent permanent impairment of the right upper extremity due to restricted ranges of motion, sensory changes and discomfort.

On January 6, 1982 the Office issued a compensation order in which it denied appellant's request for modification, after a merit review, on the ground that "the evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

In a February 4, 1982 letter appellant requested a hearing before an Office hearing representative. At the July 27, 1982 hearing, appellant testified as to his conditions. He subsequently submitted copies of compensation orders and office letters already of record.

In a decision dated and finalized on September 23, 1982, the hearing representative affirmed the January 6, 1982 Office decision.

On December 14, 1982 appellant filed a second appeal with the Board. In a March 4, 1983 motion to remand the Director of the Office noted that the September 23, 1982 hearing representative decision was defective, and requested that the Board remand the case to the Office for a *de novo* decision by the same hearing representative. In a May 26, 1983 order the Board granted the Director's motion.[2]

In an August 23, 1983 decision, finalized on August 24, 1983, the same Office hearing representative again affirmed the prior Office decisions.

On the first issue, the Board finds that the weight of the medical evidence establishes that appellant has no more than a 50 percent permanent impairment of his right upper extremity, a 10 percent permanent impairment of his right lower extremity, and a 10 percent permanent impairment of his left lower extremity, for which he received schedule awards.

The weight of the medical evidence is represented by the reports of Dr. Garcia-Moral and Dr. Peyton, the Board-certified specialists of professorial rank to whom the Office referred appellant for evaluations of his right arm and leg conditions, respectively. Dr. Garcia-Moral's October 12, 1981 report is thorough and well-rationalized and based on a physical examination of appellant. In addition, he reports specific findings and ranges of motion in support of his conclusion that appellant has no more than a 50 percent permanent impairment of the right upper extremity. An Office medical adviser concurred in his conclusion. Dr. Peyton's several reports are also thorough and well-rationalized, and are based on physical and x-ray examinations of appellant. He concluded that appellant has bilateral venous insufficiency causally related to the January 31, 1973 employment injury, and listed work restrictions. An Office medical adviser concurred in this conclusion and found that appellant has a 10 percent permanent impairment of both legs.

The several reports of Dr. Forrest, a Board-certified plastic surgeon of professorial rank, Dr. Anderson, a Board-certified surgeon of professorial rank, Dr. Landry, an employing establishment podiatrist, and Dr. Maril, an orthopedic surgeon, do not contain objective findings in support of any greater percentages of impairment. In addition, these reports are not supported by medical opinion evidence of causal relationship, and as such, are of diminished probative value. Without more, these reports are insufficient to overcome the detailed and well-reasoned reports of Drs. Garcia-Moral and Peyton.

As for the second issue, the Board finds that appellant was not "without fault" with respect to the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law * * * Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this [Act] or would be against equity and good conscience."

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[2] Docket No. 83-443, issued May 26, 1983.

It will be noted that, in order to qualify for this exception, the recipient of an overpayment of compensation must be without fault. If he is not, the waiver provisions do not apply. Further, where the recipient does not satisfy the requirements of section 8129(b), the overpayment is to be recovered even though it resulted from action of employees of the Government.[3]

After a careful review of the evidence, the Board finds that appellant was not "without fault" with respect to the overpayment. The April 5, 1976 amended schedule award informed him that his award would expire on September 4, 1976 and that he must claim for any continuing compensation. After the schedule award expired he did not receive a letter stating he was entitled to additional compensation; when he accepted compensation after September 4, 1976, he was not "without fault" in the creation of the overpayment.[4]

As for the third issue, the Board finds that appellant's wage-earning capacity was improperly determined.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his usual employment, his age and vocational qualifications, and the availability of suitable employment.[5] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[6] This generally would exclude a position in federal service.[7]

The concept of wage-earning capacity should not be confused with a situation where compensation is terminated for refusal of an employee to accept suitable work offered to him; such a determination is governed by section 8106(c) of the Federal Employees' Compensation Act and the principles applicable to it.[8]

In this case the Office failed to follow the established procedures for determining appellant's employment-related loss of wage-earning capacity, confusing those procedures with the principles of section 8106(c).

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[3] *Albert Richard Parks*, Docket No. 83-2008, issued March 12, 1984. *Clemon Spakes*,31 ECAB 97.

[4] *Albert Richard Parks*, *supra*. The Board notes that there is a discrepancy in the case record as to the proper amount of the overpayment. While the Office originally determined that a $13,270.21 overpayment existed, it amended this figure on May 31, 1979, recalculating the total as $13,732.92. However, in his August 23, 1983 decision, the Office hearing representative used the earlier figure of $13,270.21 when he found appellant at fault. Upon return of the case record, the Office should redetermine the amount of overpayment in this case.

[5] See Larson, *Workmen's Compensation Law*, section 57.21; 5 U.S.C. section 8115(a).

[6] *Samuel J. Russo*, 28 ECAB 43.

[7] See *William G. Murphy*, 11 ECAB 207; *Rudy Solovic*, 28 ECAB 105.

[8] 5 U.S.C. section 8106(c).

In accordance with the concept of wage-earning capacity described above, when the Office makes a medical determination of partial disability and of the specific work restrictions, the claimant's case record should be referred to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, which fits the employee's capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of prevailing wage rate and availability in the open labor market should be made through contact with the state employment service. Finally, application of the principles set forth in the *Shadrick* decision[9] will result in the percentage of the employee's loss of wage-earning capacity.

Since the Office determined appellant's loss of wage-earning capacity in a manner contrary to that set forth by the Board, the case shall be remanded for a redetermination in accordance with the principles herein set forth. After such further development as it may deem necessary, the Office should issue a *de novo* decision on this issue.

The decision of the Office of Workers' Compensation Programs dated August 23, 1983 is hereby affirmed insofar as it found that appellant had no more than a 50 percent permanent impairment of his right upper extremity, a 10 percent permanent impairment of his right lower extremity and a 10 percent permanent impairment of his left lower extremity, and that appellant was not "without fault" in the creation of the overpayment of compensation; that portion of the decision which found that appellant had no loss of wage-earning capacity under 5 U.S.C. section 8106(c)(2) is hereby set aside and the case is remanded for further proceedings consistent with this decision.

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[9] *Albert C. Shadrick*, 5 ECAB 376.

In the Matter of JOHN OTIS DIXON *and* DEPARTMENT OF THE ARMY, ROCK ISLAND ARSENAL, Rock Island, Ill.

Docket No. 84-495; Submitted on the Record;
Issued June 20, 1984

Before MARGARET PALLANSCH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the decision of the Office of Workers' Compensation Programs that appellant was not entitled to compensation after April 24, 1981 because he refused two offers of suitable work was proper.

GPO Dept. of Labor—Braceland: 73202

On April 3, 1978 appellant, then a 49-year-old coremaker, filed a claim for pulmonary diseases causally related to exposure to dust, gases, fumes, smoke and numerous other substances in his work in a foundry. He last worked in the foundry on approximately June 24, 1978. The Office of Workers' Compensation Programs determined that appellant had mild emphysema, chronic bronchitis and pulmonary fibrosis causally related to his federal employment and on February 3, 1982 granted appellant a schedule award for a ten percent permanent impairment of each lung. The period of the schedule award was September 18, 1980 to April 24, 1981.

Dr. Richard C. Tannen, Board-certified in internal medicine and pulmonary disease, opined in an April 24, 1978 report that appellant should cease working as a coremaker to prevent further lung injury. As noted above, appellant ceased working on approximately June 24, 1978 and thereafter apparently used sick and annual leave.

According to an October 24, 1980 letter by an employing establishment official appellant was "permanently restricted" from working as a coremaker on February 15, 1980 by an employing establishment physician and was offered a "Tool Keeper" position at a lower grade. The official stated that appellant declined that position and "opted to file for disability retirement," in March 1980. The official further stated that after the disability retirement application was denied by the Office of Personal Management the employing establishment "then offered a choice between accepting a Crane Operator. . . position or involuntary separation for inability to perform the coremaker duties in the Foundry." The official stated that since appellant "did not accept the Crane Operator. . . position" he was separated from the employing establishment effective September 26, 1980 "for reasons of disability." The employing establishment, however, subsequently cancelled appellant's separation and effective June 27, 1980, the date it received the notice of denial of the disability retirement application, it placed appellant in a pay status. The employing establishment ordered appellant to report for work on October 27, 1980 and stated it would place him in a position for which he was medically qualified. Appellant was placed in a temporary position of tool and parts attendant.

In an undated letter[1], the employing establishment noted that appellant's disability retirement had been approved in April 1981 after appellant had appealed the denial and noted that appellant had "expressed some reservations about accepting the retirement." The employing establishment advised appellant that his options were to accept the retirement or to accept as a permanent position effective April 26, 1981 the position of tools and parts attendant he was then performing at a lower grade than his coremaker position. The employing establishment informed him that he "would receive pay retention" and would be eligible for consideration for "repromotion" to higher grade positions for which he qualified. It further advised that if appellant, then 52 years old, declined both options it would endeavor to separate him from the employing establishment, and that if separated he would not be eligible for any retirement until age 62. Appellant thereupon retired on disability effective May 4, 1981.

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[1] The content of the letter shows the date to be April 1981

By letter dated November 1, 1982, the Office stated that the evidence of record indicated the employing establishment had offered appellant reemployment as either a tool keeper or crane operator and that appellant had refused both jobs. The Office requested that appellant submit a detailed explanation of his refusal of the two positions and requested the employing establishment to submit the job description, physical requirements and exposure information for the positions. The Office informed appellant that section 8106(c) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to him is not entitled to compensation.

By letter dated November 7, 1982, appellant asserted that section 8106(c) of the Act was not applicable to his case. The employing establishment submitted to the Office job descriptions and lists of functional requirements and environmental factors of the positions of crane operator and tool and parts attendant. The latter position entailed exposure to dust and intermittent excessive noise, while the former position entailed exposure to dust and fumes and required ability to operate a "roustabout crane," warehouse tractors and fork lift trucks. The employing establishment also submitted copies of correspondence previously submitted to the Office including an August 20, 1980 letter which offered appellant the job of crane operator in lieu of a disability separation from the employing establishment. This letter informed appellant that he had to arrange for a medical evaluation "to insure that your medical problems will not disqualify you for placement in this position."

An Office medical adviser reviewed the case record and opined on May 3, 1983 that appellant was capable of performing the duties of a crane operator and a tools and parts attendant in August 1980 and April 1981 respectively.

By compensation order dated June 22, 1983, the Office rejected the claim for compensation beginning April 24, 1981, the date of the expiration of the schedule award, on the grounds that under section 8106(c)(2) of the Act appellant "is not entitled to compensation for his loss of wage-earning capacity after April 24, 1981 as the evidence of record indicates he refused two suitable offers of employment which were within his work limitations for reasons which are neither justified nor reasonable." The compensation order made findings of fact that appellant had refused job offers made on August 20, 1980 and in April 1981.

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[2] 5 U.S.C. 8106(c).

By letter dated July 2, 1983 appellant requested reconsideration of the Office's decision and submitted copies of correspondence previously submitted and a copy of an April 16, 1981 letter to the employing establishment in which he requested information concerning disability retirement. By compensation order dated August 1, 1983, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was repetitious and not sufficient to warrant review.

By letter dated September 13, 1983, appellant again requested reconsideration and submitted copies of correspondence already contained in the case record. By compensation order dated October 27, 1983, the Office denied the reconsideration request on the grounds that the evidence submitted in support of the request was irrelevant and immaterial and not sufficient to require a review of the prior decision.

The Board finds that the decision of the Office that appellant was not entitled to compensation after April 24, 1981 because he refused two offers of suitable work was not proper.

In this case the evidence establishes that appellant is disabled from performing his usual work of coremaker due to his employment-related pulmonary conditions. The Office in its June 22, 1983 decision denied compensation effective April 24, 1981 because of appellant's refusal to accept in March 1980 and April 1981 the allegedly suitable positions of crane operator and tools and parts attendant, respectively. However, there is no evidence that these positions offered in March 1980 and April 1981 remained available to appellant on the date of denial of compensation in June 1983 based on appellant's refusal of positions offered in 1980 and 1981.[3]

The case will be remanded to the Office for further development. On remand, the Office should prepare a statement of accepted facts and refer appellant with the statement and medical evidence of record to an appropriate Board-certified specialist for a reasoned opinion which sets forth appellant's work limitations due to his employment-related conditions and to any preexisting conditions.[4] The Office should then determine appellant's loss of wage-earning capacity commencing in April

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[3] *Warren A. Cook*, 33 ECAB 1877. Since it was incorrect for the Office to rely on these refusals of employment, it is not necessary for the Board to address whether the positions offered constituted suitable work. The Board notes that the actions of the Office in this case are not consistent with the procedures set forth in FECA Bulletin No. 83-51 issued October 24, 1983 which contemplate a prospective approach to the use of section 8106(c)(2) of the Act and which require that the Office determine that a position offered is suitable and inform the employee of this and of the consequences of refusal of the position prior to the employee's decision to accept or refuse the offered position.

[4] The Board notes that an April 27, 1981 Office memorandum in the case record indicates appellant has an employment-related hearing loss for which he received a schedule award.

1981 under the principles applicable thereto[5] and issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated June 22, 1984 is hereby set aside and the case is remanded for further development.

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[5] See *David Smith*, 34 ECAB 409.

In the Matter of EDWARD THOMAS JOHNSTON *and* DEPARTMENT OF THE NAVY, NAVAL AIR TEST STATION, Patuxent River, Md.

Docket No. 84–656; Hearing May 15, 1984;
Issued June 21, 1984

Appearances: *Margaret J. Abraham, Esq.*, for appellant; and *Brenda Stovall, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not "without fault" with respect to an overpayment of compensation benefits and that therefore the overpayment was not subject to waiver.

On April 22, 1982 appellant, then a 35-year-old carpenter, filed a claim in which he alleged that on April 16, 1982 he sustained a "tear of medial ligament and medial meniscus right knee" while lifting at work. He stopped work on April 21, 1982, and received continuation of pay from that date through June 4, 1982, after which he claimed compensation for continuing disability.

On June 14, 1982 the Office determined that appellant had sustained "synovitis right knee" causally related to the April 16, 1982 employment injury, and authorized the payment of compensation for temporary total disability and medical benefits. When appellant returned to work on August 16, 1982 he had not then received any compensation payments.

In a September 8, 1982 form letter CA–1049 mailed to appellant, the Office notified him that compensation for temporary total disability had been authorized, retroactive to June 5, 1982, the date his 45 days of continuation of pay elapsed. The letter pointed out that the first check for $4,308.53 covered the period from June 5, 1982 through September 8, 1982. This form letter also informed him of his obligations to report employment and to return any compensation checks received after he resumed work. Appellant subsequently claimed that he never received this letter.

The case record indicates that on September 28, 1982 an Office claims examiner telephoned appellant to advise him that an overpayment had resulted due to his return to work on August 16, 1982. A memorandum of the conversation noted the following:

> "I told him the check he will receive next week for $1,251.72 should be returned immediately since he returned to work on August 16, 1982 and is therefore not entitled. He said he received the check for $4,308.53 two weeks ago. I told him he is not entitled to the entire check and that as soon as the overpayment is completed, he will be advised of the amount of overpayment."

In a January 13, 1983 letter decision the Office determined that an overpayment of compensation in the amount of $2,319.25 occurred because appellant had returned to work on August 16, 1982 and had received compensation through October 6, 1982. The Office made a preliminary finding that he was at fault in the creation of the overpayment, on the ground that "you were sent form letter CA–1049 dated September 8, 1982 advising you to return any checks received after your return to work. Therefore, you should have been aware that any compensation received after you returned to work was in error."

On February 7, 1983 appellant responded in a letter in which he noted that he had returned to work on August 16, 1982 because he had not received any compensation up to that point, and had notified the employing establishment. He stated:

> "My first check from Workmans' Compensation arrived *after* I had returned to work. If I had honored the letter from your department advising me to return any checks received after I returned to work, I would not have *any* compensation. As I am not an accountant I did not know the exact amount of money due me. It is my understanding that I was to be reimbursed for salary, mileage to and from the doctor, and days that I have had to be off work for doctor appointments since I returned to work on 16 August 1982." (emphasis in original)

In a March 10, 1983 letter decision the Office determined that the preliminary finding that appellant was at fault in the creation of the $2,319.25 overpayment was correct, on the ground that "you were aware or should have been aware from telephone conversations and the CA–1049 letter that you were not entitled to the erroneous payments." The Office therefore requested repayment in the above amount.

On March 29, 1983 appellant requested reconsideration of the Office's

March 10, 1983 decision. In support of his request he submitted his own statement in which he noted the following:

> "(1) I was never advised that checks received after I returned to work had to be returned. (2) I received a total of two checks, despite the fact that I was off work for a total of ten weeks. The first check was not received until after I had been forced to return to work (against doctor's recommendation) because I was totally without funds and unable to buy food for my children and myself. (3) When the first check was finally received, I assumed that it was a back-payment. No legend or explanation accompanied the check. I immediately cashed the check and paid back friends, relatives, creditors who had supported me and my children during the period we were without funds. (4) When the second check was received, I again assumed that it was a back payment. It was not accompanied by a legend or explanation. Therefore, I cashed it. (5) The foregoing assumptions were logical inasmuch as I immediately, reported return to work to the [employing establishment]."

* * *

"(6) I did not receive a copy of Ltr. CA–1049 dated September 8, 1982, until many months after I had already received and cashed the checks. It did not accompany either of the checks. I received a copy of that letter (despite its earlier date), only after I was notified of an overpayment. I believe the [employing establishment] gave me the copy now in my possession when I went to that office to appeal the overpayment decision. Prior to that time, I had no idea what periods the checks covered, nor did I have any idea what percentage of my gross pay was as compensation. I neither knew, nor should I have known, that an overpayment had been made.

"(7) As noted above, I did not receive a copy of Ltr. CA–1049 until after the checks were received and cashed. Therefore, I had no way of knowing that I was to return checks received after I returned to work. I would respectfully suggest that the Dept. of Labor's failure to promptly pay my valid Workers' Compensation claim caused the present situation; I logically assumed that the checks received were for the time I was off work. There was nothing to indicate that the checks overlapped my return to work."

* * *

"I was never given a detailed explanation other than that given when I applied for Compensation through the [employing establishment]. At that time I was only told that I was entitled to Compensation for work-related injuries. I was never told that checks received after I returned to work were to be sent back to the Dept.

> of Labor. I was never told that I had to notify the Dept. of Labor upon returning to work."

In an October 24, 1983 compensation order the Office denied appellant's reconsideration request on the ground that "The evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

The Federal Employees' Compensation Act, 5 U.S.C. 8129(b), states that: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment.[1]

In determining whether an individual is "without fault," what constitutes "fault" depends on such circumstances as whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; and (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [2]

In the present case it is apparent that the Office applied the third standard to appellant—acceptance of a payment which the payee either knew or should have been expected to know was incorrect—in finding appellant at fault in creating the overpayment.

After a careful review of the evidence, the Board finds that the weight of the evidence shows that appellant was not "without fault" in accepting the overpayment in issue.

On September 8, 1982 an Office form letter, CA–1049, was sent to appellant informing him of his obligation to report any employment to the Office and return any compensation checks received after he began working. This letter was sent to appellant's address of record. He had not changed his address at the time the letter was sent. The record contains a copy of the letter and the original was not returned to the Office. This does not support appellant's contention that he did not receive the September 8, 1982 letter. In view of the fact that the employing establishment received a copy of the form letter, it is to be presumd that a letter mailed to an individual in the ordinary course of a business activity was received. Secondly, the memorandum of an Office claims examiner's September 28, 1982 telephone conversation with appellant, which details appellant's responses with respect to the overpayment, tends to cast doubt on appellant's contentions of not receiving his telephone calls or his mail. The Board finds that the weight of the evidence establishes that appellant was aware of the terms of his compensation payments.[3]

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[1] *William W. Rodgers*, 30 ECAB 809.

[2] Federal (FECA) Procedure Manual, Chapter 2–807, Developing and Monitoring Payments, Part 2 - claims. Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2645, the Office established procedures set forth in the Procedure Manual to be followed in handling overpayment of compensation cases.

Under these circumstances, the Board finds that, in accepting additional compensation for periods after he had returned to work, appellant was not "without fault" within the meaning of section 8129(b).

The decision of the Office of Workers' Compensation Programs dated October 24, 1983 is hereby affirmed.

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[3] See *John J. Blanche*, 34 ECAB 121. *Allen Thomas Ettinger*, 32 ECAB 1850.

In the Matter of William S. Arthur *and* U.S. Postal Service, Main Post Office, San Mateo, Calif.

Docket No. 83-1841; Submitted on the Record;
Issued June 21, 1984

Before E. Gerald Lamboley, Michele von Kelsch, David S. Gerson

The issue is whether appellant is entitled to reimbursement of costs for his use of facilities available as an inclusive part of the monthly rent in his apartment complex for self-directed physical therapy.

On March 27, 1969 appellant, then a 55-year-old letter carrier, was rearranging his mail case when he developed severe pain in the right side of his neck while trying to remove a "stubborn" divider. Dr. Frank W. Lusignan, a Board-certified neurosurgeon, indicated in an April 28, 1969 report that x-rays showed a marked narrowing of the C5–C6 intervertebral disc with moderate hypertrophic changes. The doctor diagnosed a cervical strain which he related to appellant's employment injury.

Appellant stopped working on May 10, 1969 and returned to work on July 12, 1969. He had recurring periods of disability thereafter; from December 10, 1969 to January 24, 1970, from May 4, 1971 to August 7, 1971, and from September 7, 1971 to July 31, 1972. Appellant worked part time after his return from the latter recurrence of disability until October 14, 1972 when he returned to full-time work. The Office of Workers' Compensation Programs paid temporary total disability compensation for the periods that appellant did not work.

Dr. Reuben Stutch, a Board-certified orthopedic surgeon, stated in a

September 20, 1971 report that x-rays of the cervical spine showed degenerative changes of the C5–C6 and C6–C7 discs with some encroachment in the foramina. He diagnosed a sprain of the cervical spine. Dr. George A. Wood, a Board-certified surgeon, diagnosed chronic strain of the cervical spine. Dr. James B. Golden, a Board-certified neurosurgeon of professorial rank, diagnosed degenerative disc disease of the cervical spine. He stated that there was no evidence of nerve root compression or of a herniated intervertebral disc. He indicated that appellant's symptoms in his neck were entirely subjective.

On September 5, 1972, appellant submitted a claim for medical expenses for use of "physical therapy facilities" at his apartment complex, including a heated jacuzzi, a heated swimming pool, a steam room, a sauna, and exercise equipment. He requested $93.00 a month, calculated at the rate of $3.00 a day. He indicated that his previous physical therapy cost $277 a month. He stated that he was claiming the lesser amount because it was advantageous to the Office and himself. He also stated that it gave him more relief from pain than any other previously prescribed outside therapy treatment Appellant also submitted a July 10, 1972 physical therapy prescription from Dr. Wood who stated, "to have hot pool exercises daily." Appellant continued thereafter to submit the requests for medical benefits for self-administered physical therapy. The Office paid benefits for the periods claimed.

Appellant sustained another recurrent neck injury on July 9, 1973 while he was taking a driving test to retain his license for the employing establishment. He stopped working on July 23, 1973 and did not return. The Office commenced temporary total disability compensation effective August 23, 1973 for cervical strain and aggravation of a preexisting cervical osteoarthritis.

The Office referred appellant to Dr. Robert D. Hass, a Board-certified orthopedic surgeon. In an April 27, 1974 report, Dr. Hass stated that appellant had no objective signs of injury. He indicated that appellant had degenerative arthritis of the cervical spine not unusual in a 60-year-old man.

The Office, in a May 18, 1974 letter decision, found that the aggravating effects of his March 27, 1969 injury no longer existed when he was examined on April 3, 1974 and therefore terminated compensation effective June 1, 1974.

Appellant submitted a May 29, 1974 report from Dr. Stanley M. Hanfling, an internist, who stated that appellant continued to have objective signs of his neck condition. The Office concluded that the additional medical evidence created a conflict in the medical evidence and therefore referred appellant to Dr. Gregory Bard, a Board-certified physiatrist. In an August 9, 1974 report, Dr. Bard diagnosed moderately advanced degenerative changes of the cervical spine. He attributed 30 percent of appellant's symptoms to his preexisting degenerative arthritis of the spine, 30 percent to aggravation from his employment injuries, and 40 percent to psychogenic factors. He concluded that appellant could return to full-time work with a restriction of no lifting over 20 pounds.

The Office determined, in a decision effective June 2, 1974, that appellant could perform the duties of a salesperson (stamps & coins) [1] and therefore had a 62 percent loss of wage-earning capacity.

In a January 14, 1975 letter decision, the Office stated that it was unable to pay appellant's requests for reimbursement for the use of his apartment complex's facilities from November 1, 1973 through December 31, 1974. It indicated that the fact that it had erroneously reimbursed the charges in the past did not make it liable for such payments in the future. The Office stated that if Dr. Hanfling prescribed physical therapy, it must be performed under the supervision of a registered physical therapist at a bonafide physical therapy establishment.

Appellant requested a hearing before an Office hearing representative. He submitted a March 10, 1975 report from Dr. Hanfling who stated:

> "Mr. William Arthur has had many courses of physiotherapy under medical supervision and by licensed physiotherapists. He recognizes sufficiently well the particular kinds of therapy that have benefited his neck and back and shoulder problems.
>
> "Therefore, I have from time to time advised him to take his own therapy at the Oak Creek Apartments on a daily basis for two reasons:
>
> 1. That this is a great convenience to him and;
> 2. That the therapy he takes there is of good quality, as good as that he could obtain through private sources.
>
> "There is no evidence that he is not obtaining just as much benefit from nonsupervised treatments as he had from supervised treatment.
>
> "I believe that the nonsupervised treatments are actually holding his arthritis at the present level and preventing worsening."

Appellant also submitted a request for reimbursement for physical therapy for the period form June 1, 1975 to June 30, 1975.

After the November 7, 1975 hearing, appellant's attorney submitted an October 6, 1975 report from Dr. Stanford S. Kroopf, a Board-certified internist of professorial rank, who stated:

> "Although I have only recently become the internist of Mr. William Arthur, I have done a complete examination on him and reviewed his previous extensive records and consultations from other doctors over the course of the past six years. He has had previous physical

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[1] Department of Labor, *Dictionary of Occupational Titles*, Code No. 263.358.

> therapy, advised by his previous physicians, under medical supervision and by licensed physical therapists. At this time I do recommend physical therapy for him as it would certainly help his cervical disc disease and osteoarthritis.
>
> Since he lives at the Oak Creek Apartments and there is superb athletic and physical therapy equipment at the Oak Creek Club, it would certainly be convenient for him to use this physical therapy under my advice and supervision. He can go to the Oak Creek Club about six days a week and this forms a great deal of continuity, more than he could obtain by going to a physical therapist.
>
> "I have instructed him to use a jacuzzi in a heated therapy pool, to do breast stroke exercises in a heated pool to improve arm movements, to do arm movement exercises in a steam room and to use two to four-pound weights for exercises in the gymnasium. He will be under the supervision of Richard Hauser who is the health club director and who handles this type of therapy for patients in Stanford Hospital as outpatients.
>
> "As I stated before, I think this is more convenient for him than physical therapy. He would also save paying from $7.50 to $10.00 a visit to a physical therapist by using the Oak Creek facilities."

The Office hearing representative requested the Office medical director's opinion on whether appellant received any benefit from nonsupervised physical therapy as opposed to supervised therapy. The medical director, in a March 2, 1976 memorandum, stated:

"In his letter of March 10, 1975, Doctor Hanfling has supported the treatment at the Oak Creek Aparments. The claimant certainly derives relief from this nonsupervised treatment as much as or more than from supervised treatment. Thus I have no opposition to the claimant receiving treatment at the apartments (Oak Creek)."

The hearing representative, in a June 21, 1976 decision, affirmed the Office's decision on appellant's loss of wage-earning capacity. He also found that the Federal Employees' Compensation Act did not authorize the payment of medical benefits as claimed by appellant. He therefore affirmed the Office's refusal to pay medical benefits.

Appellant appealed to the Board. The Director of the Office filed a motion to remand the loss of wage-earning capacity decision on the ground that it was unclear whether all the evidence of record was properly considered. The Office contended, however, that its denial of appellant's request for reimbursement was proper because the Act did not require the Office to reimburse an injured employee for medical services sought out by a claimant on his own.

The Board, in a March 30, 1977 order, remanded the entire case. It granted the Office's motion to remand on the issue of the loss of wage-earning capacity decision. On the issue of medical benefits, the Board stated that self-administered physical therapy could be authorized under 5 U.S.C. 8103(a). The Board therefore set aside the Office hearing representative's decision and remanded the case for further proceedings on both issues.[2]

The Office, in a June 23, 1977 letter, indicated that it would approve payment of the physical therapy fees claimed by appellant.

In a September 22, 1977 decision, the Office determined that appellant could perform the duties of a telephone solicitor[3] effective June 2, 1974 and therefore had a 63 percent loss of wage-earning capacity. Appellant, in an October 24, 1977 letter, requested reconsideration of this decision.

In March 1978, appellant requested reimbursement for physical therapy for 1977, amounting to $1,080.00. Appellant submitted in support of his request a January 24, 1977 note from Dr. Kroopf which prescribed the daily use of the facilities at appellant's apartment complex.

An Office claims examiner in an undated memorandum indicated that the Office had requested from appellant proof of payment for the physical therapy as appellant had submitted cancelled checks for the total amount of his rent. The claims examiner raised the question of whether the reimbursement for physical therapy was actually a rent subsidy.

A supervisory claims examiner, in a July 5, 1978 memorandum, indicated that there was no separate charge at appellant's apartment complex for the use of the therapeutic facilities. The claims examiner noted that appellant had determined that, out of his $341.00 monthly rent payment, $93.00 a month represented an equitable charge for use of the facilities. The supervisory claims examiner stated that the question was not whether physical therapy was justifiable under section 8103 but whether the Office could subsidize appellant's rent. She noted that the right to use the facilities was included as part of the rent, that appellant's family used the facilities, that appellant was the person who had determined the value of the services, and that it was not clear that appellant required therapy every day.

The Office requested the Office medical director's opinion on whether the physical treatments were necessary and, if so, how often. The medical director in a September 21, 1978 memorandum, stated:

> "As stated in my previous memorandum of March 2, 1976, according to 5 U.S.C. 8103(a), the services, appliances, and supplies recommended by a qualified physician, which the Secretary of Labor considers likely to cure, *to give reflief*, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation may be authorized. As previously mentioned, Doctor Hanfling had supported the treatment of the Oak Creek Apartments. In my memorandum, I stated that the claimant certainly derives

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[2] 28 ECAB 312.

[3] Department of Labor, *Dictionary of Occupational Titles*, Code No. 299.358.

> relief from this nonsupervised treatment as much as or more so than from supervised treatment. Thus, I had no opposition to the claimant receiving treatment at the apartments. Such treatment is currently recommeded by the attending physician, Doctor Kroopf, internist of Palo Alto, on several occasions. He recommends this treatment be provided daily.
>
> "In summary, the physical therapy treatment is necessary to provide relief. Although the treatments were recommended daily by Doctor Kroopf, I agree with this recommendation of the claimant's rather severe complaints of neck and arm pain and now centered in the hand. It must be realized that cervical arthritis and cervical disc disease is a progressive condition often producing marked pain and marked limitations. The claimant does receive relief from this treatment and although this treatment will not produce a cure nor reduce the compensation. A letter of March 10, 1975 from Doctor Hanfling justifies this treatment. This letter states it agrees with the nonsupervised treatment or actually holding his arthiritis at the present level preventing worsening."

A second supervisory claims examiner, in a January 15, 1979 memorandum, stated that although appellant had received reimbursement for his claims for physical therapy the matter required further development. He noted that although appellant claimed that he moved to the apartment complex solely because of the available facilities appellant moved to the complex between May and November of 1970 yet did not attempt to claim reimbursement for part of his rent until July 1972. He recommended further investigation.

A third supervisory claims examiner, in a May 11, 1979 memorandum, indicated that health spas located near appellant's residence had charged approximately $25.00 a month and had facilities similar to those available at appellant's apartment complex. He therefore recommended appellant be paid $25.00 a month.

The Office, in a July 4, 1979 merit decision, denied appellant's request for modification of its loss of wage-earning capacity decision, on the ground that the evidence submitted in support of the request was not sufficient to warrant modification of the prior decision. In a separate July 4, 1979 letter, the Office informed appellant of its decision to authorize payment of $25.00 a month for the year 1978 for self-applied physical therapy treatments.

Appellant appealed to the Board. The Board, in a February 20, 1980 order, noted that the case record submitted on appeal was incomplete. It therefore remanded the case for reconstruction of the case record and a *de novo* decision.[4]

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[4] Docket No. 80-38.

The Office, in a July 8, 1980 decision, denied appellant's request for modification of the July 4, 1979 decision on the ground that the evidence submitted in support of the request was in sufficient to warrant modification of the prior decision.

Appellant appealed to the Board. The Board, in a March 30, 1981 order, remanded the case on the ground that the Office had failed to make a *de novo* decision on the issue of reimbursement for appellant's physical therapy as previously ordered by the Board.[5]

The Office, in a May 22, 1981 compensation order, rejected appellant's request for reimbursement for physical therapy expenses at the rate of $90.00 a month, finding that $25.00 a month was the average charge for health spas with comparable facilities. The Office also reissued its loss of wage-earning capacity decision.

Appellant, in a May 27, 1981 letter, requested reconsideration. He stated that he continued to claim reimbursement at the rate of $90.00 a month for the years 1978, 1979 and 1980. He indicated that he had moved into the apartment complex in June 1970. He stated that membership in the health spa closest to him cost between $27.50 and $35.00 and contended that the membership fee, together with mileage and gasoline costs for trips to and from the spa, would raise the costs of the health spa to over $100 a month. He concluded that the use of the health club at his apartment complex was cheaper and more desirable.

Appellant also submitted a June 1, 1981 note from Dr. Kroopf who prescribed use of a heated therapy pool, heated swimming pool, steam bath and sauna two to three times a day.

The Office, in a June 15, 1981 letter, requested from the apartment complex manager a calculation of how much of the monthly rent was allocated to the special facilities. The Office also requested from Dr. Kroopf a statement of how often appellant should engage in his self-directed physical therapy program. Dr. Kroopf, in a July 8, 1981 note stated:

> "William Arthur should participate in a self-directed physical therapy program seven days a week, two times a day. This should consist of hot therapy pool, swimming 20-30 laps in a regular pool, light exercises with weights in a gymnasium and he should finish with 10 minutes of a steam bath."

Appellant appealed to the Board. The Board, in a December 7, 1981 order, noted that the Office, subsequent to its May 22, 1981 and May 25, 1981 decisions, had sought further information in the case but had not received replies from Dr. Kroopf and the apartment manager. The Board remanded the case for further development to be followed by a *de novo* decision.[6]

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[5] Docket No. 81-58.

[6] Docket No. 81-1808.

The Office, in an August 8, 1982 letter to the apartment complex manager, repeated its previous request for information. The manager, in an August 20, 1982 response, stated:

> "Oak Creek maintains a private club for its residents who become members immediately upon their occupancy and they do not pay monthly dues. The staffing of the Club and all of the recreational problems and pleasures and associated equipment is an inclusive part of the monthly rent. It would be impossible to apportion the value of the health club and its operating expenses to one person. The amenities are here for all residents to enjoy and there is not a separate price attached to them. The primary purpose of the facilities is to provide enjoyment to our residents and it is not considered a therapeutic facility."

The Office referred the case record, along with a statement of accepted facts to Dr. Leonard A. Simpson, an orthopedic surgeon and Office consultant, requesting his opinion on whether appellant required continuing therapy for his cervical condition. Dr. Simpson, in a November 22, 1982 memorandum, stated:

> "The medical indications for the use of a health club facility would be pain and alleviation of tension, discomfort, increasing range of motion. Certainly no physician would disagree with the claimant's use of health club facilities such as a heated jacuzzi, heated swimming pool, steam bath, sauna and exercise equipment. The medical records indicate that the evaluating and treating physicians recommend that the individual make use of such a facility. Whether or not OWCP should or can reimburse the individual for the use of such a health club facility is more of an administrative rather than a medical one since it would be a universal opinion medically that the use of such facilities would be beneficial. It would appear that the medical records do not indicate that the individual sustained any acceleration or permanent aggravation as a result of the soft tissue cervical strain. From a strict orthopedic point of view, it would appear that the individual's numerous injuries resulted in temporary aggravation of underlying cervical degenerative disc disease (cervical spondylosis). The individual will require conservative, nonoperative measures such as physical therapy modalities for a period of several weeks to months following each incident but ongoing treatment would not be related to the original injuries or incidents but due to the underlying degenerative process. In reviewing the large file of records, it appears that no detailed medical rationale has been submitted that would causally relate the individual's current neck symptomatology to the various work-related incidents."

The Office, in a May 25, 1983 decision, reaffirmed its previous loss of wage-earning capacity decision. It also denied appellant's request for reimbursement for physical therapy on the ground that the payment would be reimbursement of appellant's rent and therefore not a bona fide medical expense.

The Board finds that appellant is not entitled to reimbursement of costs for his use of facilities available as an inclusive part of the monthly rent in his apartment complex for self-directed physical therapy program.

5 U.S.C. section 8103(a) provides:

> "(a) The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."

In this case, appellant's self-directed program of physical therapy was recommended or prescribed by Dr. Wood, Dr. Hanfling and Dr. Kroopf. The Office medical director and Dr. Simpson, the Office consultant, indicated that this program would give relief to appellant's symptoms. Appellant, however, has not incurred any specific, identifiable medical expense in undergoing this physical therapy. The facilities are available to all residents of the apartment complex as a recreational facility. There is no separate cost or charge for using these facilities beyond the rent payment. Appellant therefore cannot seek reimbursement for using these facilities. Use of the facilities are part of the rights he and his family enjoy in living at the apartment complex. Although they provide some relief to appellant, their therapeutic value is incidental to their recreational purpose.

Appellant has contended that he chose to move into the apartment complex because of its therapeutic facilities. Appellant, however, did not seek reimbursement for using these facilities until two years after he moved into the apartment complex. This factor lessens the weight of his argument.

The decision of the Office of Workers' Compensation Programs, dated May 25, 1983, is hereby affirmed.

In the Matter of BETTY G. MYRICK *and* U.S. POSTAL SERVICE, DETROIT BULK MAIL CENTER, Allen Park, Mich.

Docket No. 84-1005; Submitted on the Record;
Issued June 22, 1984

Before E. Gerald Lamboley, Michele von Kelsch,
David S. Gerson

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen the case for further merit review.

This is the second appeal in this case. In the previous appeal,[1] the Board found that appellant had not met her burden of establishing that her carpal tunnel syndrome was causally related to her May 5, 1982 employment injury.

Subsequent to the appeal, on February 6, 1984, appellant requested reconsideration before the Office of Workers' Compensation Programs and submitted several documents in support of her request. The Office denied this request by compensation order dated February 21, 1984.

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128.[2]

The Board finds that the Office's refusal to reopen the case for further merit review was proper.

Appellant submitted the June 11, 1982 duty status statement of an employing establishment nurse which indicated she should not lift over 15 pounds with her left arm until July 7, 1982. A nurse is not a "physician" within the meaning of section 8101(2)[3] of the Federal Employees' Compensation Act,[4] and this statement is therefore of no probative value with respect to the issue on reconsideration.

Appellant submitted a November 14, 1983 report of Dr. Jeffrey L. Eisman, a chiropractor, which stated it was "conceivable and probable" that appellant's condition was "precipitated and/or exacerbated by trauma at work." Under section 8101(2) of the Act, chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist . . . " As the condition addressed by Dr. Eisman was not a subluxation, Dr. Eisman's report is of no probative value.

Appellant also submitted a May 4, 1983 report of Dr. H. J. van Valzah, a specialist in occupational medicine, concerning a fitness-for-duty examination. This report noted right shoulder tenderness and restriction of motion and recommended working below the shoulder level. As it did not indicate that appellant's condition was employment related, this report is not relevant to the issue on reconsideration. Similarly, Dr. van Valzah's December 22, 1983 report of a second fitness-for-duty examination only discussed appellant's current "musculoskeletal pain syndrome with strong functional overlay," and did not relate her condition to her employment.

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[1] Docket No. 83-1474 (issued October 25, 1983). The facts of the case as set forth in the previous decision are hereby incorporated by reference.

[2] *Eladio Joel Abrera*, 28 ECAB 401.

[3] 5 U.S.C. section 8101(2).

[4] 5 U.S.C. section 8101 *et seq.*

The decision of the Office of Workers' Compensation Programs dated February 21, 1984 is hereby affirmed.

In the Matter of MELBA ELAINE FORD *and* DEPARTMENT OF THE ARMY, PRESIDIO OF SAN FRANCISCO, San Francisco, Calif.

Docket No. 84-373; Submitted on the Record;
Issued June 22, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied continuation of pay for appellant's absence from work from October 7, 1982 through January 12, 1983.

On February 26, 1982, appellant, then a 42-year-old sales store checker, tripped over a dolly at work and fell, injuring her right elbow, left shoulder, both knees, and left tibial area. She was examined on March 4, 1982 by Dr. Peter Mandell, a Board-certified orthopedic surgeon, who found "bruises over the left shoulder, right medial knee, and abrasions over the left shin." Appellant missed work on February 27, 1982, from March 13 through 20, 1982, and on March 24, 1982, receiving continuation of pay for these absences.

In a December 13, 1982 report, Dr. Mandell stated that appellant had had "increasing problems" with her left knee. His report referred to an August 25, 1981 injury, and a copy of a November 3, 1981 report of Dr. Mandell in the case record indicated appellant had a low back condition and had injury to her left foot in October 1981.

On January 13, 1983, Dr. Mandell performed an arthroscopy of the left knee and a partial left medial meniscectomy with removal of loose bodies from the left knee. The postoperative diagnoses were large flap-type tear of the posterior half of the medial meniscus; osteochondral defect of the femoral condyle with two cartilagenous loose bodies; unidentified anterior cruciate ligament; and fairly advanced degenerative changes of the medial tibial plateau and medial facets of the patella with patella chrondromalacia.

By letter of January 20, 1983, the Office of Workers' Compensation Programs notified appellant that it would not pay her medical bills for her left knee condition, which it said "appears to be unrelated in any way to your federal employment . . ."

Appellant missed work on the following dates, for which she received continuation of pay, according to employing establishment records: October 7 through 9, 1982; portions of October 15 and 27, 1982; November 12 and 13, 1982; a portion of November 26, 1982; December 8, 18, 21 through 24, and 28 through 31, 1982; and January 4 through 12, 1983. Thereafter, she was on sick leave through February 25, 1983.

In reports dated January 27, 1983, March 15, 1983, and May 25, 1983 Dr. Mandell stated his opinion that appellant's left knee condition and the January 13, 1983 surgery were causally related to her February 26, 1982 employment injury.

Dr. Leonard A. Simpson, an orthopedic surgeon and an Office medical consultant, reviewed the case record and stated in a September 23, 1983 report that the medical evidence indicated that appellant's left knee condition was causally related to her February 26, 1982 employment injury and caused disability from December 18, 1982 through March 23, 1983.

In a letter decision dated October 6, 1983, the Office accepted appellant's claim for compensation through February 25, 1983. In another letter decision of October 6, 1983 the Office found that appellant was not entitled to continuation of pay from October 7, 1982 through January 12, 1983 on the ground that this period of disability occurred more than six months after she first returned to work following the employment injury of February 26, 1982.

The Board finds that the Office properly denied continuation of pay for the above-mentioned period.

Section 8118[1] of the Federal Employees' Compensation Act[2] authorizes continuation of pay to an employee who has filed a timely claim for wage loss due to traumatic injury "for a period not to exceed 45 days" and "under accounting procedures and such other regulations as the Secretary [of Labor] may require." Pursuant to this section of the Act, the Secretary has promulgated regulations governing the applicability of continuation of pay for a recurrence of disability which state in part:[3]

"*** (b) If the employee so elects [after the recurrence of disability], the official superior shall again continue regular pay, providing the 45 calendar days were not all 'used' during the initial period of disability.

This is applicable, however, only during a six month period beginning from the date the employee first returned to work following the initial disability. If a recurrence happens after the six months have expired, the employing agency should not continue regular pay, although some of the 45 days may remain 'unused'. In such instances, the employee is entitled only to compensation payable by the Office.

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[1] 5 U.S.C. section 8118.

[2] 5 U.S.C. section 8101 *et seq.*

[3] 20 CFR section 10.208.

(c) If the 45 day entitlement period has been exhausted, or six months have expired since the employee first returned to work, the employing agency is not required to continue regular pay. The Office shall be responsible for initiating payment of compensation. In such instance, the employee shall file claim for any wage loss on the appropriate Form CA-7 or CA-8."

Appellant first returned to work after the February 26, 1982 injury on March 2, 1982, and her absence from work commencing October 7, 1982 due to a recurrence of disability was therefore outside the six-month period following her initial return to work. Accordingly, under the above-quoted provisions of the Secretary's regulations, appellant is not entitled to continuation of pay for her absence after the October 7, 1982 recurrence.[4]

The October 6, 1983 decision of the Office of Workers' Compensation Programs denying continuation of pay is hereby affirmed.

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[4] The Board notes that appellant is entitled to compensation (as distinguished from continuation of pay) for all periods of disability caused by her February 26, 1982 employment injury.

In the Matter of LEO COHEN *and* U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, N.Y.

Docket No. 84–210; Submitted on the Record;
Issued June 26, 1984

Before MARGARET PALLANSCH, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant had any disability after February 9, 1982 causally related to his December 27, 1966 employment-related myocardial infarction.

On December 27, 1966 appellant, then a 52-year-old chauffeur carrier, felt severe pain in his chest after lifting a very heavy sack at work. He was hospitalized that same evening by Dr. J. S. Rosen, a Board-certified internist, who stated in a February 11, 1967 report that appellant was hospitalized from December 27, 1966 through January 23, 1967. In a March 25, 1967 report he stated that a diagnosis of "acute myocardial infarction" had been definitely established during appellant's hospitalization, and stated that appellant's exertion in lifting the heavy sack at work "may have been the causal factor in the infarction."

Appellant stopped work on December 27, 1966 following his myocardial infarction. He returned to work (on light duty) on March 6, 1967.

An Office of Workers' Compensation Programs medical adviser reviewed the case record. On April 24, 1967 he concluded that appellant's December 27, 1966 myocardial infarction was causally related to his exertion at work on that date. In a May 5, 1967 letter, the Office notified appellant that his claim had been approved.

Appellant continued working on light duty from March 6, 1967 through May 7, 1976, missing occasional periods of work for periodic evaluations of his heart condition. On May 7, 1976 he stopped work, claiming a recurrence of disability due to his heart condition. In support of his claim of recurrence, he submitted a May 27, 1976 report on an Office form CA-20a from Dr. Arthur A. Shachner, an internist, who diagnosed myocardial ischemia and noted that appellant was experiencing angina. Appellant did not return to work after May 7, 1976.

The Office determined that appellant's recurrence of disability was causally related to his December 27, 1966 myocardial infarction and began paying him compensation for temporary total disability.

The Office on July 12, 1977 requested a supplement report from Dr. Shachner, including a description of appellant's work tolerence limitations. In a report of the same date, Dr. Shachner stated that appellant had full capacity for sitting, could walk and stand for one-half hour at a time, and had an American Heart Association classification of II-III. In a July 25, 1977 report, Dr. Shachner diagnosed arteriosclerotic heart disease, increasing myocardial ischemia, and old posterior wall infarction, and stated:

> "In conclusion this patient obviously suffered inferior wall infarct and is suffering increasing angina with little effort as well as emotional strain and in my opinion the work he was currently employed in is not conducive to keep the patient angina free."

The Office referred appellant to Dr. Seymour S. Cutler, a Board-certified cardiologist, for examination and evaluation. In an October 24, 1977 work tolerance limitations form report, Dr. Cutler indicated that appellant was capable of performing light duty on a full-time basis, with the following restrictions: standing and sitting, eight hours; walking and kneeling, four hours; repeated bending and stooping, one hour. He also noted that appellant's American Heart Association classification was II B-C. In a November 7, 1977 narrative report, Dr. Cutler concluded that appellant was "capable of performing light or moderate work" and stated that his angina, which was described as "mild to moderate," was a "permanent physical impairment."

A second Office medical adviser reviewed Dr. Cutler's report. On November 28, 1977, he concurred with the work limitations described by Dr. Cutler.

By a February 10, 1978 letter decision, the Office reduced appellant's compensation effective February 2, 1978 on the ground that he was capable of performing the duties of a Pen and Pencil Assembler, Code No. 733.887 of the Department of Labor's *Dictionary of Occupational Titles*.

Appellant requested reconsideration of the Office's February 10, 1978 decision, but did not submit any evidence in support of his request. By compensation order dated February 5, 1979, the Office denied the request for reconsideration without reviewing the case on its merits.

Appellant requested reconsideration and submitted a June 3, 1981 report from Dr. Shachner, who repeated his earlier diagnoses of arteriosclerotic heart disease, increasing myocardial ischemia, and old posterior wall infarction, and noted that appellant developed a bifasicular block in April of 1978.

A third Office medical adviser reviewed the case record and opined on September 8, 1981 that appellant was not totally disabled and could perform the duties of a pen and pencil assembler. He continued:

> "Claimant had myocardial infarction 1966, work-related, from which he recovered and total disability ceased. The letters of Dr. Shachner recite recurring disability from natural progression of the underlying cardiac pathology and lend no support or credence to the hypothesis that current disability is work related.
>
> "[I] suggest an impartial [evaluation] to determine when work-related disability ceased."

By compensation order dated January 18, 1982, the Office denied appellant's request for reconsideration after reviewing the case on its merits.

The Office subsequently referred appellant, a statement of accepted facts and the entire case record to Dr. John Edson, a Board-certified cardiologist. In a February 22, 1982 report, after noting the history of injury and his findings on physical examination, Dr. Edson noted that an electrocardiogram revealed "a regular sinus rhythm with a right bundle branch block and a left anterior hemiblock," which findings were "unchanged from the copies of the tracings which [appellant] brought from Dr. Shachner dated 4/14/78 and dated 10/18/81." Dr. Edson continued:

> "It is my impression that Mr. Cohen has Arterisclerotic and Hypertensive Cardiovascular Disease with stable angina pectoris.
>
> At this time he is not totally disabled for all employment. He is capable of performing the activities related to the job of pen and pencil assembler.
>
> "Arteriosclerotic Heart Disease [ASHD] is a slowly progressive process which is not caused by any kind of work. It is apparent that

> Mr. Cohen's ASHD began to manifest itself some five years before 1966. The episode of December 27, 1966, therefore, was an aggravation of a preexisting disease. This aggravation ceased when his myocardial infarct healed some two to three months after the onset of the myocardial infarction. The subsequent episodes of angina related to his underlying ASHD and were not due to work. The development of the bifasicular block also related to his underlying ASHD and not to a work effort. The partial disability, which he has at present, is entirely the result of his underlying ASHD, and not due to any work effort. Mr. Cohen's work-related disability certainly ceased by February 2, 1978 and, as I say, probably long before that."

The third Office medical adviser reviewed Dr. Edson's report. On April 1, 1982, he concurred with Dr. Edson, stating:

> "There has been no work-related disability since three months after 12/27/66. Episodes which have transpired since then are due to the natural, inexorable progression of the preexisting, inherent ASHD."

By compensation order dated November 23, 1982 the Office terminated appellant's compensation after February 9, 1982 (the date he was examined by Dr. Edson) on the grounds that "the weight of probative, reliable medical evidence finds the claimant has no remaining employment-related disability; that any disability he does have is due to conditions unrelated to his employment."

Appellant requested a hearing before an Office hearing representative and submitted an October 6, 1982 report from Dr. Shachner, who repeated his earlier diagnoses and opined that appellant "is not fit for gainful employment, as travel requires too much stress on his impaired myocardial function." In an April 11, 1983 report, Dr. Shachner stated that appellant "may show some improvement, but the fact remains that the [December 27, 1966] injury is still obvious as evidenced by his continual complaints of angina and shortness of breath."

The hearing before an Office hearing representative was held on April 18, 1983. In a decision dated and finalized on August 5, 1983, the hearing representative affirmed the November 23, 1982 decision.

The Board finds that the Office did not meet its burden of proof in finding that appellant's employment-related disability had ceased by February 9, 1982. Accordingly, the case will be remanded to the Office for further development.

The Office based its decision to terminate appellant's compensation on the February 22, 1982 report of Dr. Edson, a Board-certified cardiologist. In his report, Dr. Edson concluded that the December 27, 1966 employment-related aggravation of appellant's preexisting arteriosclerotic heart disease "ceased when his myocardial infarct healed some two to three months after the onset of the myocardial infarction." However, Dr. Edson did not provide any medical rationale supporting his conclusion that appellant's heart condition was only temporarily aggravated by his employment activities, and did not specifically address whether the December 27, 1966 myocardial infarction (accepted by the Office as employment related) left any permanent employment-related residuals (such as death of heart tissue). Accordingly, the case will be remanded for further development.

On remand, the Office should refer appellant, along with a detailed statement of accepted facts and the entire case record, to a Board-certified cardiologist not previously associated with the case for a rationalized medical opinion whether appellant has any continuing disability causally related to his December 27, 1966 myocardial infarction and, if so, for how long a period, or any permanant residuals therefrom. After such further development as the Office may deem necessary, a *de novo* decision should be issued.

The August 5, 1983 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded to the Office for further action consistent with this decision of the Board.

In the Matter of VIVIAN HALL *and* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Fresno, Calif.

Docket No. 84–822; Submitted on the Record;
Issued June 29, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant had any disability after November 10, 1977 causally related to her January 9, 1973 employment injury.

On January 9, 1973 appellant, then a 54-year-old audit clerk, sustained an injury to her back and buttocks when she slipped on a plastic mail clip and fell to the floor. She stopped work that date and did not return. The Office of Workers' Compensation Programs accepted her claim for lumbosacral and cervical strain and paid compensation for temporary total disability commencing January 12, 1973.

On February 21, 1973 appellant sustained a recurrence of her back disability when she fell while walking down steps of the medical building in which her attending physician, Dr. Richard Canaan, a Board-certified orthopedic surgeon, was located.

Appellant was subsequently referred by Dr. Canaan for a neurological consultation with Dr. James A. Yarrow, a neurosurgeon. She was hospitalized on November 29, 1973 and underwent a myelogram which revealed a herniated disc at the L4-5 level and narrow spinal canal syndrome. On December 10, 1973 Dr. Yarrow noted that appellant elected to undergo further conservative medical treatment.

Appelant also submitted the July 31, 1974 report of Dr. Richard A. Chan, who indicated she complained of pain to the points of her right upper limb, arms, forearms and feet. He noted appellant had evidence of osteoarthritis but that she exhibited a "considerable amount of functional overlay" on examination. It was also reported that an EMG [electromyogram] of her neck and upper extremities was negative.

By letter dated March 28, 1972 the Office requested that appellant submit a current medical evaluation from Dr. Yarrow. In a report dated April 11, 1977 Dr. Yarrow noted that appellant complained a pain to her neck, suboccipital pain and constant headache, lack of sensation in the right arm and both legs, and mental confusion. He stated, however, that on examination appellant exhibited "functional and hysterical symptomatic exaggeration" of her symptoms and that he could find no evidence on lumbar or cervical examination of any organic neurological lesion which would account for her symptoms. Dr. Yarrow recommended that appellant undergo psychiatric evaluation.

By letter dated November 30, 1977 the Office advised appellant that Dr. Yarrow's evaluation did not indicate any injury-related findings and recommended that she submit further evidence in support of disability. Her compensation was terminated effective November 9, 1977 for lack of probative medical evidence.

Appellant submitted the January 30, 1978 report of Dr. Chan who noted she continued to exhibit back pain and was unable to work. He also indicated that appellant suffered from anxiety and depression secondary to her 1973 injury and enclosed a psychiatric consultation report from Dr. Finn Lunde, Board-certified in psychiatry. Dr. Chan also referred appellant for an orthopedic consultation with Dr. Breck Davis, a Board-certified orthopedic surgeon, who stated in a report dated February 8, 1978 that she had multiple subjective complaints which she related to her 1973 injury; however, Dr. Davis found no objective findings correlated with her complaints.

By compensation order dated November 7, 1978 the Office rejected appellant's claim for continuing compensation finding that the medical evidence of record failed "to establish that the disability for which claim is made was caused by injury in the performance of duty."

By letter dated November 29, 1978 appellant requested a hearing before an Office representative. At the hearing held on February 28, 1979, appellant submitted the January 15, 1979 report of Dr. Herbert C. Sanderson, an orthopedic surgeon, who noted she had generalized arthritis superimposed upon protruding disc disease at L4-5 and periarticular arthritis of both shoulders. He indicated that appellant remained disabled from employment.

By decision dated December 11, 1979 and finalized December 14, 1979 the Office hearing representative affirmed the November 7, 1978 Office decision finding that the medical evidence did not indicate that appellant's disability after November 10, 1977 was causally related to the injury of January 9, 1973.

By letter dated April 14, 1980 appellant, through her representative, requested reconsideration and in support thereof submitted the August 11, 1980 report of Dr. John E. Graham, a chiropractor, who reported x-rays of appellant's lumbar spine revealed arthritic changes in accordance with her age with no evidence of fracture, luxation or bone disease. He indicated that appellant's injury of 1973 had "set into motion" a series of events leading to her current disability.

Appellant also submitted the December 23, 1980 report of Dr. Richard T. Yates, a Board-certified orthopedic surgeon, who indicated that he reviewed appellant's medical records and stated that the fact her "present type of involvement at the L-4, 5 level seven years following injury would be arthritis in nature rather than a persistent herniation of the nucleus pulposus" did not detach the condition causally from the 1973 employment injury. He stated that her degenerative arthritic changes could be expected to progress subsequent to the disc herniation.

On January 21, 1981 Dr. Leonard A. Simpson, an Office consultant in orthopedics, reviewed the case record and stated that the medical evidence did not indicate that appellant's symptoms were related to the January 9, 1973 injury. He noted that Dr. Graham's report failed to establish a causal relationship between appellant's symptomatology and the employment injury.

By letter dated October 22, 1981 the Office notified appellant that a merit review of the claim would be conducted as it found the medical evidence of record conflicting as to the orthopedic residuals of her employment injury. It also noted that the issue as to appellant's psychiatric disability had not been adequately resolved.

Appellant was referred, together with the case record and statement of accepted facts, to Dr. Carroll Brodsky, a Board-certified psychiatrist, for coordination of a comprehensive medical evaluation. Dr. Brodsky was directed by the Office to secure consultations with other specialists in the fields of orthopedic surgery and neurology.

In a report dated April 1, 1982 Dr. Brodsky indicated that he had examined appellant together with Dr. Franklin Hoaglund, a Board-certified orthopedic surgeon; Dr. Ernest Bates, a Board-certified neurosurgeon; and Dr. Gregory Bard, Board-certified in physical medicine and rehabilitation. Dr. Brodsky stated:

"*Mental Status:* Ms. Hall is well-developed, well-nourished . . . female who was neatly dressed and groomed. She remained lying in bed during the whole time that I conducted the examination. She did not move until she had to get up to draw a clock. When she did there was no evidence of any difficulty in doing it.

"There was no evidence of any sensory defect or any motor defect. There were no involuntary movements. He sensorium was clear. She was fully oriented as to time, place and person. Her memory for remote recent events was intact.

"There was no evidence of hallucinations, delusions or ideas of reference. Her speech was well within normal limits. Her chain of associations was intact. She appeared to be in good spirits.

"She performed spottily on tests of intellectual function. She had some difficulty in subtracting 7s serially. She could provide abstract interpretations of proverbs. She could do comparisons. Her knowledge of common facts was not too good. Her memory as tested by digit was quite good. In order to test for ability to convert a set of directions into visual motor work, I asked her to draw a clock and to write the words, state of California. The clock she drew was symmetrical and the sample of her handwriting showed that it was neat."

* * *

"*Reports of Consultants: Orthopedic Consultation:* Franklin Hoaglund indicated that this patient had minimal findings of tenderness and restriction of motion without neurologic findings in the lower extremities. Nor did she have remarkable x-ray findings. He suggested a weight-reduction program and an exercise program. There was no significant disc narrowing when he compared 1973 x-rays to the 1982 x-rays. There was minimal osteophyte formation of disc spaces L2-3, L3-4, and L4-5.

"*Neurosurgical Consultation:* Dr. Ernest Bates found no evidence of neurosurgical disease. The findings were 'functional' in the sense that she had a stocking hypaesthesia. He saw no reason for further diagnosis or treatment. He saw no reason why she would be unable to work as a clerk, and established no preclusions for that line of work. He stated that her condition was permanent and stationary.

"*Physical Medicine and Rehabilitation Consultation:* Dr. Gregory Bard found no evidence of neurologic abnormality. Electromyographic testing of the musculature for lower extremities performed on March 11, 1982 revealed no abnormal action potentials. X-rays of the cervical spine revealed degenerative changes involving C4-C5, C5-C6 and C6-C7 levels with osteophytosis of the vertebral margins and narrowing of the disc spaces at these levels. There were minimal degenerative changes and the disc spaces were well-maintained. He indicated that his findings revealed a 'paucity' of objective musculoskeletal signs. She did have a slight cervical-dorsal kyphosis and a lumbosacral lordosis. These factors might be contributing to chronic postural strain and occasional pain but he doubted that these symptoms were of a totally disabling magnitude. The degenerative changes were in keeping with her age and were unrelated to the fall of 1973. He noted that throughout her record there was mention of suspected functional overlay. Dr. Bard himself noted inconsistencies in her performance that reflected psychogenic factors contributing to her awareness of symptoms. From a musculoskeletal standpoint he considered her condition to be permanent and stationary and recommended no further diagnostic or treatment studies. He classified her symptoms as nil with rest and minimal with the activites of daily living and of slight to moderate intensity when engaged in heavy work. He found no indications for the use of crutches or canes. He indicated that she should be able to resume full-time employment with the preclusion of heavy work. He noted that advanced age and a prolonged period of unemployment were factors that would require serious attention when considering suitable employment for her.

"*Psychiatric Evaluation:* Dr. Carroll Brodsky conducted a psychiatric examination. He concluded that there was no evidence of any psychopathology. There was no evidence of a thought disorder. There was no evidence of an organic brain syndrome. There was no evidence of an anxiety state that would affect her ability to work. She is intelligent. From a psychiatric standpoint she is functioning well given her age and education and activities. She seems interested in other people and engages in a number of activites."

* * *

"*Vocational Rehabilitation Consultation:* Ms. Barbara Sykes indicated that this patient had made a satisfactory adjustment to retirement and was enjoying various hobbies which kept her active. She noted that the patient did not feel that she herself would ever be able to return to employment and doubted that any effort would be successful.

"*Summary and Conclusions:* There were no medical records describing this woman's earlier medical care. Therefore we have to rely entirely on the history that she gave us. She stated that she had a good health history prior to the time that she fell. She states that she had a good history. According to the patient, on the day before her fall she had no physical and no mental symptoms. She was not under the care of a physician.

"This woman did have a fall and from the very beginning there was a paucity of symptoms. In reviewing this record our group of

> consultants could find no explanation of this woman's prolonged disability. The only factor that seemed to account for her behavior was that because of her fall, she was able to reunite with her husband; and from that point on, he took care of her because he was her 'legal guardian.' There seemed to have been a number of beneficial results of this, including his abstinence from alcohol.
>
> "The patient paints a picture of being able to do very little, though as one takes a history, she is capable of doing a great deal. In discussion [of] this matter with the consultants and in reviewing their reports, it is evident that they can find no explanation of why this woman would be any less active than any person her age. There are the most minimal of degenerative changes. The physicians who examined her and review the x-rays indicated that although she might have some aches and pains from time to time, there was no evidence of pathology that would interfere with her ability to function normally. Similarly, there was no evidence on physical examination of any neurologic deficit or of any orthopedic abnormality that would interfere with her ability to function.
>
> "The group that conducted this evaluation concluded that she was one of the many persons who complains of the inability to function and of pain in many parts of the body who have no physical findings or laboratory findings to explain the symptoms and whose symptoms are inconsistent with any known disease entity.
>
> "For some people, being sick and disabled and dependent fulfills psychological needs. I believe that there was a high probability that Ms. Hall is one of those persons.
>
> "In reference to the questions you posed, her present diagnosis would be a mild degenerative disease of the spine. The panel agreed that this woman did not have a medical condition or disability that had been precipitated, accelerated or aggravated or proximately caused by factors of federal employment. It is certainly possible that shortly after her injury, she had some aches and pains and was temporarily disabled. The work limitations imposed by her condition would be those for any person her age who might have a slight degenerative disease. There were no recommendations for future medical care."

On May 19, 1982 Dr. George E. Becker, an Office consultant in psychiatry and Board-certified in orthopedic surgery, reviewed Dr. Brodsky's report and stated:

> "I believe the evidence in the medical record adequately establishes that there is no orthopedic diagnosis related to the patient's fall. Lumbar spine films taken at the time of the injury, when compared with lumbar spine films taken in 1982, show no specific localizing change related to the L4-5 space which would indicate the result of

any occult trauma in 1973. The findings on x-ray, as described, are those which one would expect simply as the result of the aging process. Therefore, I agree with the psychiatrist and the orthopedist, that the patient has no post-traumatic orthopedic and, in fact, no post-traumatic physical dysfunction. I cannot, however, agree with Dr. Brodsky that the patient has no evidence of psychopathology (please see his report quoted above). I believe that on *Axis I, DSM-III classification, the patient has a Psychogenic Pain Disorder (307.80)*. She meets all of the diagnostic criteria for this diagnosis: (a) severe and prolonged pain is the predominant disturbance, (b) the pain presented as a symptom is inconsistent with the anatomic distribution of the nervous system, and (c) no organic pathology has been found to account for the pain which is grossly in excess of what would be expected in view of the physical findings. The psychological factors are clearly etiologically involved in the pain: there is a temporal relationship between an environmental stimulus that is related to a psychological need and the initiation or exacerbation of the pain. (The patient had been abandoned by her husband, she had the injury, and because of persistent symptoms it was 'necessary' for him to return to her to take care of her. He has been taking care of her ever since). Additionally, the pain enables the patient to avoid an activity that is noxious to her (presumably work, since the patient had discontinued work before her husband left her, but returned only after he did so, presumably for financial reasons). In addition to these, the pain clearly enables the individual to gain support from the environment (her husband, friends and neighbors, children) that otherwise might not be forthcoming. All of the foregoing are clearly established by the medical record quoted above in summary which precedes this discussion and clearly establish the psychiatric diagnosis noted on Axis I. Additionally, the diagnosis is buttressed by the findings on the MMPI which show a 'psychosomatic V,' indicating that the patient does tend to develop somatic symptoms in response to psychological stress. The existence of psychopathology is therefore clearly demonstrated and described in the medical record, both the MMPI and in Dr. Brodsky's report itself.

"Additionally, there is much in the medical record which suggests that the person has a *Mixed Personality Disorder with histrionic, schizoid, borderline dependent and passive-aggressive features (DSM-II, Axis II, Mixed Personality Disorder—301.89)*.

"The question then to be answered is whether or not the patient's psychiatric diagnoses are related to the trauma. It seems clear from the history, and this is adequately documented, that the patient was functioning and coping reasonably well until the fall. It was

> only after this fall that she seemed to 'fall apart' from a psychological standpoint and develop the psychogenic pain which has been the ongoing problem. The patient had all of the psychological underpinnings which made it possible for this trivial accident to precipitate the decompensation which to most observers has appeared out of all proportion to the injury. The injury nonetheless, in my opinion, precipitated the emergence of her psychopathology to the point that she was incapacitated by this psychopathology. I agree with the report that the patient is not totally disabled and I feel that from an orthopedic standpoint she is not anymore disabled than any other physically healthy person of her age. The patient, however, is not emotionally healthy and her disability, which seems injury-related, is the reason she is unable to be gainfully employed. I believe, based on the AMA guidelines, that because of this disability, the patient has approximately eight to ten percent permanent impairment as a result of the accident. From a practical standpoint I agree with the recent University of California evaluation that the patient will probably not be able to return to work, both because of the behavioral reinforcement she has had in her invalid role and because she lacks both insight and motivation."

On July 1, 1982 the Office assistant regional administrator reviewed Dr. Becker's report and concurred in his opinion that appellant had no orthopedic or neurological disability related to the January 9, 1973 employment injury. He disagreed, however, with Dr. Becker's assessment of appellant's psychiatric condition stating: "Dr. Becker completely ignores the rational, logical goal of the claimant who is seeking monetary benefits," and concurred in Dr. Brodsky's opinion that she had no psychopathology causally related to the employment injury.

The record was thereafter referred to Dr. A. H. Hirschfeld, an Office consultant, who reviewed the reports of Drs. Brodsky and Becker and stated:

> "While neither doctor can be said to be in error, this is a case where vis-a-vis discussion would quickly dispel the apparent difference in words. Both men saw the absent neurotic pattern—no 'psychopathology.' Both men saw the otherwise healthy personality patterns and defenses, where a tragic life could be lived (no father, no mother, loss of grandmother in early days; marriage failure three times as an adult). In the words of one current diagnostic system, this is a Psychogenic Pain Disorder; in another, it is a personality pattern that long precedes an accident, without a current neurosis. Dr. Brodsky does clearly say that patient had a temporary aggravation of her personality but that is long since past.
>
> "Since the meanings are the same, one has an apparent but no real conflict, and he has a person in trouble who has seized a mech-

> anism offering hope and companionship. She has adjusted well to this and it should be recognized. The temporary effects of the accident are gone, and the same symptoms now chronically support the patient's problems chronically. Medically, no compensation is merited on the most clear mechanisms."

By compensation order dated November 8, 1983 the Office denied modification of the December 4, 1979 decision finding that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision.

The Board finds that with regard to appellant's back conditions, the weight of the medical opinion evidence does not establish that it is related to the January 9, 1973 employment injury.

The weight of medical evidence on this issue is represented by the report of Dr. Brodsky who coordinated a compensation medical evaluation of appellant together with Dr. Hoaglund, a Board-certified orthopedic surgeon, Dr. Bates, a Board-certified neurosurgeon, and Dr. Bard, Board-certified in physical medicine and rehabilitation. Dr. Hoaglund indicated that appellant exhibited minimal findings on examination without neurologic findings in her low back. He reviewed her x-ray and found no significant disc narrowing between the 1973 x-ray report and the reports of 1982. Dr. Bates found no objective evidence of neurological disease on examination or reason for further treatment. Dr. Bard noted that an EMG was negative for abnormal action potentials and that her cervical x-rays revealed degenerative changes consistent with her age and unrelated to the fall in 1973. He diagnosed a slight cervical-dorsal kyphosis and lumbosacral lordosis which could contribute to occasional pain, but noted that these conditions were not related to the employment injury. Dr. Bard noted that on examination appellant demonstrated inconsistencies in her performance which were more demonstrative of psychogenic factors than objective physical disability. All three physicians concluded that appellant was physically capable of returning to full-time employment subjective to specified work restrictions.

The Board notes that the reports of the other physicians of record were inconsistent and created a conflict on the nature and extent of appellant's back condition and its relationship to her employment injury. In order to resolve the conflict, she was referred for an impartial group consultation. In situations where there exists opposing medical reports and the case is referred to impartial medical specialists for the purpose of resolving the conflict, the opinion of such specialists, if sufficiently well-rationalized and based upon a proper factual background must be given special weight.[1] The report of the group orthopedic and neurological consultation that appellant has no disability related to her federal employment constitutes the weight of the medical evidence.

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[1] *Nyla J. Baillio*, Docket No. 83-1188, issued August 5, 1983.

As to the issue of appellant's emotional condition and its relationship to her employment injury, the Board finds that the case is not in posture for decision.

The record demonstrates a conflict in the medical opinion evidence between the reports of Dr. Brodsky, a Board-certified psychiatrist, and Dr. Becker, a psychiatrist and Board-certified orthopedic surgeon. Although the case record was referred to Dr. Hirschfeld for resolution of the dispute, he is an Office medical consultant, and he cannot serve as an impartial specialist to resolve the conflict.[2]

The case shall be remanded to the Office for referral of appellant, together with a statement of accepted facts and the case record, to a Board-certified psychiatrist for a rationalized opinion on whether her emotional condition was caused or aggravated by the employment injury, whether any employment-related aggravation was temporary or permanent, and if temporary, the period of employment-related disability. After further development of the case as is deemed necessary, the Office should make a *de novo* decision.

The November 8, 1983 decision of the Office of Workers' Compensation Programs is affirmed, in part, on the issue of appellant's orthopedic disability; the case is remanded for further development on the issue of appellant's emotional condition to be followed by a *de novo* decision.

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[2] See *Silvester Lewis*, Docket No. 84-314, issued April 2, 1984; see also, the Federal (FECA) Procedure Manual, Chapter 3-400, for the procedures to be followed by the Office in selecting an impartial specialist pursuant to 5 U.S.C. section 8123(a).

In the Matter of WHEELER MORRIS *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84–1004; Submitted on the Record;
Issued June 29, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant has disability or an impairment due to employment-related asbestos exposure.

Appellant, 69 years of age, worked in various capacities at the employing establishment beginning October 28, 1941. His last position was that of a rigger helper, which he held from September 6, 1970 until the last date he worked, January 30, 1971. He retired on December 13, 1971. On July 6, 1981 he filed a claim alleging that he contracted asbestosis as a result of the factors of his federal employment.

In response to an Office of Workers' Compensation Programs questionnaire concerning his alleged asbestos exposure, appellant stated that his first exposure to a heavy amount of asbestos (i.e., visible airborne asbestos particles were evident), was during the period 1942 to 1960 when he worked as a blocker, bracer, packer, and labor cleaner with the employing establishment. He also stated that he was first exposed to a medium amount of asbestos (i.e., asbestos dust was visible on floors and work surface), from 1960 to 1961 when he worked as a fleet worker on a naval fleet. He added that he was again exposed to a medium amount of asbestos from 1961 to 1971 when he worked as a molder helper, outside mechanic helper, and rigger helper with the employing establishment. Appellant indicated that he had no smoking history and stated that he had never been treated for any heart or lung problems. However, he stated that he had been treated for high blood pressure in 1959 and for arthritis in 1970.

The employing establishment submitted copies of appellant's health qualification record dated October 30, 1959 and March 13, 1981, a copy of appellant's employment record, a copy of an application describing appellant's trades and skilled occupations, the cover page to an undated certificate of medical examination enumerating the functional requirements and environmental factors of appellant's position, and copies of appellant's position descriptions, together with the estimates of the quantity, degree, and frequency of appellant's exposure to asbestos during his employment.

Also submitted was a medical report by Dr. Clara V. Gelbard, a pulmonary disease specialist and Dr. Reuben R. Merliss, a Board-certified internist of professorial rank specializing in cardiovascular disease, dated March 12, 1981, who, after discussing appellant's employment and medical history and findings on physical examination, reported the following:

> "*OUR INTERPRETATION OF CHEST X-RAY:*
>
> "* * * This man has pleural asbestosis and strong question of parenchymal asbestosis.
>
> *DISCUSSION:*
>
> "Unfortunately we have neither pulmonary functions nor an electrocardiogram on this patient. Consequently we cannot give a firm opinion as to the patient's disability. It is suggested you have another pulmonary function performed in San Francisco and have the test mailed down to us. However we can give you an opinion as to the patient's disability based on the information we have. His x-rays are quite clear, and the patient's history of exposure to asbestos is also quite clear, as is his history of dyspnea. We believe he falls in a class midpoint between class II and class III of the American Medical Association of disability, this disability being tentative as yet, and due to the inhalation of asbestos in his work."

The Office prepared a statement of accepted facts and referred it, together with appellant and the case record, to Dr. Harry J. MacDannald, a Board-certified internist specializing in pulmonary diseases, for a pulmonary evaluation.

Dr. MacDannald examined and evaluated appellant and submitted a copy of pulmonary function studies, laboratory test results and radiographic report discussing the interpretation of a chest x-ray performed at his request. In a report dated September 26, 1983 Dr. MacDannald set forth appellant's employment, exposure and medical history, and discussed his findings on physical examination. The doctor reported the following:

> "*LABORATORY DATA:*
>
> Chest X-Ray: With CT ratio 15/29. There is mild bilateral pleural thickening. There is an elevated right hemidiaphragm. It cannot be discerned whether this diaphragm is paralyzed or moves normally.
>
> "Electrocardiogram: With sinus bradycardia, rate 58 and nonspecific ST-T wave changes.
>
> "Pulmonary Function Tests: FVC [forced vital capacity] 2.72 liters (68%), FEV_1 [forced expiratory volume in one second] 2.37 liters [88%] FEV_1/FVC 87%. [MVV-maximum voluntary ventilation—of 118 (57%)]. TLC [total lung capacity] 5.91 liters (95%), RV/TLC ratio 40%, DLCO [diffusing capacity of the lung for carbon monoxide] 114%, pO_2 [partial pressure of oxygen] 77, pCO_2 [carbon dioxide pressure] 40. This is a normal pulmonary function study.
>
> "Hematocrit is 42, WBCs 5,700 with normal differential. Urinalysis is clear. A nonfasting sample of chemistry panel: triglycerides 182, otherwise within normal limits.
>
> "*IMPRESSION:*
>
> "1. Pleural asbestosis.
>
> "The patient has a significant asbestos exposure history and has radiographic evidence of mild bilateral pleural thickening with an elevated right hemidiaphragm. His pulmonary function studies are within normal limits. The patient has minimal complaints of dyspnea with moderate exertion. He has mild cardiomegaly present. The patient's condition can be considered permanent and could possibly be progressive. He should be seen again in the future if his clinical symptoms dictate. The patient should continue to avoid any asbestos dust exposure.
>
> "2. History of rectal cyst removed in the past.
>
> "3. Hypertension."

On October 25, 1983 Dr. Charles C. McDonald, an internist and pulmonary diseases specialist acting as an Office consultant, reviewed the evidence of record and after briefly discussing appellant's history of asbestos exposure stated:

> "There is a complete pulmonary specialist evaluation by Dr. Harry

MacDannald which is dated September 26, 1983. At this time dyspnea with moderate exertion is noted. No further quantification is given. Examination of the chest is normal. Chest x-ray shows mild bilateral pleural thickening. Pulmonary function tests are normal. The conclusion is pleural thickening secondary to asbestos-related disease. Dr. MacDannald felt that Mr. Morris' complaints of dyspnea with moderate exertion was not significant.

"As a result of a more current examination, the following statements may be made:

"1. The condition of the pleural thickening found on the most current examination was precipitated by the accepted conditions of employment.

"2. The diagnosis is pleural thickening secondary to asbestos exposure.

"3. The claimant is not disabled from his position due to disease resulting from exposure to asbestos while in federal employment.

"4. The degree of respiratory impairment secondary to asbestos-related diseases is 0%."

By letter decision dated January 5, 1984 the Office informed appellant of the following:

> "The medical evidence of record confirms that radiological and/or clinical findings establishes that you have sustained pulmonary injury consistent with exposure to asbestos in the performance of duty for the United States. In determining the existence and degree of impairment arising from such a condition, this Office employs the standards of the American Medical Association in its publication, *Guides to the Evaluation of Permanent Impairment.* On the basis of these standards, there is at this time no evidence of impairment or disability. At this time, therefore, there is no basis for the payment of monetary compensation benefits. However, since you have sustained an asbestos-related disease in the performance of duty for the United States, you are authorized to receive periodic medical examinations at the expense of this Office in order that your radiological and clinical findings may be closely monitored. If medical care for the condition does, in your attending physician's judgment, become necessary, this Office should be contacted immediately for authorization."

The Board finds that the case is not in posture for decision and must be remanded for further development.

The Office has established guidelines for the evaluation of asbestosis claims.[1] These require that the medical reports used to determine the extent of any pulmonary disability include the following information:

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[1] See Federal (FECA) Procedure Manual Chapter 2-806 FECA Tr. No. 81-44 issued August 1981, p. 56.

> "*Pulmonary Function Studies:* Pulmonary function studies must include measurement of the following functions (the report of the results of FVC, FEV, and diffusing capacity must include actual recorded values, the percent of predicted normal and identification of the normal standard applied for tests conducted before and/or after the use of bronchodilators). These studies should be performed under the supervision or direction of a Board-certified pulmonary specialist.
>
> A. *Forced Vital Capacity* (FVC) and *Forced Expiratory Volume in one Second* (FEV_1) measured in liters and representing the best of three efforts; and the FEV_1/FVC ratio ($FEV_1\%$) computed from these results . . ."
>
> * * *
>
> "The report must be accompanied by appropriately labeled spirometric tracings (for all tests) showing distance per second on the abscissa and distance per liter on the ordinate.
>
> "The Office's guidelines also suggest that the AMA *Guides* be used to determine the percent of pulmonary impairment."[2]

Dr. MacDannald, a Board-certified internist specializing in pulmonary disease who examined appellant at the request of the Office, reported that appellant had a "significant asbestos exposure history," and noted that x-rays revealed "mild bilateral pleural thickening with an elevated right hemidiaphragm." The doctor diagnosed, among other things, pleural asbestosis, and noted that pulmonary function studies were within normal limits. Dr. McDonald, the Office consultant, concurred with Dr. MacDannald's assessment but added that appellant was not disabled from his position as a result of asbestos exposure, and that he had a zero percent lung impairment secondary to asbestosis.

The Board notes that one criteria of a zero percent impairment according to the *Guides* is that at least two of the three FEV_1, FVC and MVV tests be performed and be not less than 85 percent of the predicted values. In the present case, Dr. MacDannald's pulmonary function test value for FVC was 68 percent of predicted and the MVV value was 57 percent of predicted, both of which were less than 85 percent of the predicted value. These values, according to the AMA *Guides*, are a Class 3 or 25-35 percent impairment, which normally would entitle appellant to a schedule award. It appears that neither physician correlated these findings with AMA *Guides* because they both concluded that the pulmonary function studies were normal.

With respect to appellant's possible entitlement to a schedule award, the Board notes that a schedule award is payable only for the loss or loss of use of a function or member of the body that is specifically enumerated in section 8107 of the Federal Employees' Compensation Act.[3] The Act was amended effective September 7, 1974, authorizing a schedule award for loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary [of Labor.]" [4] Pursuant to regulations, the Office has provided for a schedule award for a lung impairment.[5] However, the 1974 amendments specifically state that this provision is applicable only to an injury or death occurring on or after the date of enactment, September 7, 1974.[6] This amendment is therefore inapplicable to appellant's condition because his exposure to asbestos ceased in 1971, prior to the effective date of the 1974 amendments.[7] Nevertheless, he would be entitled to compensation only if it were established that his employment-related pulmonary condition resulted in a loss of wage-earning capacity.[8]

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[2] American Medical Association's *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office and approved by the Board as a standard for evaluating scheduled losses. See *Richard W. Duckson*, 31 ECAB 1518; and *Nelson Beals*, 34 ECAB 1243.

On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to a Board-certified internist specializing in pulmonary disease, not previously connected with the case, for a complete pulmonary function study. The specialist should be requested to correlate the pulmonary function findings with the criteria set forth in the AMA *Guides*, and to address the issue of whether appellant has a pulmonary impairment or disabling condition causally related to his exposure to asbestos during the course of his federal employment. If so, the Office should determine whether the pulmonary condition resulted in a loss of wage-earning capacity. Following this and such further development as the Office deems necessary a *de novo* decision should be issued.

The decision of the Office of Workers' Compensation Programs dated January 5, 1984 is set aside; the case is remanded for further proceedings consistent with this decision of the Board.

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[3] 5 U.S.C. section 8107. See *Kenneth H. Cummings, Sr.*, 28 ECAB 284.

[4] Act of September 7, 1974, 88 Stat. 1145.

[5] 20 CFR 10.304(a).

[6] Act of September 7, 1974, 88 Stat. 1151.

[7] See *Eugene V. Gable*, 27 ECAB 161; *Hiram L. Hendricks*, 33 ECAB 1487.

[8] *Eugene V. Gable*, *supra*.

In the Matter of HERBERT L. BAKER *and* DEPARTMENT OF THE ARMY, FORT STEWART, Ga.

Docket No. 83–2109; Submitted on the Record;
Issued June 29, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective May 19, 1983 and whether it properly declared an overpayment for the period March 26 through May 18, 1983.

Appellant, a 59-year-old carpenter, cut his left thumb and index finger on October 30, 1981 while using a power saw to cut a piece of wood. In a November 4, 1981 attending physician's report Dr. Robert P. Stanton diagnosed "amputation left thumb, lacerated tendons, nerves left index finger." He noted that appellant was hospitalized from October 30 to November 2, 1981 and underwent "debridement, closure, tendon repair." On April 1, 1982 Dr. Lamar Fleming, a Board-certified orthopedic surgeon, performed a "transposition of index ray to the thumb metacarpal, left hand, with a wrap around graft" and Dr. T. Roderick Hester, a Board-certified plastic surgeon, performed a "transfer of skin and nail of left toe to thumb utilizing microvascular techniques for reconstruction. Reconstruction of phalanx of thumb utilizing bone from the amputated index finger." On May 21, 1982 Dr. Hester performed a "debridement of left great toe, closure of defect." Appellant received continuation of pay from October 31 through December 14, 1981. He thereafter apparently used sick and annual leave until June 16, 1982 from which date the Office paid him temporary total disability compensation.

By letter dated January 19, 1983 the Office informed the employing establishment that it should "take steps to return [appellant] to work as soon as possible" and should "consider surveying the job held before the injury to see if [he] could do a portion of it.

In a January 19, 1983 letter to appellant the Office stated the following:

> "Your attending physician will notify us when you are no longer totally disabled. If you are able to resume your regular work at that time, your compensation will cease. If you are unable to resume your regular work, your compensation will be computed on the loss of wage-earning capacity caused by the injury-related partial disability that remains.
>
> "We will advise you when the medical evidence indicates you are no longer totally disabled. If you have returned to work your actual pay may be accepted as your wage-earning capacity, providing it is fair and reasonable. If you are not working, we must determine your wage-earning capacity on the basis of what you should be able to do and to earn."

By another letter dated January 19, 1983 the Office informed appellant of, in part, the following:

> "When you are no longer totally disabled because of your injury, you must seek employment suitable to your improved condition (including light duty or part-time employment if applicable). At such time you should report to the establishment where you last worked. They will advise you of your reemployment rights. If they do not have employment suitable for you, you should register with the nearest office of the State Employment Service. The state furnishes employment services free of charge. It is incumbent upon you to seek employment suitable to your improved condition. Refusal by a partially disabled employee to seek, accept, or continue suitable work is lawful grounds for the suspension of compensation."

On January 21, 1983 appellant signed a copy of the January 19, 1983 letter acknowledging its provisions.

In a February 2, 1983 report Dr. Fleming stated that he thought appellant's digital nerve should be explored and reanastomosis or graft performed."

In a duty status report dated March 25, 1983 Dr. Fleming concluded that appellant "has a functional but insensitive thumb and this could cause skin injury if he did not wear gloves. He has a permanent impairment to his hand.[1] Dr. Fleming did not respond to the question whether appellant could perform his regular duties. He did indicate that appellant could perform light work.

In a May 9, 1983 note the Office indicated that the employing establishment had not received a copy of the March 25, 1983 duty status report. The Office sent the report to the employing establishment on the following day.

On May 23, 1983 the Office terminated appellant's compensation effective May 19, 1983, stating that the March 25, 1983 duty status report from Dr. Fleming indicated that he could "return to work with no restrictions other than wearing gloves." It computed an overpayment for the period March 26 through May 18, 1983.

In a May 24, 1983 telephone conversation with the Office appellant stated that he was not informed by Dr. Fleming that he could perform light duty work. He stated that Dr. Fleming told him that he would be hospitalized again for surgery.

In a May 25, 1983 memorandum a supervisory claims examiner from the Office stated as follows:

> "The claimant has denied that the physician advised him he could return to work.. The employing establishment stated on May 9,

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[1] It is not clear from the duty status report what physical limitations Dr. Fleming felt appellant had due to his employment injury.

> 1983 that they did not receive the Form CA-17 [duty status report], therefore no light duty was offered to the claimant. Compensation was terminated effective May 19, 1983.
>
> "In view of the above, I don't believe that we can sustain the fact that the claimant is at fault or even that an overpayment has occurred."

By letter dated June 14, 1983 the Office informed appellant that his compensation was terminated effective May 19, 1983. It also informed him that the March 25, 1983 duty status report indicated he could return to work as of that date. It asked him for a full explanation why he did not follow the instructions sent to him on January 19, 1983 and signed by him on January 21, 1983.

By form letter dated June 14, 1983 the Office informed appellant that it had made a preliminary determination that there was an overpayment in the amount of $1,902.05 on the ground that the "medical evidence shows you could return to work on 3/26/83 with no restriction other than wearing gloves." The Office also stated that it had made a preliminary finding that appellant was at fault on the ground that "you were notified in our 1/19/83 letter that when you were no longer totally disabled because of your injury, you must seek employment suitable to your improved condition and should report to your employing establishment."

By final decision dated August 23, 1983 the Office found that there was an overpayment of compensation in the amount of $1,902.05 on the ground that the "medical evidence of record shows you were able to return to work on 3/26/83, with no restrictions other than wearing gloves, but you continued to receive compensation through 5/18/83." The Office also made final its determination of fault on the ground that appellant "presented no evidence to show you disagreed with the amount of the overpayment, that the overpayment occurred, or that you were without fault."

The Board finds that the Office improperly terminated appellant's compensation effective May 19, 1983 and improperly declared an overpayment for the period March 26 through May 18, 1983.

The March 25, 1983 duty status report from Dr. Fleming, a Board-certified orthopedic surgeon, upon which the Office relied to terminate appellant's compensation and to declare an overpayment, did not indicate that appellant could return to work as a carpenter, the job he held when injured. Dr. Fleming concluded that appellant could perform light duty work. He also stated that appellant could cause further injury by not wearing gloves. However, he did not state, as the Office contended, that appellant could return to work as a carpenter with no restrictions other than wearing gloves. The medical evidence therefore indicated that appellant was still partially disabled.

As to whether appellant should have sought suitable work pursuant to section 8106(c)(1) of the Federal Employee's Compensation Act the Board notes that that section states, in pertinent part: "A partially disabled employee who (1) refuses to seek suitable work . . . is not entitled to compensation." [2] The Office informed appellant in a January 19, 1983 letter that he would be informed by his attending physician when he was no longer totally disabled. In another January 19, 1983 letter the Office instructed appellant that when he was no longer totally disabled he "must seek employment suitable to [his] improved condition . . ." Appellant contended that Dr. Fleming did not inform him that he was capable of performing light duty work, a contention which was not contradicted by the evidence of record. Under these circumstances it was improper to find that appellant refused "to seek suitable work."

The Office should request from Dr. Fleming a complete evaluation as to appellant's work tolerance limitations. If appellant is found unable to perform the duties of the job of carpenter the Office should inquire of the employing establishment whether it has any suitable work available consistent with appellant's physical limitations or, alternatively, make a loss of wage-earning capacity determination.

The August 23, 1983 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action in accordance with this decision and FECA Bulletin No. 84-4 issued on February 24, 1984 concerning the restoration of benefits, to be followed by a *de novo* decision.[3]

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[2] 5 U.S.C. section 8106(c)(1).

[3] The Board notes that in a June 25, 1982 report an Office medical adviser, using the AMA's *Guides to the Evaluation of Permanent Impairment*, concluded that appellant had a 49 percent permanent loss of use of his left hand. The Office did not award appellant a schedule award based on this report. By letters dated September 7 and 28, 1983 the Office referred appellant to two separate physicians for evaluations as to the degree of permanent impairment of his left hand. There is no report in the record as a result of either of these referrals. Upon the return of the case record, the Office should proceed with a determination of appellants' entitlement to a schedule award.

In the Matter of Ted and Hazel Carson, claiming as dependent parents of Leonard D. Carson, deceased employee, *and* U. S. Postal Service, Post Office, Bloomington, Ill.

Docket No. 84–1118; Submitted on the Record;
Issued July 6, 1984

Before E. Gerald Lamboley, Michele von Kelsch, David S. Gerson

The issue is whether appellants were partial dependents of the employee at the time of his death within the meaning of 5 U.S.C 8133.

This is the second appeal in this case. In the first appeal,[1] the Board, on December 15, 1983, issued a decision remanding the case to the Office of Workers' Compensation Programs "to afford appellants the opportunity to submit documentary evidence to support their claim."

On remand, appellants, by their attorney, submitted copies of checks the decedent wrote to his parents, appellants herein, in 1979 and 1980. In addition, appellant, decedent's father, attested on February 3, 1984 that the decedent contributed money in the form of cash to him and his wife "for the purchase of groceries and the payments of utility bills" and that the decedent purchased appliances for him and his wife that they would otherwise have not been able to afford. Decedent's father stated: "Leonard Carson did have a checking account during the last years of his life but only wrote checks for items that he needed tax records for. Most of the time he made purchases in cash and that is the reason that there are few records of the contributions made by my son to us."

In other affidavits, individuals who knew the decedent attested that the decedent had purchased groceries and appliances for appellants and generally contributed to their financial support.

In a letter dated February 3, 1984, appellants' attorney stated in part:

> "Because he didn't live with his parents at the time of his death, they only had limited access to his business records. As is evidenced from the hearing transcript, Leornard Carson purchased a number of appliances and pieces of equipment for his parents but we can find no record of how they were purchased. They may have been paid for in cash or charged."

By compensation order dated February 24, 1984, the Office found that "[t]he evidence of record fails to establish dependency within the meaning of the Federal Employees' Compensation Act."

In *Agnes M. Chekel*,[2] the Board stated: "In order to meet the test of dependency, it is necessary to show that the parent claiming as a dependent looked to and relied upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living. It is not necessary to show dependency to a substantial extent."

The Board finds that the appellants have failed to submit evidence supporting their claim that they as parents of the decedent [employee] were partially dependent upon him.

On remand, appellants, by their attorney, submitted copies of decedent's cancelled checks which were made out to his parents in varying amounts of money over the period of time of December 1979 to October 1980. The total amount of support the decedent provided to his parents over this 11 month period of time was shown by this evidence to have been $248.92. Also submitted by appellants were affidavits attesting that the decedent purchased groceries and appliances for his parents and contributed to the support and maintenance of their family home.

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[1] 35 ECAB 423.

[2] 13 ECAB 269.

The key phrase in the above-mentioned test for dependency is whether the employee provided the "means of maintaining or helping to maintain a customary standard of living." The evidence submitted by appellants does not meet this test of dependency. Although the affidavits tend to show that the decedent financially assisted his parents in certain respects, the affidavits do not show that the decedent's support helped appellants maintain their "customary standard of living." Further, the copies of the cancelled checks do not assist appellants in meeting this test.

The compensation order of the Office of Workers' Compensation Programs, dated February 24, 1984, is hereby affirmed.

In the Matter of JEFFREY R. DAVIS *and* DEPARTMENT OF AGRICULTURE, FOREST SERVICE, MISSOULA EQUIPMENT DEVELOPMENT CENTER, Missoula, Mont.

Docket No. 84–236; Submitted on the Record;
Issued July 6, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant is entitled to compensation for time spent outside his normal duty hours travelling to and from medical treatment authorized by the Office of Workers' Compensation Programs.

This case has previously been before the Board on appeal regarding another issue. The Board's decision and order dated August 23, 1983 sets forth the facts and history of the case up to that date.[1] The Board set aside the Office's January 27, 1983 decision and remanded the case to the Office for further consideration of payment of travel expenses to and from appellant's home to engage in pain management program during a split-shift workday.

Following the Board's remand to the Office, appellant requested the Office to reconsider the portion of its January 27, 1983 decision which rejected his claim for compensation for time spent travelling to the Northwest Pain Clinic in Portland, Oregon on June 26, 1982 (a Sunday) and returning to his home on July 17, 1982 (a Saturday). Appellant claimed that such travel time constituted expenses incident to the securing of approved medical treatment under section 8103(a) of the Federal Employees' Compensation Act[2]

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[1] 34 ECAB 1599.

The employing establishment reported that appellant's regular tour of duty was from Monday to Friday each week. The Office authorized evaluation and treatment at the Northwest Pain Clinic from June 28, 1982 to July 16, 1982.

By an October 31, 1983 decision the Office rejected appellant's claim for compensation for time spent in travelling to and from the Northwest Pain Clinic. Regarding appellant's claim that this travel time was compensable under section 8103 of the Act as transportation and expenses incident to the securing of medical services, the Office decision stated:

> "Our interpretation of this is that we may pay: (1) compensation for the time an employee loses pay (or is carried in leave status if recrediting of leave is requested) in obtaining medical services; (2) the cost of transportation; and (3) reasonable and necessary incidental expenses. Such would include cost of meals, taxi fare or car rental, laundry, cleaning and pressing of clothes, tips to bellboys and for meals, etc., all of which would be claimed by submission of a standard travel voucher. As noted above, you received compensation for 40 hours of lost pay during each of the above periods, we paid for transportation and reimbursed you for all items within the categories above claimed via travel voucher."

The Board finds that appellant is not entitled to compensation for time he spent outside his normal duty hours travelling to and from the Northwest Pain Clinic.

Medical expenses, along with transportation and other expenses incident to securing medical care, are covered by section 8103 of the Act.[3] This section provides, in pertinent part:

> "(a) The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.*** The employee . . . may be furnished necessary and reasonable transportation and expenses incident to the securing of such services, appliances, and supplies."

Appellant's regular work week was from Monday to Friday. The travel time for which he claimed compensation occurred on a Saturday and a Sunday. The Office paid appellant compensation for temporary total disability for 40 hours for each week he was in the Northwest Pain Clinic,[4] and also paid for his transportation, lodging, and meals while he was there. Under these circumstances appellant's travel time outside his regular workweek for which he claimed compensation cannot be considered an expense incident to the securing of medical services, as no expense was incurred. The Office properly rejected his claim.

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[2] 5 U.S.C. section 8103(a).

[3] 5 U.S.C. section 8103.

The decision of the Office of Workers' Compensation Programs dated October 31, 1983 is hereby affirmed.

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[4] See *Myrtle B. Carlson*, 17 ECAB 644.

In the Matter of MILDRED KAYE *and* U.S. POSTAL SERVICE, POST OFFICE, Warren, Mich.

Docket No. 84–955; Submitted on the Record;
Issued July 11, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant had any disability after March 24, 1982 causally related to her June 21, 1967 employment-related back injury.

This is the second time appellant's case has been appealed to this Board. On the first appeal, in a July 23, 1982 decision and order, the Board found that there was a conflict in the medical evidence, and remanded the case to the Office of Workers' Compensation Programs for "referral of appellant, along with a statement of accepted facts and the entire case record, to a Board-certified orthopedic surgeon or other appropriate impartial specialist for a rationalized medical opinion on whether appellant's employment-related disability had ceased by March 24, 1982," to be followed by a *de novo* decision.[1] The facts of the case up to the time of the Board's prior decision are recited at length in that decision and will not be repeated here.

On remand, the Office referred appellant, a statement of accepted facts and the entire case record to Dr. Ronald E. Little, a Board-certified orthopedic surgeon. In an October 28, 1982 report, he concluded:

> "It is my clinical impression the patient does have restriction of motion, some spasms noted on the extremes of motion. From a clinical standpoint, roentgenographically, she has spondylolisthesis with virtually no joint space between the fourth and fifth lumbar vertebrae. The spondylolisthesis is clearly a congenital condition.

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[1] 33 ECAB 1578.

> However, in view of this I do not feel that the patient can return to activity that would require bending, lifting, standing, stooping, or walking for this would serve to aggravate her present condition."

The Office requested clarification of Dr. Little's report. In a February 17, 1983 reply, he stated:

> "In regard to your letter of January 25, 1983, I have closely scrutinized the letter and the history, your definition of temporary aggravation versus permanent aggravation, and the existing problem.
>
> "In reviewing this patient's history, she injured her back in March of 1977 and she ceased work June 24, 1977.[2] It was found that she had a spondylolisthesis at that time. The patient states that she had no prior back problem prior to that. We have no x-rays predating her accident. Spasms were found at the time of the examination on flexion at 45 degrees after an accident which happened five years ago.
>
> "Taking all of these things into consideration, I have to rely on the veracity of the patient's history for which I have no control over.
>
> "The patient is definitely disabled at the present time from doing the work that I have outlined in my first letter.
>
> "According to her, she had no problems with her back prior to her injury in 1977. I do believe that this was a preexisting injury so we are dealing with aggravation.
>
> "Now if the patient's history is correct insofar as that she has done nothing during the interim to aggravate her condition, then this would have to be termed as permanent aggravation. However, there are spasms elicited on 45 degrees of flexion. Spasms are generally noted to be evidence of acute injuries or an aggravation of injuries of a recent injury. Bearing these variables in mind, it boils down to the veracity of the patient as far as the history is concerned."

The Office then requested Dr. Little to reevaluate his opinion in light of the fact that appellant's injury occurred in 1967 rather than 1977. In a March 31, 1983 response, he stated:

> "This is a reply to your letter of March 23, 1983. In reviewing my records, I found that there was an error on my part in including that the patient was injured in 1977 as opposed to 1967. I don't think that fact alone would alter my opinion in the fact that this was a preexistent injury that was aggravated by what she did. I do not feel that this was a permanent aggravation for if this happened fifteen years ago and the patient has done nothing since that time it still seems a little strange that the patient would have spasms if she had not reinjured herself in the recent past."

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[2] The correct date of the injury was June 21, 1967.

An Office medical adviser reviewed the case record. In an undated response to an April 29, 1983 request for his opinion, the adviser concluded that the "error in Dr. Little's report of dating the time of the accident in 1977 instead of 1967 vitiates the entire report. . . Such a discrepancy in time must have influenced his judgment concerning the case." The medical adviser recommended that the case be evaluated by another impartial specialist, who should consider the following questions:

> "1. Is the spondylolisthesis L4 on L5 or L6 on SI? Reports differ.
> "2. If an asymptomatic congenital spondylolistheisis is aggravated by an injury to become symptomatic, is it proven to be permanent rather than temporary?"

The Office referred appellant, the case record and a statement of accepted facts to Dr. J. L. Tofaute, a Board-certified orthopedic surgeon. In a July 1, 1983 report, after noting the history and his findings on physical examination, Dr. Tofaute stated:

> "I ordered x-rays of the thoracic and lumbosacral spine, the latter as AP [anterior-posterior],lateral, spot lateral, and both oblique projections. These films showed a moderately severe kypholordosis, a transitional lumbosacral segment with bilateral pseudoarthroses, most probably representing a transitional segment and most likely what is referrred to generally as lumbarization of S1. In addition to the above findings, I noticed a thoracolumbar scoliosis of mild degree and a Grade II spondylolisthesis of L5 on S1 with virtual disappearance of the disc space between these two vertebrae.
>
> "DIAGNOSES: (1) History of thoracolumbar spinal strain (see discussion below), healed, asymptomatic. (2) Grade II spondylolisthesis L5 on S1, symptomatic but in my opinion not a work-related injury or condition--see discussion below.
>
> "*DISCUSSION:* As you requested, I reviewed not only the statement of facts but the entire *medical* file on this patient. I paid special attention to Dr. Little's reports of 10-28-82, 2-17-83, and 3-31-83. I studied Dr. Finkle's report also. In addition, I spent a great deal of time going over the results of examinations by Dr. George Pendy, the treating orthopedist or orthopedic consultant at the time of this woman's original injury. The latter was especially helpful, because Mrs. Kaye herself said, a great deal of time has elapsed since the original injury. This time gap not only tends to cloud one's remembrance of historical fact and pain patterns, but the same disadvantage can change the opinion of physicians examining this woman 14 to 16 years after the fact. Dr. Pendy notes in the report of his examination dated 6-29-67 that her pain and discomfort were "in the interscapular and mid dorsal upper lumbar region.' At this time

Mrs. Kaye evidently told him that the pain was “between her shoulder (probably shoulder blades)’ and ‘does not describe any radiating pain into the lower extremities or around the rib margins.’ He also states that there was ‘considerable tightness of paraspinal muscles in the dorsal and upper lumbar region.’ In his consultation of August 18, 1967, Dr. Pendy mentions that once again that Mrs. Kaye had ‘developed back pain in the interscapular and infrascapular area’ as a result of the injury. He further states that ‘Her symptoms were in the interscapular area and were not related to the spondylolisthesis.’ It was in this particular consultation that he mentions Mrs. Kaye having had x-rays or a report of them has been obtained, but Mrs. Kaye tells me that at that time her last name was Burns. This may be helpful in locating them. These x-rays, she tells me, were occasioned by a fall that she suffered at that time but from which she said there was no residual back problem. In a dismissal summary dictated by D. Angus Duncan, M.D., dated 7-5-67, Dr. Duncan said: ‘To paraphrase Dr. Pendy further, he stated that the patient did not appear to have signs or symptoms referable to her low back. . . ’ Dr. Pendy himself emphasized in his 8-18-67 consultation that ‘her symptoms were in the interscapular area and were not related to the spondylolisthesis.’

“Dr. Little’s letters of 10-28-82, 2-17-83, and 3-31-83 in my opinion deal with pain in the *low back* -- ‘from her waist down.’ He deals with the x-ray findings of the spondylolithesis and its attendant symptoms. By this time in the chronology of this particular injury, the focus seems to have shifted entirely to complaints referable to the low back, which it’s my understanding developed at least several weeks after the original injury to the ‘interscapular region.’ I prefer to ascribe greater credence to the detailed symptom and findings as recorded by Dr. Pendy at the time of this patient’s original injury in June of 1967. In my opinion, that injury was a thoracolumbar spinal sprain, perhaps superimposed upon a very mild thoracolumbar scoliosis. I find no residual at this time from that work-related injury. I find that injury healed without residual and I am of the opinion that this woman is able to work with regard to the healed thoracolumbar spinal sprain of 6-21-67.

“I am unable to directly connect the symptoms referable to the *low back* and problems connected with her spondylolisthesis to the events of 6-21-67 despite the focus having so heavily been placed on these more dramatic complaints, physical findings, and x-ray appearance of what is in my opinion a preexisting condition.”

The Office requested Dr. Tolaute to submit a supplemental report. In an August 30, 1983 response, he stated:

“1. In my experience, aggravation of a spondylolisthesis (by injury)

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> should produce some localizing signs -- palpable and possibly visible muscle spasms in the lower lumbar spine region, tenderness of muscles and ligaments of this area, and possibly increased low back pain (with or without radicular symptoms) on straight leg raising -- all in the lower one half of the lumbosacral spine area. I would not expect these to first appear one year after injury.
>
> "2. Aggravation of an asymptomatic spondylolisthesis by injury can be either temporary or permanent. By that, I mean that this can have an acute phase followed by resolution or an acute phase which merges into a chronic condition. If one accepts that this woman's spondylolthesis was aggravated by the injury, then we must consider this chronic. However, I would point out, once again, that the client herself mentioned the difficulty in remembering facts and symptoms because of the length of time since the injury; and I had to rely most heavily on recorded observations of those who were examining and treating her at that time of the injury of June 21, 1967. It was only sometime later that Dr. Pendy mentioned in October of 1968 that her 'back discomfort . . . *may* have been made symptomatic following her sprain in June, 1967.'"

A second Office medical adviser reviewed the case record. In an undated response to an October 5, 1983 request for his opinion, the medical adviser stated:

> "I have reviewed this file and find Dr. Tofaute's findings and conclusions quite sound. I agree with his logic of relying on Dr. Pendy's original report (especially since this is typewritten and done as an orthopedic consultant). In his 8/17/67 report [Dr. Pendy] clearly states 'Her symptoms were in the interscapular area and were not related to the spondylolisthesis.' His exam was also in keeping with such a statement. Dr. Tofaute's present exam illustrates her very real present disability due to her grade II [spondylolisthesis] (25-50 percent slip of one vertebral body on another). Her original injury, however, must be considered based on the medical evidence -- merely a thoracolumbar sprain which should have resolved in 6-8 weeks. In summary, I agree with Dr. Tofaute."

By compensation order dated December 5, 1983, the Office terminated appellant's compensation effective March 24, 1982 on the ground that her "disability resulting from the injury of June 21, 1967 had ceased as of that date."[3]

The Board finds that the weight of the medical evidence establishes that appellant did not have any disability after March 24, 1982 causally related to her June 21, 1967 employment-related back injury. The Board further finds that appellant is entitled to compensation for employment-related loss of wage-earning capacity for the period March 24, 1982 through August 30, 1983, the date the Office met its burden of proof (with Dr. Tofaute's supplemental report).

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[3] The Office also reaffirmed its prior determination that appellant was capable of performing the duties of a mail clerk for the period April 24, 1980 through March 23, 1982. On appeal, appellant's attorney did not contest this aspect of the Office's decision; accordingly, the Board's decision will not address this issue.

The weight of the medical evidence is represented by the July 1, 1983 and August 30, 1983 reports of Dr. Tofaute, the Board-certified orthopedic surgeon selected to resolve the conflict in medical opinion present at the time of the Board's July 23, 1982 decision. In two detailed, well-rationalized reports, he concluded that appellant's spondylolisthesis was neither permanently nor temporarily aggravated by her June 21, 1967 employment injury. Dr. Tofaute carefully evaluated the medical evidence in the case record, including the reports of Dr. Pendy which were contemporaneous with the June 21, 1967 employment injury. As the impartial specialist selected to resolve the conflict in the medical evidence, his reports are entitled to special weight.[4] Dr. Tofaute's reports, with which the second Office medical adviser concurred, constitute the weight of the medical evidence.[5]

The December 5, 1983 decision of the Office of Workers' Compensation Programs is modified to reflect that appellant is not entitled to compensation after August 30, 1983 and is affirmed as modified. The case is returned to the Office for payment of appropriate compensation for the period March 24, 1982 through August 30, 1983.

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[4] *James P. Roberts*, 31 ECAB 1010.

[5] Appellant's attorney contended on appeal that the Office went beyond the mandate of the Board's July 23, 1982 decision, and that Dr. Tofaute's reports should be disregarded because he relied on the reports of the reports of Dr. Little. Concerning the former contention, it is well settled that the Office may review a claim under 5 U.S.C. section 8128 at any time, and "where supported by the evidence, may set aside or modify a prior decision and issue a new decision." See *Eli Jacobs*, 32 ECAB 1147. With respect to the latter contention, it is evident from a careful reading of Dr. Tofaute's reports that he was relying substantially on the report of the physical examination performed by Dr. Little, not on Dr. Little's ultimate conclusions on the question at hand. It is clear from Dr. Tofaute's report that he conducted an independent and thorough analysis of the medical evidence.

In the Matter of ANDERSON REYNOLDS *and* DEPARTMENT OF THE NAVY, MARE ISLAND SHIPYARD, Vallejo, Calif.

Docket No. 84-979; Submitted on the Record;
Issued July 12, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issues are whether appellant is entitled to a schedule award for an alleged permanent impairment of his lungs due to his exposure to asbestos, and whether he is entitled to medical benefits or disability compensation for such a condition.

On August 28, 1979 appellant, then 59 years old, filed a claim for asbestosis which he alleged was caused by his exposure to asbestos in his work at the employing establishment as a sandblaster and pipefitter. Appellant was exposed to asbestos in his work as a pipefitter helper from 1947 to 1952 and as a sandblaster from 1952 until his resignation on December 19, 1958.

By a compensation order dated December 13, 1983 the Office of Workers' Compensation Programs rejected appellant's claim on the ground that he had not sustained a pulmonary disease or condition from his exposure to asbestos.

The Board finds that appellant is not entitled to a schedule award for a permanent impairment of his lungs.

The Federal Employees' Compensation Act provides for payment of schedule awards for a permanent loss of use of certain specified anatomical members or functions of the body.[1] For an injury which occurred prior to September 7, 1974 a schedule award is not payable for the loss of use of a part of the body not specifically enumerated in the Act.[2] The lung is not one of the members of the body so specified.

The Act was amended effective September 7, 1974, authorizing a schedule award for loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary."[3] Pursuant to regulations the Office has provided for a schedule award for a lung impairment.[4] However, the 1974 amendents specifically state that this provision is applicable only to an injury or death occurring on or after the date of enactment, September 7, 1974.[5] This amendment is therefore inapplicable to appellant's condition because his exposure to the asbestos causing his pulmonary condition ceased in 1958, prior to the effective date of the 1974 amendment.[6]

The Board finds that the case is not in posture for decision on the issue of whether appellant is entitled to medical benefits or disability compensation under the Act for an employment-related pulmonary condition.

Dr. Reuben R. Merliss, a Board-certified internist specializing in pulmonary diseases, stated that x-rays revealed pleural plaquing and pleural asbestosis. Dr. Michael I. Cohen, who is Board-certified in pulmonary diseases, stated that x-rays showed no significant pleural thickening or pleural plaques. Dr. Stanley Sizeler, a Board-certified radiologist, stated that x-rays showed pleural thickening. Dr. Horton C. Hinshaw, Jr., a Board-certified internist specializing in pulmonary diseases who acted as an Office consultant in this case, stated that x-rays showed probable minimal pleural thickening of appellant's left lower lung suggestive of asbestos-related disease, but considered the evidence of asbestos-related pleural disease borderline or equivocal and not sufficient for a definite diagnosis.

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[1] 5 U.S.C. section 8107.

[2] *John T. Bradley*, 25 ECAB 348.

[3] Act of September 7, 1974, 88 Stat. 1145.

[4] 20 CFR 10.304(a).

[5] Act of September 7, 1974, 88 Stat. 1151.

[6] See *Eugene V. Gable*, 27 ECAB 161; *Hiram L. Hendricks*, 33 ECAB 1467.

Under these circumstances, the Office should refer appellant to an appropriate medical specialist for a reasoned opinion whether he has a condition causally related to his exposure to asbestos in his federal employment. If so, appellant is entitled to medical benefits of the Act. He would also be entitled to compensation for any disability due to such a condition.

The decision of the Office of Workers' Compensation Programs dated December 13, 1983 is hereby affirmed insofar as it found that appellant is not entitled to a schedule award. The Office's December 13, 1983 decision is otherwise set aside and the case remanded to the Office for further action in accordance with this decision of the Board to include a *de novo* decision regarding the other aspects of the case.

In the Matter of JOHN CLEMENT *and* DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

Docket No. 84-826; Submitted on the Record;
Issued July 13, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issues are: (1) whether appellant is entitled to a schedule award for a permanent partial impairment to his lungs due to asbestos exposure prior to December 4, 1973 in the course of his federal employment; and (2) whether he has an employment-related lung condition due to asbestos exposure entitling him to medical benefits and to compensation for any resulting disability for work.

Appellant, a 72-year-old retired pipefitter, filed a claim on November 15, 1981 for a schedule award for impairment to his lungs, identifying the date of injury as "prior to December 4, 1973."

Appellant submitted an August 5, 1981 medical report from Dr. Kaye H. Kilburn, a Board-certified internist specializing in pulmonary disease, who stated that appellant's x-rays showed evidence of asbestosis and that appellant had slight airways obstruction.

Dr. Kilburn stated that pulmonary function tests performed on May 31, 1981 indicated appellant's FVC was 70 percent of predicted, his FEV_1 was 56 percent of predicted and his diffusing capacity was 24.9 percent of predicted.

In a September 10, 1981 report, Dr. Kilburn noted that appellant had a history of pneumonia and had severe shortness of breath when walking on level ground or climbing stairs, which was even bothersome at rest. Appellant had wheezing and whistling in his chest and has had episodes of anginal chest pain. Chest x-rays revealed bilateral pleural thickening. Dr. Kilburn concluded:

> "In summary, there is moderate airway obstruction. There has been no significant change in values since May 1981.
>
> "*Summary and Conclusion:* This gentleman who has over 25 years of exposure and a latent period since 1938, 43 years, has parenchymal and pleural asbestosis. He has at the moment quite severe functional impairment but a considerable portion of this may be congestive heart failure in view of the increase in heart size and the other clinical findings including his ejection murmur. He is severely short of breath. Contributing to this are both airway obstruction and asbestos disease, and at the moment congestive heart failure. His risks for lung cancer have been diminished greatly by his cessation of cigarette smoking."

The employing establishment submitted information indicating that appellant had heavy exposure to asbestos in his federal employment.

The Office of Workers' Compensation Programs referred appellant, with the case record and a statement of accepted facts, to Dr. Richard G. Barbers, a Board-certified pulmonary specialist, whose June 27, 1983 report included an asbestos exposure and medical history, as well as the results of physical examination. Dr. Barbers provided these test results:

> "*Chest Radiograph:* PA, lateral and oblique views of the chest obtained on 6/26/83 were of satisfactory quality. There were no outside films for comparison. The soft tissues were within normal limits. The bony thorax revealed degenerative joint disease of the thoracic spine. The heart size was within normal limits. The pulmonary vascular markings appeared normal. There was no evidence for interstitial disease. There were prominent lung markings consistent with chronic bronchitis. There was tenting of the left diaphragm consistent with an old inflammatory process such as pneumonia. There was no definite evidence for pleural calcification or thickening. In summary, there was no significant evidence for asbestos-related

disease on the recent films although they were consistent with chronic bronchitis.

"*Pulmonary Function Tests:* These were obtained 6/27/83. The FVC [80 percent predicted] was within normal limits. The FEV_1 [66 percent predicted] was mildly reduced and the FEV_1/FVC ratio was moderately reduced. The mid-flow rate was severely reduced. Peak flow rates and MVW [61 percent predicted] were within normal limits. There was a significant response in the FEV_1 and a small response in the mid-flow rate, peak expiratory flow rate and MVW after bronchodilators. The vital capacity was within normal limits. The TLC was within normal limits and the diffusing capacity [95 percent predicted] was also within normal limits. The arterial blood gases indicated a mild respiratory alkalemia with a normal arterial oxygenation for his age. The oxygen saturation was also within normal limits. He did not have an elevated carboxyhemoglobin level. In conclusion, there was a moderate obstructive ventilatory defect with significant reversibility of the airway obstruction after bronchodilators. There was no evidence for diffusion impairment or abnormalities of lung volumes to suggest asbestosis."

Dr. Barbers concluded:

> "Mr. Clement had evidence for obstructive airways disease with mild reversibility after bronchodilators on his recent pulmonary function tests. In addition, he had symptoms of chronic sputum production, cough, wheezes and episodes of pneumonia. The pulmonary function studies and the respiratory history were consistent with chronic bronchitis."
>
> * * *
>
> "*Discussion:* Mr. Clement had severe primary and secondary asbestos exposure for about 30 years with an adequate latency period. He did not have evidence for asbestos-related pleural or interstitial disease. He quit smoking 6 years ago and had a smoking history of $^1/_2$ to 1 pack per day for 32 years. He had a respiratory history as well as pulmonary function tests compatible with chronic bronchitis. He did not have evidence for a pulmonary malignancy at this time. He had diabetes mellitus that was controlled with insulin therapy. He claimed dyspnea on exertion that could be explained by his pulmonary function test and chronic bronchitis.
>
> "Recommendations:
>
> "Mr. Clement was advised to have periodic examinations of his lungs to screen for the development of asbestos-related disease."

At the request of Dr. Barbers, Dr. Carl Ovenfors, a diagnostic radiologist, provided this evaluation of appellant's x-rays from 1981 and 1983:

> "REVIEW OF OUTSIDE FILMS: For UCLA Asbestos Program.
>
> "Three outside films dated 9/8/81 and marked Barlow Hospital, Los Angeles, California are available for evaluation. PA and both oblique views are available.
>
> "The heart is borderline enlarged. The aorta is somewhat elongated and widened with calcifications in the arch region. There is a pleural pericardial adhesion with tenting of the left hemidiaphragm, posterolaterally on the left side. The lungs are otherwise unremarkable. No evidence of asbestos-related disease.
>
> "CHEST, PA, LATERAL AND BOTH OBLIQUES: 6/27/83.
>
> "Compared with 9/8/81 from Barlow Hospital.
>
> "There is no interval change. Again noted is moderate cardiomegaly depending upon left ventricular enlargement and a somewhat tortuous and calcified aorta. Tenting of the left hemidiaphragm is again noted with pleural pericardial adhesions. There is no evidence of asbestos-related disease."

On September 27, 1983, the case record was reviewed by Dr. Charles C. McDonald, an internist specializing in pulmonary disease who served as Office medical consultant. Dr. McDonald stated that Dr. Kilburn's September 10, 1981 evaluation contained a history of smoking and dyspnea when walking, climbing stairs and at rest, as well as wheezing without rales; chest x-rays showed bilateral pleural thickening. With regard to Dr. Barbers' report, Dr. McDonald stated:

> " *** Examination of the chest was normal. Four views of the chest showed no evidence for interstitial disease. There were prominent lung markings consistent with chronic bronchitis. There was no evidence for pleural calcification or thickening. Pulmonary function tests showed a normal FVC with a reduced FEV_1/FVC ratio. The total lung capacity was normal. The conclusion was obstructive airways disease, probably secondary to ciagrette use. There was no evidence for asbestos related pulmonary disease. It was noted that the claimant had diabetes mellitus which was controlled with Insulin therapy.
>
> "There is an x-ray interpretation of x-rays dated September 8, 1981 and June 27, 1983. Moderate cardiomegaly is noted. There is no evidence for pleural or parenchymal disease.
>
> "The pulmonary function tests obtained in 1981 and 1983 are similar, both showing mild airways obstruction. The difference in evaluation lies in interpretation of the radiographic readings, and the most current evaluation includes correlation of current x-rays with those taken in 1981, and has been read by two readers. The following statements reflect the findings of Dr. Barbers.
>
> "(1) There is no condition found on the most current examination which is related to the accepted conditions of employment.

> "(2) The diagnoses are: (a) History of asbestos exposure without impairment. (b) Obstructive airways disease, likely secondary to smoking. (c) Dyspnea on exertion, likely secondary to b. above. (d) Diabetes mellitus.
>
> "(3) The claimant is not disabled from his position due to disease resulting from exposure to asbestos while in federal employment."

By compensation order dated December 29, 1983 the Office denied appellant's claim for compensation on the ground that he had not sustained a pulmonary disease or condition resulting from exposure to asbestos in the performance of duty.

The Board finds that appellant is not entitled to a schedule award for a permanent partial impairment of his lungs.

Among the benefits provided by the Federal Employees' Compensation Act is the schedule award provision[1] which provides compensation for loss of or loss of use of specified body organs and members. The lung was added to the list of organs in 1974, under regulations[2] formulated as a result of the 1974 amendments to the Act.[3] The Act specified, however, that this amendment was not made retroactive[4] and so injuries occurring before 1974 are not covered. For schedule award purposes, the date of injury for an occupational disease is the date of last exposure to the causal agent, which in this case is the date of appellant's retirement on December 4, 1973. Appellant is therefore not entitled to compensation under the schedule award provisions of the Act.

The Board further finds that there is a conflict in the medical evidence as to whether appellant has an asbestos-related lung condition which would entitle him to future medical examinations and treatment and to compensation for any resulting disability for work.

Dr. Kilburn stated that chest x-rays revealed pleural thickening on both sides of the lung; the doctor diagnosed parenchymal and pleural asbestosis. However, Drs. Barbers and Ovenfors concluded that chest x-rays showed no evidence of asbestos-related disease. Dr. Barbers concluded that appellant had evidence of obstructive airways disease, noting that the pulmonary function studies and respiratory history were consistent with chronic bronchitis.[5]

The Office should refer appellant, with a statement of accepted facts, all the chest x-rays of record, and the entire case record to a Board-certified pulmonary specialist for a rationalized medical opinion on whether appellant has a pulmonary condition causally related to employment-related asbestos exposure. The specialist should be requested to perform a complete pulmonary evaluation, including x-rays and pulmonary function studies. After such development as may be deemed necessary, a *de novo* decision should be issued.

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[1] 5 U.S.C. section 8107.

[2] 20 CFR section 10.304.

[3] 5 U.S.C. section 8107(c)(22).

[4] See *Katherine M. Dunlap*, 32 ECAB 875; *Robert Henry Guy*, 29 ECAB 734.

[5] The Board notes that because Dr. McDonald is an Office medical consultant he cannot serve as the impartial specialist to resolve the conflict between Dr. Kilburn and Drs. Barbers and Ovenfors. See Vivian Hall 35 ECAB 930; see also Federal Procedure Manual, Chapter 3-400.

The decision of the Office of Workers' Compensation Programs dated December 29, 1983 is affirmed insofar as it found appellant is not entitled to a schedule award. It is set aside as to whether appellant has an employment-related pulmonary condition entitling him to disability benefits and medical treatment. The case is remanded for further action on these aspects.

In the Matter of DALE I. WILLIAMS *and* U.S. POSTAL SERVICE, POST OFFICE, Lakewood, Colo.

Docket No. 84-512; Submitted on the Record;
Issued July 13, 1984

Before MARGARET PALLANSCH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office properly determined that under section 8106(b) of the Federal Employees' Compensation Act, appellant forfeited his right to compensation for the period of April 15, 1977 to April 26, 1979 in view of the fact that he had earnings during that period which he did not report and that deductions would be made from his annuity payments to recover the overpayment.

Appellant, then a 29-year-old letter carrier, filed a claim on August 4, 1976 alleging that he sustained an injury to his left shoulder and low back when he was lifting packages. He stopped work on August 4, 1976 and returned to work on August 6, 1976.

In a report dated August 19, 1976, Dr. Wilfred D. Stedman, a Board-certified orthopedic surgeon, stated that appellant "appears to be suffering from some muscular complaints involving the parascapular musculature of the left shoulder and also the paravertebral musculature in the left low back which he attributes to lifting activities performed on 8/2/76 and 8/3/76." Dr. Stedman went on to state: "I have reassured the patient that I find no underlying problem such as arthritis, nerve compression or any other serious injury."

On September 8, 1976, appellant filed a notice of recurrence of disability for the period beginning September 3, 1976.

In a report dated September 7, 1976, Dr. Stedman stated:

"Mr. Williams was reevaluated in this office on September 3, 1976.

He says that all of his difficulties in the left shoulder girdle region relate to the thoracic outlet problem and the subsequent operation of December, 1974. He has not been able to do any of the light duties that were permitted him since his last visit. This light duty involved lifting up to 20 pounds on a given work day. 'Any type lifting tightens me up, then my surgery area in my left shoulder stiffens and hurts.'

"It appears that he seems not able to actually use his left upper extremity effectively for any type of gainful work away from his trunk. He seemed to agree with this appraisal.

"I don't see any orthopedic treatment that can change the situation in this man. Accordingly, if these limitations are in fact permanent, it appears that he cannot carry on as a letter carrier for the U.S. Postal Service. He will discuss this matter with you.

"From an orthopedic standpoint, I do not feel he needs any further work-up or any specific treatment."

Appellant received continuation of pay for the period of August 3 to September 20, 1976 and began receiving compensation for temporary total disability on September 21, 1976.

An Office of Workers' Compensation Programs medical adviser stated on October 5, 1976 that appellant sustained a low back strain and a left shoulder girdle strain.

In a letter dated January 10, 1977, the Office informed appellant of its award for compensation. The following statement also appeared in that letter:

> "In order to avoid an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after return to work." (emphasis on original).

In a second letter to appellant also dated January 10, 1977, the Office stated in part:

> "You are presently being paid compensation for total disability. Such benefits will continue as long as your injury-related disability prevents you from returning to any employment. If, however, your condition improves and you are able to perform some type of work, it will then be necessary to redetermine the amount of your compensation."

In another letter to appellant dated March 30, 1977, the Office stated in part:

> "The medical evidence shows that you are no longer totally disabled for work. Therefore, we must determine your wage-earning capacity in your partially disabled condition. This, in all probability, will

> reduce your compensation; however, we will advise you in advance of any reduction.
>
> "If you are now working, your actual pay may be accepted as your wage-earning capacity if it appears fair and reasonable. In this case you should furnish the name and address of your employer, the kind of work you do, your rate of pay, and your gross weekly earnings.

On July 27, 1978, the Office requested that appellant "report all employment during the past 12 months" within 30 days or his compensation would be suspended. In addition, the Office requested that appellant "account for the entire time, including periods of self-employment" and return signed releases for information from the Internal Revenue Service and Social Security Administration. Appellant did not respond to the Office's request.

On March 20, 1979, the Office requested that appellant "report all employment since September 21, 1976. This response must be received within 30 days from this date or your compensation will be suspended." In addition, the Office repeated its request for the signed releases and requested that appellant "account for the entire time, including periods of self-employment or unemployment" and if self-employed, report as pay "what it would cost you to have hired someone to do the same work."

By letter dated May 8, 1979, the Office informed appellant of the following:

> "Your compensation has been suspended effective 4/26/79 since you did not respond to our requests for information regarding your dependents and your working status.
>
> "When your response is received, your file will be reviewed for your entitlement to compensation based on your earning capacity. A current medical report is also required. Your health benefits have been transferred to [the] Office of Personnel Management."[1]

On May 11, 1979, the Office received appellant's response to its March 20, 1979 request for employment information by indicating that for the period September 1976 to April 1977 he was unemployed; that for the period of April 1977 to April 1978 he was employed as a salesman with earnings of $150.00 per week; that for the period of April 1978 to June 1978 he was unemployed; that for the period June 1978 to October 1978 he was employed as a salesman with earnings based on unidentified commissions; and that for the period of October 1978 to May 1979 he was unemployed.

In a report dated May 21, 1979, Dr. Duane G. Messner, a Board-certified orthopedic surgeon, stated in part:

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[1] Appellant retired on disability benefits effective November 16, 1976.

> *"CONCLUSIONS*
>
> "It is my impression that from an orthopedic point of view as far as his back is concerned this patient has no significant disability. I feel that the extent of disability referable to his left arm should be determined by his thoracic surgeon, Doctor Cleveland."

A Social Security Administration "Itemized Statement of Earnings" indicated that appellant had earnings reported in every quarter in calendar year 1977 totalling $6,714.53. The Internal Revenue Service disclosed on August 3, 1979 appellant's outside earnings for the calendar years 1977 and 1978.

On January 4, 1980, the Office determined that appellant had a 41 percent loss of wage-earning capacity based on his ability to perform the duties of a sales clerk, retail effective April 26, 1979. The Office also on January 4, 1980 requested appellant to elect between workmen's compensation and disability benefits in view of the fact that they are not payable for the same period of time. In addition, the Office stated:

> "Regarding the overpayment that resulted because of your employment for the years 1977 and 1978, it has been determined that the amount of overpayment will be computed on the basis of your actual earnings as determined by your 1040 income tax returns for those years. This figure has been computed to be $10,278.00. Earnings between 1/79 to 4/26/79 must also be considered. Upon receipt of your 1979 earnings, we will advise you if an adjustment is necessary.
>
> "In computing an overpayment for actual earnings, the formula applied requires us to break down wages earned for particular periods of time. We are requesting, to the best of your knowledge, your actual earnings for the following periods: 1/1/77-6/30/77; 7/1/77-12/31/77; 11/1/78-4/30/78; 5/1/78-10/31/78; 11/1/78-12/31/78; 1/1/79-4/26/79."

On March 17, 1980, appellant elected to receive disability benefits effective April 26, 1979.

In a letter dated May 30, 1980, appellant stated that he "worked for no one from 11-16-76 to 4-15-77 [and] also from 4-15-78 to 6-30-78. I owned my own business from 10-15-78 until 11-30-79 with a $22,268.00 loss [of] revenue. If this shows as I got a $10,278.00 overpayment then I would like to see that amount of money."

In a letter dated November 25, 1980, the Office informed appellant of the following:

> "This Office has found an overpayment of compensation in your case, in the amount of $19,259.00. The overpayment occurred because: You reported in your 1977 income tax return (form 1040) wages earned in the amount of $9,638.00 and in your 1978 income tax return

> (form 1040), wages earned in the amount of $9,621.00, thereby totaling $19,259.00. You were receiving compensation from this office on the basis of temporary total disability during the same period.
>
> "A preliminary finding has been made that you were with fault in this matter for the following reason(s): You were advised, when placed on our compensation rolls for total disability to notify this office immediately when wages were earned.
>
> "This does not represent a formal decision. You have the right to submit additional evidence or arguments if you disagree with the amount or the fact that the overpayment occurred, or if you feel that you are without fault in the matter. Further, you have the right to a hearing with a representative of our Branch of Hearings and Review. However, the only issues that may be dealt with at a hearing are the preliminary finding of fault, or a determination of whether or not the overpayment should be waived."

In a statement dated February 10, 1981, appellant stated that he owned the Clover Knolls 66 Motel and that he sold it in 1979 at a $21,000.00 loss.

In a decision dated August 24, 1981, the Office found the following:

> "This letter is in further reference to the overpayment of compensation in the amount of $19,259.00 that was found in your case and which occurred because: You earned wages totaling $19,259.00 in 1977 and 1978 while you were receiving compensation for total disability.
>
> "Your case has been carefully studied and any additional evidence or arguments submitted have been given full consideration. I have determined that the preliminary finding that you were at fault in the matter of the overpayment was correct for the following reason(s): You were advised to notify this office immediately when you obtained employment and that you were entitled to compensation for total disability only as long as your injury-related condition prevented you from returning to any employment."

In a request for reconsideration dated October 25, 1981, appellant stated that the Office did not pay him $19,259.00 in 1977 and 1978; that he only received $670.00 per month from the Office; that he worked from 4-15-77 to 4-17-78 and from 7-1-78 to 10-1-78 when he purchased a business and "did not work"; that he only worked 16 months; that he was involved in a bankruptcy; and that his "expenses on the road exceeded everything I earned as exhibited on my tax returns under business deductions."

In a letter decision dated December 8, 1981, the Office stated that its finding that appellant was at fault was proper. However, the Office did state that the amount of the overpayment would be reviewed.

On December 11, 1981, the Office wrote letters to appellant's different employers during 1977 and 1978 requesting "specific periods of such employment" and a statement of his gross wages. The only response received by the Office was from United Mobile Homes, Inc. which stated that appellant began employment with the firm on July 24, 1978 and was terminated on November 6, 1978 and that he had gross earnings during that period of $5,763.20.

In a statement dated January 13, 1982, appellant stated in part:

> "I didn't work from [the] date of retirement 11-16-76 until 4-15-77 with the exception of 3 days for Coffee Systems which I made a few telephone calls for $148.00. I was unemployed from 4-15-78 until 7-24-78 and owned Clover Knoll 66 [motel] from 11-1-78 until 12-1-79 which I lost $21,000.00."

On March 17, 1982, the Office made another preliminary overpayment decision finding the following:

> "This Office has found an overpayment of compensation in your case, in the amount of $19,201.17. The overpayment occurred because: This corrects the amount of the overpayment as previously indicated in form CA-2201 dated 11/25/80. You had earnings from 1977 through 1979, and failed to report them to the office while you were receiving compensation on the basis of temporary total disability. The overpayment was computed on the basis of loss of compensation for the period in which you were working as indicated in your 1/13/82 letter. A preliminary finding has been made that you were at fault in this matter for the following reason(s):
>
> "You were advised, when placed on our compensation rolls for total disability, to notify this office immediately when wages were earned."

In a final decision dated April 19, 1982, the Office found the following:

> "This letter is in further reference to the overpayment of compensation in the amount of $19,201.17 that was found in your case and which occurred because:
>
> "You failed to report earnings in years 1977-1979 while receiving compensation for total disability.
>
> "Your case has been carefully studied and any additional evidence or arguments submitted have been given full consideration. I have determined that the preliminary finding that you were at fault in the matter of the overpayment was correct for the following reason(s): You were advised to notify this office when wages were earned. In addition, the concept of wage loss compensation as an income replacement system should be fairly obvious to almost anyone, and that earning wages would affect compensation entitlement."

On April 28, 1982, appellant requested reconsideration. By compensation order dated May 18, 1982, the Office found that "[t]he evidence submitted in support of the application for review is found to be of an irrelevant and immaterial nature and is not sufficient to warrant review of the prior decision."

Appellant thereupon filed an appeal with the Board. The Director of the Office filed a motion to remand, dated April 25, 1983, in which he stated that recomputation of appellant's overpayment was necessary. In an order dated May 31, 1983, the Board granted the Director's motion to remand.[2]

On remand, the Office determined that appellant forfeited all the compensation he received during the period of April 15, 1977 to April 26, 1979 in view of the fact that he had earnings in 1977, 1978 and 1979 he did not report. The amount of the overpayment computed was $22,074.39. In a letter decision dated December 8, 1983, the Office formally notified appellant that he was at fault in the matter of the overpayment and that the amount of the overpayment was $22,074.49 and that the amount of $146.47 would be withheld from his "continuing annuity payments" effective October 1, 1983.

The Board finds that appellant is subject to the forfeiture provisions of section 8106(b) of the Act[3] for the period April 15, 1977 to April 26, 1979, because of his failure to report earnings as required under the section.

On January 10, 1977, the Office advised appellant he would automatically receive compensation for temporary total disability. The Office specifically advised appellant that "In order to avoid an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK." Appellant was also advised to return any compensation check received "after you return to work." The record shows appellant did return to work for a period in April 1977, but did not communicate this fact to the Office. On July 28, 1978 the Office wrote appellant requesting a "report within 30 days" on "all employment during the past 12 months," i.e. back to July 28, 1977, and return of signed release of information forms to the Internal Revenue Service and the Social Security Administration. Appellant was also advised that if self-employed he must report as pay "what it would have cost you to have hired someone to do the same work." Appellant did not respond to this request. The record shows that appellant had earnings in every quarter in 1977 and from four different employers in 1978 which he failed to report as required by the Office.

Again, on March 20, 1979 the Office requested appellant to report within 30 days of that date all employment since September 21, 1976, and sign the enclosed release forms to the Social Security Administration and the Internal Revenue Service.

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[2] Docket No. 83-188.

[3] 5 U.S.C. section 8106(b).

The record shows the Office did not receive appellant's response to this request until May 11, 1979, after the Office issued its May 8, 1979 notice of suspension and that he listed himself as "unemployed" after October 1978. Under these circumstances, appellant has failed to comply with the reporting provisions of section 8106(b) of the Act, for the period April 15, 1977 to April 26, 1979.

The Board further finds, however, that the case is not in posture for decision on the amount of overpayment and the collection of such amount. The Board notes that the case was remanded upon the Director's motion that recomputation of the amount of the overpayment was necessary. The December 8, 1983 letter decision did not explain to appellant how the Office determined its latest computation and therefore did not afford appellant an opportunity to comment on whether it was accurate. The decision also proceeded to recoup the revised overpayment amount without following the procedures of FECA Bulletin 80-35.[4] In view of the fact that the overpayment has been revised and recomputed on several occasions appellant should be afforded a detailed decision on how the amount of overpayment was computed and be apprised of the overpayment procedures of Bulletin 80-35 prior to any recoupment action.

The December 8, 1983 decision of the Office of Workers' Compensation Programs is affirmed insofar as it finds that appellant is subject to the forfeiture provisions for the period April 15, 1977 to April 26, 1979; however, the Office's decision with respect to all other findings is set aside and the case remanded for further proceedings in accordance with this decision.

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[4] The revised procedures contained in Bulletin 80-35 were incorporated in the Federal (FECA) Procedure Manual in July 1981 with additions on July 30, 1982. See Chapter 2-807, Developing and Monitoring Payments, Part 2-1 Claims.

In the Matter of William C. Cardenas *and* Department of the Navy, Long Beach Naval Shipyard, Long Beach, Calif.

Docket No. 84-1259; Submitted on the Record;
Issued July 17, 1984

Before E. Gerald Lamboley, Michele von Kelsch, David S. Gerson

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for disability compensation due to a pulmonary condition on the basis of the three-year time limitation provision of the Federal Employees' Compensation Act.

On April 15, 1981 appellant, then a 55-year-old retired sheetmetal worker, file a claim alleging he sustained a pulmonary condition as a result of exposure to asbestos in his work at the employing establishment from May 15, 1961 to March 15, 1976. He stated he first became aware of the disease in March of 1976.

By letter dated October 22, 1981 the Office of Workers' Compensation Programs informed appellant that he should submit a medical report in support of his claim. In addition, the Office requested that he clarify his statement made on the CA-2 form by describing in detail when and how he became aware of the possibility of an asbestos-related disease and that it was possibly work related.

In a letter dated August 20, 1982 appellant responded: "From 1976 to the present date I have become aware of a progressive shortness of breath and tire very easily. During my employment with [employing establishment] from May 1961 to March 1976, I was exposed very frequently to asbestos and asbestos particles. . . Initially, prior to 1981, I did not file a claim thinking my condition would improve with time."

By decision dated April 15, 1983 the Office rejected appellant's claim finding he failed to discharge his burden of proof in establishing a *prima facie* case by not submitting any medical evidence in support of his claim.

By letter dated April 27, 1983 appellant, through his representative, requested a hearing and in support thereof submitted the April 2, 1982 report of Dr. Brian P. Dolan, a Board-certified internist.

By compensation order dated October 20, 1983 the Office vacated the April 15, 1983 decision noting that appellant had submitted medical evidence in support of his claim. The Office hearing representative remanded the case for further development and a finding on whether the claim was timely filed.

On remand, appellant, through his representative, submitted a December 7, 1983 letter indicating that he did not became aware of the fact that his pulmonary condition was work related until his July 14, 1981 examination by Dr. Dolan.

Thereafter, the Office obtained a photocopy of a June 29, 1976 medical report by Dr. Herman S. Coleman, a Board-certified internist and former associate in the Office of Dr. Dolan who examined appellant on May 26, 1976.[1] His report discussed appellant's complaints of varicose veins, shortness of breath, and noted the following history:

> "From 1966 on he frequently worked directly on the ships. He worked in the areas where asbestos insulation was being repaired and often

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[1] The Board notes that Dr. Dolan referred to Dr. Coleman's 1976 report in the 1982 report that was submitted to the Office by appellant.

> inhaled the asbestos dusts. When the ventilation areas were being torn apart Mr. Cardenas was measuring the area and again would inhale large amounts of asbestos dust. He worked about asbestos dust a few hours each day from 1966 to 1974, except for one year when he worked only in the shop. The ventilation on shipboard was usually poor. He did not wear a mask until 1972. He was also exposed to the fumes and smokes caused by the welding and burning done by other workers. Cleaning and paint fumes and dusts were also inhaled."

Dr. Coleman also reported that a screening spirometry was abnormal, showing "a defect greater than can be explained on the basis of this patient's sixteen pack-years of smoking." He concluded that appellant had "some pulmonary injury" and recommended that he avoid further dust inhalation.

The Office, in an April 17, 1984 compensation order, determined that Dr. Coleman's report made appellant aware, or should have made him aware, of the possible relationship between his pulmonary condition and his exposure to asbestos by May 26, 1976 and, therefore, found that his claim had not been timely filed.

The Board finds that appellant's claim was not filed within the three-year period of limitation provided by 5 U.S.C. section 8122 as amended in 1974.

The Federal Employees' Compensation Act places responsibility upon the claimant to file a timely claim for any condition he believes was caused or aggravated by his employment.[2] The 1974 Amendments to the Act, at section 8122, included changes to the time limitation provision which apply to all injuries after September 7, 1974. Section 8122 (a) of the amended Act requires that a claim must be filed "within 3 years after the injury or death."[3] Subsections (1) and (2) contain exceptions to this requirement, allowing a claim to be considered even if not filed within the three-year period where the immediate superior had actual knowledge of the injury within 30 days or if written notice of injury was given within 30 days.[4]

In the case of occupational disease the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his impairment and his employment. Where the employee continues in the same employment, after such awareness, the time limitation begins to run on the date of his last exposure to the implicated employment factors.[5]

Under the circumstances of the present case, the Office properly determined that the time limitation commenced to run no later than May 26, 1976, the date of appellant's examination by Dr. Coleman, a Board-certified pulmonary specialist. Appellant's exposure ended by March 15, 1976. The evidence establishes that appellant was aware by March of 1976 of his asbestos exposure at work and his examination by Dr. Coleman made him aware, or should reasonably have made him aware, of the possible relationship between his pulmonary condition and his employment. Therefore, the time limitation began to run on that date. Since his claim was not filed within the applicable three-year time limitation period, it is barred by the Act.

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[2] *Wesley J. Schmidt*, Docket No. 82-831, issued August 17, 1982.

[3] For a full discussion of section 8122 and the 974 amendments, see *Richard E. Jacobson*, 33 ECAB 1517

[4] *Wesley J. Schmidt, supra*

[5] See, *Silas S. Elliott*, 32 ECAB 202.

Appellant's claim would still be regarded as timely under 5 U.S.C. section 8122(a)(1) if his "immediate superior had actual knowledge of the injury or death within 30 days. The knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death."[6]

The Board finds that the evidence in the present case fails to establish that the employing establishment had timely actual notice of an alleged employment-related disease. The only evidence in this regard is the statement by appellant's supervisor on the reverse of appellant's CA-2 form which indicates that the "employee first reported condition to supervisor" on April 15, 1981. This notice was not within 30 days of May 26, 1976.

The April 17, 1984 decision of the Office of Workers' Compensation Programs is affirmed.

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[6] *Gladys E. Olney*, 33 ECAB 1643.

In the Matter of FLOYD S. SHERWOOD *and* U. S. POSTAL SERVICE, POST OFFICE, Des Moines, Iowa

Docket No. 84-1277; Submitted on the Record;
Issued July 24, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the refusals of the Office of Workers' Compensation Programs to reopen appellant's case for further merit review pursuant to 5 U.S.C. section 8128(a) were proper.

On June 23, 1981, appellant, then a 34-year-old clerk, filed a claim alleging that on June 8, 1981, he injured his lower back at work while bending over to lift a mail tray. A copy of a June 9, 1981 note of Dr. Stephen C. Gleason, an osteopath, states appellant was "being admitted to hospital on 6-9-81 for severe back strain on the job."

Copies of other medical records submitted to the Office of Workers' Compensation Programs showed that appellant had been hospitalized from December 9 to 15, 1980 for low back pain that he had had since a nonemployment-related automobile accident on December 5, 1980. Hospital records showed a history of a back injury in the Navy in 1967 and laminectomies in 1967 and 1971, a spinal fusion in 1975, and a left puriform ligation in 1976. According to other records, appellant returned to work after the automobile accident in early April 1981 and was hospitalized April 9, 1981 for therapy for his low back pain.

In a July 29, 1981 attending physician's form report, Dr. Gleason stated appellant was hospitalized from June 9 to 13, 1981, with a diagnosis of severe lumbosacral strain and slight cervical myofascial strain. The doctor stated appellant's condition was caused by his history of "previous back surgery in 1967, 1971, and 1978. Car accident on [12/5/80]."

Appellant received continuation of pay from June 9, 1981 through July 23, 1981 and claimed continuing compensation thereafter. The case record indicates he has not returned to work.

By letter decision dated August 10, 1981, the Office denied appellant's claim on the ground that the evidence failed to establish a causal relationship between his "June 1981 disability and the incident at work on June 8, 1981."

Appellant submitted an August 11, 1981 attending physician's form report which related appellant's condition to the June 8, 1981 injury. By letter dated September 14, 1981, the Office notified appellant that this evidence was "not sufficient to overturn the previous denial."

Appellant requested reconsideration and submitted an April 21, 1983 affidavit in which he stated that he returned to work on approximately March 1, 1981 after his December 5, 1980 automobile accident and that he "worked without problems" until his alleged employment injury in June 1981. He also submitted an April 26, 1983 report of Dr. Gleason which stated in part:

> "[Appellant] did sustain a job-related injury on June 9, 1981. He was hospitalized with a severe lumbosacral strain as a result of that injury. The injury, although not totally responsible for the lumbosacral pain and instability, did exacerbate previously long-standing problem in the low back area."

"By letter of July 1, 1983, the Office notified appellant's attorney that the additional evidence was not sufficient to warrant reconsideration and gave him a month to submit detailed and rationalized medical evidence establishing causal relationship between the injury and his disability. No additional evidence was submitted, and the Office denied appellant's request for reconsideration in an August 12, 1983 compensation order, finding the evidence submitted in support of the request "lacks substantial probative value."

Appellant again requested reconsideration and submitted a February 20, 1984 report of Dr. Gleason which stated as follows:

> "It has come to my attention that one of my patients, Floyd Sherwood, has been denied compensation for an injury he received while on the job in June, 1981. The reasons given me for denial of Mr. Sherwood's compensation was that your office determined that medical evidence of record failed to establish a causal relationship between Mr. Sherwood's June of 1981 disability and his incident at work on June 8, 1981. Another reason given to me for Mr. Sherwood's denial of compensation was that medical evidence of record related his 1981 disability to an injury of December 5, 1980, which was not work related. The purpose of this letter is to set out specifically what my conclusions are concerning Floyd Sherwood so that they might not be inferred from prior reports.
>
> "Floyd Sherwood was examined and treated on June 9, 1981 through June 13, 1981, for an injury to his lower back that he received on June 8, 1981 from lifting a mail tray while at work. I diagnosed Mr. Sherwood's injury as a severe L-S strain and slight cervical myofascial strain. Laboratory and radiation tests were not taken and the patient was treated with heat packs and massage until his discharge on June 13, 1981.
>
> "As is apparent Mr. Sherwood previously had a long-standing problem in the low back area with prior laminectomies. However, to the date of June 8, 1981, Mr. Sherwood was able to perform his regular duties for the U. S. Post Office which included required lifting and bending. His injury on June 8, 1981 exacerbated his condition to such a degree that Mr. Sherwood is permanently disabled. The cause of this disability is his injury of June 8, 1981. Mr. Sherwood is restricted permanently from doing any lifting, bending, stooping, or any activity which can be considered physical."

By compensation order dated March 29, 1984, the Office denied appellant's request for reconsideration, finding that the evidence submitted in support of the request was "of a cumulative nature and lacking substantial probative value. . ." Appellant filed an appeal with the Board on April 30, 1984.

The Board notes that the only decisions before it are those of the Office dated August 12, 1983 and March 29, 1984 which found the evidence submitted in support of the requests for reconsideration insufficient to require review of the August 10, 1981 merit decision. Since more than one year has elapsed from that decision until the filing of appellant's appeal on April 30, 1984, the Board lacks jurisdiction to review that decision.[1]

The Board finds that the Office's refusals to reopen the case for a merit review were improper.

To require the Office to reopen a case for consideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128.[2] Accordingly, as is well-established under Board precedent,[3] the Office is required to reopen a case on its merits when such evidence or contentions are presented.

In the present case, appellant submitted relevant evidence not previously of record that was sufficient to require the Office to reopen the case for reconsideration. The Office's August 10, 1981 letter decision denied appellant's claim on the ground that the evidence failed to establish a causal relationship between the June 8, 1981 employment incident and his allegedly disabling condition. The April 26, 1983 and February 20, 1984 reports of Dr. Gleason, an osteopath, directly addressed the issue of causal relationship and were therefore relevant to the issue on reconsideration.

The Board notes that the compensation order of August 12, 1983, as did the March 29, 1984 compensation order in part, denied reconsideration on the ground that the additional evidence lacked "substantial probative value." This is not the correct test to follow in determining whether to reopen a case for reconsideration.[4]

Following remand, an Office medical adviser should review the entire case record, including the additional relevant reports of Dr. Gleason. After such further development as is necessary, the Office should issue a *de novo* decision on the merits of the case.

The decisions of the Office of Workers' Compensation Programs dated August 12, 1983 and March 29, 1984 are hereby reversed and the case remanded for further proceedings consistent with this decision.

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[1] 20 CFR section 501.3(d)(2). See *Nicholas Gatto*, 25 ECAB 300.

[2] *Eladio Joel Abrera*, 28 ECAB 401.

[3] See, e.g., *Cynthia L. Lee*, 15 ECAB 425; *Leopold J. Gunston*, 18 ECAB 149; *Billy F. Carter*, 32 ECAB 1987.

[4] See notes 2 and 3, *supra*.

In the Matter of JOAQUIN SOUZA *and* DEPARTMENT OF THE NAVY, NAVAL MATERIAL COMMAND, ALAMEDA AIR STATION, Alameda, Calif.

Docket No. 84-1294; Submitted on the Record;
Issued July 24, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant has any disability or permanent impairment due to a pulmonary condition causally related to his federal employment.

Appellant, a 61-year-old welder, filed a claim on August 3, 1983 alleging that he had pulmonary asbestosis due to his exposure to asbestos at work from 1941 until his voluntary retirement on June 29, 1973.[1]

In a June 30, statement appellant stated that he smoked one pack of cigarettes a day for 19 years, stopping in 1978.

In an August 1, 1981 report Dr. George S. Cohlmia, a general surgeon, set forth the following results of pulmonary function tests: FVC (forced vital capacity) - 82 percent of predicted, FEV_1 (One second forced expiratory volume) - 47 percent of predicted, FEV_1/FVC - (one second forced expiratory volume expressed as a percentage of FVC) - 42 percent, and MVV (maximal voluntary ventilation) - 64 percent of predicted. He stated that appellant had "(1) no evidence of restrictive pulmonary disease. (2) moderately severe to severe obstructive pulmonary diseases. (3) normal diffusion capacity." Dr. Cohlmia concluded:

> "[Appellant's] past medical history is noncontributory and he has no significant lung disease that he has noted. His physical examination does not show some decrease in the breath sounds and increase in the anterior to posterior diameter which may lead to early chronic obstructive pulmonary disease. The patient's laboratory exam is within normal limits. His pulmonary function tests, however, are definitely abnormal. Thus show a moderate to moderately severe degree of obstructive pulmonary disease. This is corroborated by his flow volume loops. It was stated that because of his moderate degree of smoking history there may be some influence of this upon these abnormal findings, however, because of the patient's severe and heavy asbestos exposure, it is very likely that this places significant proportion of the cause. Patient's x-rays [taken by Dr. Stanley Sizeler, a Board-certified radiologist] are nonspecific and show no evidence of pleural or parenchymal asbestosis."

By letter dated December 29, 1983 the Office of Workers' Compensation Programs referred appellant together with a statement of accepted facts to Dr. Oscar Scherer, a Board-certified internist specializing in pulmonary disease, for a complete pulmonary evaluation.

In a February 27, 1984 report Dr. Barry R. Horn, a Board-certified internist specializing in pulmonary diseases and an associate of Dr. Scherer, set forth the following results of pulmonary function tests: FVC - 71 percent of predicted, FEV_1 - 53 percent of predicted and FEV_1/FVC- 72 percent of predicted. He concluded that appellant had a "moderate obstructive lung disease with air trapping, which improves with aerosol bronchodilator." Chest x-ray taken by Dr. Joy Price, a Board-certified radiologist and a government certified "B" reader, revealed "no evidence of active disease in the chest." Dr. Horn concluded:

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[1] Thereafter appellant worked in private industry, where, he contended, his exposure to asbestos continued.

> "At the present time [appellant] does not demonstrate evidence of asbestos -related disease. His chest x-rays demonstrate neither pleural nor interstitial lung disease. His pulmonary function test shows lung volumes that are at the upper limits of normal, along with moderate airway obstruction. The single breath pulmonary diffusing capacity is normal. The airway obstruction is due to his prior history of cigarette smoking and is not related to asbestos exposure."

In a March 23, 1984 report Dr. Judd Shellito, a Board-certified internist specializing in pulmonary disease and an Office medical consultant, stated that Dr. Cohlmia's report did not suport a conclusion of asbestos-related pulmonary disease in that appellant's chest x-rays were normal, pulmonary function testing revealed only obstructive spirometry and his comments supporting such a relationship were speculative. Dr. Shellito noted that Dr. Horn's pulmonary function testing revealed only obstructive spirometry and that chest x-rays revealed no pleural or parechymal abnormalities. He concluded as follows:

> "1. According to the medical evidence at this time, no condition or disability was caused by the accepted conditions of employment.
>
> "2. The diagnoses are established as (a) Asbestos exposure without current evidence of asbestos-related pulmonary disease. No pleural abnormalities have been demonstrated on chest x-ray. There is insufficient evidence to support a diagnosis of parenchymal asbestosis in the face of normal physical exam, normal lung markings on chest x-ray, obstructive spirometry, increased rather than decreased lung volumes, and a well-preserved diffusing capacity. (b) Chronic obstructive pulmonary disease, likely secondary to cigarette smoking. This is not a work-related condition.
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> "3. The claimant is not disabled from his position due to disease resulting from exposure to asbestos while in federal employment.
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> "4. The percentage of respiratory impairment due to asbestos-related pulmonary disease is 0 percent."

By compensation order dated April 6, 1984 the Office found that "the claimant has not sustained a pulmonary disease or condition resulting from exposure to asbestos in the performance of duty."

The Board finds that appellant is not entitled to a schedule award for any permanent impairment due to an employment-related pulmonary condition.

The Federal Employees' Compensation Act provides for payment of schedule awards for a permanent loss of use of certain specified anatomical members or functions of the body.[2] For an injury which occurred prior to September 7, 1974 a schedule award is not payable for loss of use of a part of the body not specifically enumerated in the Act.[3] The lung is not one of the members of the body so specified.

The Act was amended effective September 7, 1974 authorizing a schedule award for loss or loss of use of "any important external or internal organ of the body as determined by the Secretary.[4] Pursuant to regulations the Office has provided for a schedule award for a lung impairment.[5] However, the 1974 amendments specifically state that this provision is applicable only to an injury or death occurring on or after the date of enactment, September 7, 1974.[6] This amendment is therefore inapplicable to appellant's condition because his exposure to asbestos in his federal employment ceased on June 29, 1973, when he retired, prior to the effective date of the 1974 amendment.[7]

The Board also finds that the weight of the medical evidence establishes that appellant does not have a disabling pulmonary condition causally related to his federal employment.

Dr. Cohlmia concluded that "because of the patient's severe and heavy asbestos exposure it is very likely that this places significant proportion of the cause [of his pulmonary condition]." His conclusion was inconclusive and speculative in that it was not supported by any evidence of asbestos-related lung disease.

Dr. Horn, a Board-certified internist specializing in pulmonary diseases, concluded based on pulmonary function testing showing moderate obstructive lung disease and chest x-rays, which were interpreted by a "B" reader, showing no evidence of pleural or interstitial lung disease, that appellant did not have any pulmonary disease causally related to his exposure to asbestos. This conclusion was concurred with by Dr. Shellito, a Board-certified internist specializing in pulmonary diseases and an Office consultant.

The medical evidence of record is not probative of any causal relationship between appellant's pulmonary condition and his exposure to asbestos at work.

The April 6, 1984 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[2] 5 U.S.C section 8107.

[3] See *John T. Bradley*, 25 ECAB 348.

[4] Act of September 7, 1974, 88 Stat. 1145.

[5] 20 CFR 10.304(a).

[6] Act of September 7, 1974, 88 Stat. 1151.

[7] See *Hiram L. Hendricks*, 33 ECAB 1487.

In the Matter of PEDRO LAGUER *and* U. S. POSTAL SERVICE, POST OFFICE, San Juan, P. R.

Docket No. 84–1304; Submitted on the Record;
Issued July 25, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant's claim for an emotional condition is barred by the applicable five-year time limitation provision of the Federal Employees' Compensation Act.

Appellant, a 53-year-old postal clerk, filed claims on May 23, 1983 and June 27, 1983 alleging that in 1962 he had a nervous breakdown due to factors of his federal employment. He stated that his "condition worsened to the point that I had to be removed from service." He stopped work on April 19, 1963 and retired on disability in 1964.

Appellant reported that he first became aware of his condition on January 1, 1962 and of the relationship between his condition and his employment on December 10, 1962 while under the care of a psychiatrist. He stated that his illness was the product of "harassment, nicknames, racial conflicts, noise, stress, persecution, etc." and that he "caught this illness in the Postal Service." In response to a question regarding the late filing of his claim for compensation, appellant stated that the employing establishment did not advise him of his "right to apply for benefits on account of occupational disease."

In an attending physician's report dated May 12, 1983, appellant's treating physician, Dr. S. Ramos Torbia, found him to be an "unstable person unable to perform duties satisfactorily." He diagnosed schizophrenia and checked the box marked "yes" in answer to the question whether appellant's current disability related to his 1962 nervous breakdown.

In a report dated June 27, 1983, Dr. Torbia stated that appellant had complained of nervousness, insomnia, and restlessness since 1974 when he first began treating appellant, and that "this condition has been controlled by medication." As to appellant's past history, Dr. Torbia wrote, "Not remarkable."

In response to an Office request, the employing establishment submitted a letter dated August 22, 1983 indicating that it could not be ascertained whether there was timely knowledge of appellant's condition on the part of his supervisor.

By compensation order dated November 10, 1983 the Office denied appellant's claim on the ground that it "was not timely filed as required under 5 U.S.C. 8122."

At appellant's request a hearing was held before an Office hearing representative on February 17, 1984, at which time appellant testified that he became aware of the possible relationship between his emotional condition and his employment while he was at work and that he did not file a claim for compensation earlier because he thought he already was receiving compensation. He also stated that his supervisor was aware of his mental condition.

By decision dated April 13, 1984 and made final that same day the Office hearing representative found that appellant "did not file his claim within the applicable time limitation provisions of the Act and therefore is not entitled to compensation benefits." The hearing representative further found that appellant was not entitled to medical benefits.

The Board finds that appellant's claim for an emotional disorder was not filed within the five-year period of limitation applicable to this case.

In a claim such as the present one based on an allegation of occupational disease, the time limitation of the Federal Employees' Compensation Act begins to run when the employee becomes aware, or reasonably should have been aware, of a possible relationship between his condition and his employment.[1] In situations where the exposure to the implicated employment factors continues after such knowledge, the time for filing begins on the date of the employee's last exposure to such factors.[2]

In this case appellant was aware of his emotional condition and its relationship to factors of his federal employment in 1962. Since appellant's last day of exposure to the implicated factors of employment was on April 19, 1963, the time limitation began to run on that date.

The section of the Act applicable to this case provides that the claim for compensation must be filed within five years from the date when the period of limitations began to run. This requirement is a maximum mandatory one which may not be waived regardless of the reasons for, or the circumstances surrounding, the failure to file a claim within the prescribed time.[3] In the present case the period of limitation began to run on April 19, 1963. Since appellant's claim was not filed until May 23, 1983 it is barred by the five-year mandatory time limitation provision.

The remaining question is whether the employing establishment had actual timely knowledge of appellant's conditions, entitling him to medical benefits.[4] Other than appellant's recollection that 19 years earlier he told his superior of his condition, there is nothing in the record to indicate that appellant's supervisor had knowledge that appellant regarded his condition as being employment related. Therefore, appellant is not entitled to medical benefits.

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[1] *Paul A. Jones*, 30 ECAB 966; *Jack O. Rose*, 28 ECAB 201.

[2] *Paul A. Johns, supra; Jack O. Rose, supra.*

[3] See *Robert Shelton*, 28 ECAB 11.

[4] *Hyman Modelevsky*, 30 ECAB 411.

The decision of the Office of Workers' Compensation Programs dated November 10, 1983, and the decision of the Office hearing representative dated April 13, 1984 and finalized that same date, are hereby affirmed.

In the Matter of GRADY O. PORTER *and* DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, Tex.

Docket No. 84–1187; Submitted on the Record;
Issued July 26, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs acted properly in suspending appellant's possible entitlement to compensation benefits on the ground that he refused to undergo a physical examination as directed by the Office.

On June 6, 1983 appellant, then a 55-year-old heavy mobile equipment repair inspector, filed a claim for a hearing loss which he attributed to exposure to noise in his employment. The employing establishment submitted information on his exposure to noise and submitted audiograms made there on April 28, 1964, April 18, 1978, and June 9, 1980.

On September 26, 1983 the Office referred appellant to Dr. William Crutcher, a Board-certified otolaryngologist in Dallas, Texas, for audiometric testing and otologic evaluation.

By an October 21, 1983 letter appellant advised the Office that he was unable to keep this appointment for the reason that his physician told him that he was for all practical purposes blind in his left eye. Appellant stated "I feel the risk in driving up there and back in an unfamiliar town and public transportation is not convenient is greater than any compensation that may be awarded for my hearing loss."

The record contains a memorandum to the file stating that there were two Board-certified otolarynologists in Texarkana, Texas but that the Office had decided not to further use their services for the reasons that their initial reports took four to five months to arrive, that requests for additional information were necessary, that the reliability of the audiometric testing was often doubtful, that their reports were skimpy and did not address the issues posed or provide rationale, and that the Office had been billed for unauthorized treatment.

By an October 27, 1983 telephone call, the Office advised appellant that it would reimburse him for bus transportation to and from Dallas, and for meals. The Office further advised him of the available schedule of bus transportation which would permit him to make the trip in 1 day. Appellant still refused to undergo the examination in Dallas.

By a December 19, 1983 compensation order the Office found that appellant's "refusal to submit to an examination constitutes obstruction as outlined in section 8123(d) of the Federal Employees' Compensation Act and precludes him from receiving compensation until such time as the obstruction no longer exists." [1]

The Board finds the Office acted properly in suspending appellant's compensation on the ground that he refused to undergo a medical examination by Dr. Crutcher in Dallas.

Section 8123 of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of federal employment to undergo physical examination as it deems necessary.[2] Subsection (d) of section 8123 states that "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[3]

The Office's referral to Dr. Crutcher in Dallas was not unreasonable, in light of the problems documented in an Office memorandum, which the Office had experienced with two Board-certified otolaryngologists in Texarkana, Texas, the city closest to appellant's residence. A referral to a Board-certified otolaryngologist was needed to determine the extent and cause of appellant's hearing loss.

Appellant's reason for refusing to submit to this examination was not sufficient to justify his refusal. Appellant stated that he did not feel safe in driving to Dallas, and that public transportation was not convenient. The Office answered these objections by furnishing information about bus transportation and by offering to reimburse appellant for such transportation and for meals, but appellant still refused to undergo the examination.

The decision of the Office of Workers' Compensation Programs dated December 19, 1983 is hereby affirmed.

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[1] This compensation order is titled rejection of claim, but the Office's finding quoted above, makes it clear that the Office's decision constituted the proper action of suspension of his possible entitlement to compensation. See *Vernon A. Ambey*, 35 ECAB 611.

[2] "(a) An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required."

[3] See *Dorine Jinkins*, 32 ECAB 1502.

In the Matter of Shirley A. Hayes *and* U. S. Postal Service, Post Office, Fort Worth, Tex.

Docket No. 84–1196; Submitted on the Record; Issued July 27, 1984

Before E. Gerald Lamboley, Margaret Pallansch, Michele von Kelsch

The issue is whether appellant has more than a 10 percent impairment of the right upper extremity, for which she received a schedule award.

On January 2, 1981, appellant, then a 37-year-old clerk, filed a claim alleging that her work at the employing establishment had caused a "chronic cervical and right shoulder strain." In a statement submitted to the Office of Workers' Compensation Programs with her claim, appellant related that she began having shoulder pain "a long time ago," but that it had become worse the previous five months. She stated that casing mail with her right arm aggravated her right shoulder and neck pain when she had "to reach up or very far to the right." She claimed compensation for intermittent absences from work September 12, 1980 through December 22, 1980 and from April 9, 1981 and continuing.[1]

Appellant submitted the office notes of Dr. Joe M. Todd, a Board-certified orthopedic surgeon, who indicated in his November 14, 1980 notes a diagnosis of bicipital tendinitis, subscapular calcification, and cervical strain. Dr. Todd referred her to Dr. Keith C. Watson, a Board-certified orthopedic surgeon, who diagnosed a calcium deposit in the right shoulder and surgically removed the deposit on April 8, 1981. He stated the calcium deposit was related to appellant's "reaching behind" and picking things up" at work.

In attending physician's form reports dated April 23, 1981 and May 1, 1981, Dr. Watson diagnosed calcific tendinitis and instability of the right shoulder which he stated was related to factors of employment. He indicated that appellant would be totally disabled for at least 90 days.

The Office accepted appellant's claim for temporary total disability compensation effective March 9, 1981 and continuing.

In a December 9, 1981 work restriction evaluation report submitted at the request of the Office, Dr. Watson stated that appellant could work eight hours a day with sitting, walking, bending, squatting, kneeling, twisting, and standing. He stated she could lift up to 10 pounds for up to an hour throughout a work day and could not climb.

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[1] The case record indicates appellant went on leave-without-pay on April 4, 1981 after using up her sick and annual leave.

The Office requested the employing establishment to determine whether it could offer appellant light duty consistent with her work restrictions, and on February 24, 1982, it offered her a light duty position of manual distribution clerk. Appellant accepted the position and reported for work on May 11 and 12, 1982. She stopped work on May 14, 1982 due to pain in the right shoulder. In a May 27, 1982 report, Dr. Watson indicated appellant was unable to perform the limited duty position.

The Office ceased compensation payments when appellant returned to work, and it notified her by letter dated July 30, 1982 that it needed a rationalized opinion from Dr. Watson explaining why she could not perform the limited duty before compensation could be restored. In a September 10, 1982 report, Dr. Watson stated:

> "At this time Ms. Hayes appears to be suffering from a chronic subacromial impingement problem due in part to the buildup of scar tissue following the removal of her calcium deposit in her rotator cuff in April 1981. This is a most difficult problem to treat conservatively and we have been working on this for over a year now with minimal improvement."

By letter decision dated September 24, 1982, the Office determined that appellant had the wage-earning capacity of a limited duty distribution clerk and that it would pay compensation for a loss of wage-earning capacity effective May 11, 1982.

The Office referred appellant, along with the case record and a statement of accepted facts, to Dr. Frank S. Wood, a Board-certified orthopedic surgeon, for examination and evaluation. In a December 2, 1982 report, Dr. Wood related appellant's medical history and current symptomatology and stated:

> "My examination reveals a well-healed incisional scar on the anterior and anterior lateral aspect of the right shoulder. There is no particular tenderness in or around the scar and only minimal to mild tenderness to palpation in the region of the clavicle, acromion, greater and lesser tuberosities, and coracoid process. There are no key trigger areas. She has fairly significant crepitation on movement of the shoulder. She has approximately 40 degrees of external rotation of the shoulder with the elbow down at the side and approximately 80 degrees of internal rotation compared with about 90 degrees on the left side. Forward flexion of the shoulder is approximately 165–170 degrees, and abduction is about 155–160 degrees. There are pains on the extreme of motion. There is mild atrophy of the right deltoid when compared with the left.

> "X-rays of her shoulder show no calcium deposits at the present time. There is no significant narrowing of the subacromial space. There is a spur on the greater tuberosity at the insertion of the supraspinatus tendon, and I assume that this is a reactive spur from the calcium deposits. No other abnormalities are seen.
>
> "This lady has a fairly long and detailed problem. She had a calcium deposit which was not responsive to normal conservative measures and required surgical removal. Postoperatively, she has continued to have discomfort and limitation of motion and an inability to work because of pain with sustained use. She has radiographic evidence of a spur at the greater tuberosity which would be quite consistent with the impingement syndrome mentioned by Dr. Watson. I feel that the only way her situation could be improved would be surgically consisting of an exploration of the shoulder with probable resection of the coracoacromial ligament and possibly an anterior lateral acromioplasty. The results from surgery such as this are quite unpredictable, and there is, of course, no guarantee that the condition could be made better by the surgery. There is also, of course, the possibility that her condition could be made better by the surgery. There is also, of course, the possibility that her condition might deteriorate with such surgery. Since she is relatively functional at home, I would be very hesitant to recommend surgery to her at that point.
>
> "I feel that her initial problem was calcific tendinitis which very likely was precipitated by her work at the post office using her arms up and over her head on a repetitive basis. I believe that she is employable but only in a situation where she could work at a desk job in which most of her activities involved resting her arms on her desk and doing primarily paper work. I do not believe that she could go back to her job sorting mail under any circumstances at this point. I believe that her condition is permanent and that she has reached maximum benefit from her treatment at this time."

The Office then requested Dr. Wood to review the physical requirements of the light duty position offered appellant and submit an opinion on whether she could perform these requirements. In a December 30, 1982 report, he stated she "would be able to perform duties with the restrictions as noted . . ."

The Office determined that there was a conflict between the opinions of Drs. Watson and Wood on the issue of whether appellant could perform the light duty position offered her, and it referred her, along with the case record and a statement of accepted facts, to Dr. Bernard E. McConnell, a Board-certified orthopedic surgeon and an impartial medical specialist, to resolve the conflict. In a May 2, 1983 report, Dr. McConnell reviewed appellant's medical history and stated:

> "Orthopedic examination of this patient reveals that she stands erect without list. She holds the head and neck in no abnormal attitude. The patient's shoulders are level. She has approximately twenty-five percent limitation of abduction of the shoulders and external and internal rotation are limited by a similar amount. Forward abduction of the shoulder seems to occur at about eighty degrees of abduction and internal and external rotation seems to produce more impingement at this point. There is a definite popping and grating at this point, suggesting to me that there is a large scar formation or impingement is being produced by the scar or spur arising from the supraspinatous tendon insertion at the greater tuberosity, as it passes beneath the corococlavicular ligament and under the acromion. Films of this patient's shoulder suggest to me that there is some definite irregularity on the under surface of the acromion.
>
> "I am of the opinion that this patient's persisting symptoms are on the basis of impingement syndrome of scar tissue and irregularities of the greater tuberosity, as it passes under corocorcromion ligament of the undersurfaces of the acromion. I think that further impingement might be produced by irregularities on the under surface of the acromion, as suggestive by x-ray film. I feel these prominences will cause pain and discomfort to the patient on any work which requires her to elevate her arm away from her body or to internally or externally rotate the shoulder joint. I think that even these problems would be aggravated by any type of repetitive rotary motions or motions with the arm relative adducted, still produce symptoms because of the impingement syndrome which clinically is quite prominent.
>
> "The question posed to me as consideration as to whether or not I feel the patient could perform a limited duty at the job which she was returned to on May 20, 1982. I am of the opinion that this patient cannot return to such duties and I feel at that time she could not have returned to such duties."

By letter dated June 21, 1983, the Office notified appellant that it had accepted that she was entitled to continuing compensation for temporary total disability.

In order to determine appellant's entitlement to a schedule award for an impairment of her right upper extremity, the Office, upon the recommendation of an Office medical adviser, requested Dr. McConnell to reexamine appellant and provide a supplemental report with the following:

> "1. Date of considered maximum medical improvement achievement.
>
> "2. Description of any restriction of movement in terms of degrees of retained active motion.
>
> "3. Description of all other pertinent objective findings-decrease

of strength, atrophy, ankylosis, sensory changes, or other, as applicable.

"4. Description of subjective complaints—pain, discomfort, or other, causing impairments.

"5. Recommended percentage of impairment of the affected member(s) as correlated to the AMA *Guides*."[2]

In a July 6, 1983, Dr. McConnell stated:

> "Reexamination of this patient reveals she can actively abduct the right shoulder within fifteen degrees of full abduction. At that point an obstruction is reached which a very slight amount of external rotation is required to let the obstruction pass and then the patient can go ahead and fully abduct the shoulder. This obstructive lesion seems to be located on the rotator cuff of the shoulder and as it passes under the acromion and the coracoclavicular ligament it produces an impingment syndrome which can be overcome, but does produce symptoms. Forward flexion of the shoulder is restricted by thirty degrees and internal rotation of the shoulder is restricted by fifteen degrees.
>
> "Review of this patient's history reveals that she reached maximum recovery approximately six months after manipulation of her shoulder in September 1980. Symptoms have remained much the same and she has pain which is aggravated by cold and dampness. She finds it impossible to do any work with shoulders abducted for any appreciable time. The examination does not reveal any definite sensory loss. I am unable to demonstrate any muscle atrophy about the shoulder girdle. There is no sensory changes. The dominant right forearm measures one-half inch greater in circumstances than does the left. Otherwise the circumstances of the extremities are equal.
>
> "In my opinion, I would estimate the permanent residual disability to this patient's right shoulder is in the neighborhood of thirty percent permanent residual disability."

The Office medical adviser reviewed Dr. McConnell's report and stated in an August 8, 1983 report that under the AMA *Guides*, appellant's 30 degree loss of forward flexion of the right shoulder constituted a three percent impairment and her 15 degree loss of internal rotation constituted a three percent impairment. The medical adviser stated that Dr. McConnell's report indicated that appellant had full abduction of her right shoulder. He rated her impairment due to pain as four percent, for a total impairment of 10 percent.

By letter decision dated January 20, 1984, the Office issued a schedule award for a 10 percent impairment of the right upper extremity, with the award running from January 26, 1984 through August 31, 1984.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2 d ed. 1977). The Board and the Office have recognized the AMA *Guides* as general guides which should be used where feasible in making schedule awards. See, e.g., *Herbert L. Blatt*, 31 ECAB 648.

The Board finds that appellant has no more than a 10 percent impairment of the upper extremity.

Upon the recommendation of an Office medical adviser, the Office requested Dr. McConnell, a Board-certified orthopedic surgeon, to reexamine appellant and provide a report that included measurements of "any restriction of movement in terms of degree of retained active motion," along with a recommended percentage of impairment "of the affected member(s)" pursuant to the AMA *Guides*. In his July 6, 1983 report, Dr. McConnell provided measurements in degrees of restriction of movement of the right shoulder and opined that appellant had an impairment of the right shoulder "in the neighborhood of thirty percent." The Office medical adviser reviewed this report and, pursuant to the applicable provisions of Chapter I of the AMA *Guides*, stated that appellant's 30 degree loss of forward flexion of the right shoulder, as measured by Dr. McConnell, constituted a three percent impairment, and her 15 degree loss of internal rotation constituted a three percent impairment. The medical adviser rated appellant's impairment due to pain as four percent,[3] for a total impairment of 10 percent.

The Board finds that the Office properly selected the measurements in Dr. McConnell's July 6, 1983 report to use in the calculation of appellant's schedule award. All other medical reports in the case record were primarily concerned with the extent of appellant's disability, while this report of Dr. McConnell was submitted in response to the Office's specific requests for information relevant to the determination of a schedule award. The Board further finds that the Office properly followed the AMA *Guides* in determining appellant's schedule award. Dr. McConnell estimated appellant had a 30 percent impairment of the right shoulder, but it is clear that this amount was not calculated under the AMA *Guides*.[4]

The January 20, 1984 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[3] The Board has stated in numerous cases that some impairments, such as pain and weakness, which limit the normal function of a limb but are not reflected in the AMA *Guides*, should be considered in determining the amount of a schedule award. See e.g., *Herbert L. Blatt*, *supra* note 2, and cases cited therein.

[4] The Board notes that section 8107(c) of the Federal Employees' Compensations Act does not provide for a schedule award for an impairment of the shoulder *per se*, but rather for the loss or loss of use of an arm.

In the Matter of ANTHONY OLIVEIRA, *and* U. S. POSTAL SERVICE, TERMINAL ANNEX, Denver, Colo.

Docket No. 84–758; Submitted on the Record;
Issued July 27, 1984

Before MARGARET PALLANSCH, MICHELE VON KELSCH,
DAVID S. GERSON

The issues are (1) whether the Office of Workers' Compensation Programs properly determined appellant's employment-related loss of wage-earning capacity effective May 21, 1981 based on his ability to perform the duties of a clerk, general, and (2) whether the Office properly determined that appellant could not receive dual benefits under both the Federal Employees' Compensation Act and the Civil Service Retirement Act and if so whether it properly determined that it could discontinue payment of compensation benefits until his election of benefits was made between the two programs.

Appellant, then a 45-year-old postal clerk, filed a claim on February 12, 1976 alleging that he injured his left knee when he slipped on a wet spot at the employing establishment. He stopped work on that date and received continuation of pay from February 12 to March 27, 1976 and began receiving compensation for temporary total disability on March 28, 1976.

In a report dated November 10, 1976, Dr. Henry S. Gardner stated:

> "Mr. Oliveira had surgery for instability of his left knee on 5/18/76, at which time a medial meniscectomy, a ligament reconstruction, and a pes anseinus transfer were done. In spite of the fact that at the time of the surgery the knee was really very snug and stable, as time has gone on, Mr. Oliveira has developed increasing medial instability and some rotatory instability. When seen on 9/23/76, a simple knee brace was prescribed for him in hopes that this alone would provide sufficient stability to compensate for his problem and make him functional again. On 10/26/76, when reevaluated, he was found to not have obtained sufficient support from this type of brace. Mr. Oliveira would like to avoid further surgery and for this reason a Lennox-Hale knee brace was prescribed. This brace which has been found to be very useful even in professional athletes who have persistent ligament instability, is designed specifically to compensate adequately for both his medial and rotatory instability. I feel that this is certainly worth a try rather than embarking on further surgery with Mr. Oliveira."

On February 17, 1978, the Office referred appellant to Dr. Dennis P. Gordon, a Board-certified orthopedic surgeon, for evaluation regarding the extent of appellant's disability.

In a report dated March 15, 1978, Dr. Gordon stated in part:

> "Examination today reveals that he has full range of motion of his

> knee. He is wearing a Lennox-Hill brace, which he states is a year and a half old; I find no evidence of wear on this brace. He has obvious absence of the anterior cruciate ligament and marked laxity of the medial collateral ligament. There is significant rotary instability. There is no effusion today.
>
> "X-rays taken in the office today, reveal patellofemoral arthritic changes, as well as some early degenerative changes along the margin of the medial tibial plateau.
>
> "I have discussed the nature of this injury with the patient and discussed the possibility of reconstruction with him. He is adamant that nothing further be done to his knee. He states that if anything were done to his knee, he would want a 'written guarantee.'
>
> "IMPRESSION: Ligamentous laxity of the right knee with patellofemoral and femoral tibial arthritic changes.
>
> "I feel that this man is not able to do any work standing for any length of time and therefore is totally and permanently disabled, from the type of work that he explains to me.
>
> "It is entirely possible for this man to be retrained to do work which would not require any lifting or prolonged standing or walking."

An Office medical adviser on April 28, 1978 reviewed Dr. Gordon's report and indicated that maximum medical improvement of appellant's knee condition had been reached on March 15, 1978, the date of Gordon's report. The medical adviser further stated that based on Dr. Gordon's report, appellant had a 50 percent permanent impairment of the left lower extremity.

On June 30, 1978, the Office issued appellant a schedule award for a 50 percent permanent loss of use of the left leg covering the period March 15, 1978 to December 16, 1980, inclusive.

In a letter to appellant dated August 18, 1978, the Office stated:

> "You cannot collect both compensation and schedule award benefits. You can, however, collect U.S. Civil Service Commission retirement benefits while you are receiving your schedule award.
>
> "Please make your election of benefits on the attached forms. At the expiration of the [schedule] award, you may again elect to receive compensation from OWCP."

In a letter to appellant dated September 8, 1978, the Office stated in part:

> "An error was made in that letter [to appellant] in that an election of benefits is not presently required. The election must be made at the expiration of the schedule award. Since our letter was written only three weeks ago, the U.S. Civil Service Commission has not had adequate time to establish their payments to claimant."

On March 30, 1979, the Office informed the Office of Personnel Management that appellant was receiving a schedule award covering the period of March 15, 1978 to December 16, 1980, inclusive.

On December 3, 1980, an Office claims examiner noted that appellant's schedule award would expire on December 16, 1980 and that appellant's payments should be transferred to temporary total disability effective December 17, 1980.

On January 5, 1981, the same Office claims examiner requested the Office of Personnel Management "suspend monthly annuity payments" and "transfer the annuitant's health benefits enrollment to us." The claims examiner further indicated that appellant received a schedule award from the Office covering the period of March 15, 1978 to December 16, 1980 and that appellant elected to receive compensation from the Office effective December 17, 1980.

In a report dated December 31, 1980, Dr. Gordon stated in part:

> "IMPRESSION: I feel this man's status is exactly the same as it was two and one half years ago when I examined him. He is certainly able to do work that does not require prolonged standing, walking, or lifting. He is completely disabled from any type of work which requires carrying a load, lifting, prolonged walking."

The Office thereupon proceeded to determine whether appellant had an employment-related loss of wage-earning capacity. The Office determined that appellant could perform the duties of a clerk, general, and that the position was reasonably available in the Denver, Colorado area.[1]

On May 5, 1981, the Office determined in a loss of wage-earning capacity decision that appellant was no longer totally disabled; that he was capable of performing the duties of a clerk, general; and that his compensation would be reduced accordingly effective April 23, 1981. Also on May 5, 1981, the Office informed appellant that he could not receive monetary benefits of the Federal Employees' Compensation Act and benefits of the U.S. Civil Service Retirement Act at the same time; that he would have to make an election of "the benefits that are more advantageous"; and that if he elected compensation benefits, the Office would reimburse the Office of Personnel Management for all benefits paid by that agency and send the balance to him.

In a letter to appellant on May 5, 1981, the Office stated: "Your schedule award expired 12/16/80. You have been receiving both OWCP and OPM benefits since then, where you were not entitled to both. Compensation benefits will cease." The Office did in fact discontinue appellant's compensation effective April 23, 1981 before appellant began receiving compensation for his loss of wage-earning capacity.

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[1] At the time of the Office's determination, appellant had been living in the Las Vegas, Nevada area since November of 1977.

On May 13, 1981, appellant elected to receive benefits under the Federal Employees' Compensation Act. On September 16, 1981, appellant elected to receive benefits under the Civil Service Retirement Act.

Appellant's representative stated in a letter dated September 25, 1981 that "[appellant] is currently receiving nothing from either agency and is in an increasingly poor financial state."

In a letter to OPM dated October 5, 1981, the Office stated:

> "Attached please find Mr. Anthony Oliveira's election of benefits requesting benefits from the Office of Personnel Management in preference to benefits from the Office of Workers' Compensation. Mr. Oliveira's benefits from this office were terminated effective 5/21/81. He received a schedule award from 3/15/78 through 12/16/80. We had subsequently reduced Mr. Oliveira's benefits to reflect a wage-earning capacity effective May 21, 1981, and gave him another election. However, we have been informed that his benefits from your office have also been terminated."

On May 14, 1981, appellant requested reconsideration of the Office's loss of wage-earning capacity decision. By compensation order dated January 6, 1983, the Office found that "[t]he evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

On February 18, 1983, the Office calculated that an overpayment of compensation in the amount of $5,646.96 had occurred for the period of December 17, 1980 to April 22, 1981 when appellant had been paid compensation for temporary total disability.

On February 1, 1983, appellant again requested reconsideration. On October 27, 1983, the Office again denied his application for review.

The Board finds that there are deficiencies in the Office's loss of wage-earning capacity determination requiring further development.

The worksheet calculating the wage-earning capacity pursuant to *Shadrick*[2] does not appear in the case record for the Board to review the percentage of loss of wage-earning capacity incurred by appellant. The percentage of loss of wage-earning capacity should be determined by comparing the employee's earning capacity with the current wage of the job he held at the time of injury; after such percentage has been determined, compensation for partial disability should be computed on the basis of the monthly pay as defined in the Federal Employees' Compensation Act.[3]

Although the Office made a finding that the position of clerk, general was reasonably available in Colorado where the injury was sustained, appellant moved to Nevada in November 1977. Therefore the Office should have determined whether the selected position was reasonably available in Nevada before making a finding on this issue.[4]

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[2] *Albert C. Shadrick*, 5 ECAB 376.

[3] *Joseph H. Brunette*, 26 ECAB 121.

The Board further finds that the Office properly determined that appellant was not entitled to receive dual benefits under the Federal Employees' Compensation Act.

Under the provisions of section 8116(a) of Title 5 of the United States Code, appellant is prohibited from receiving compensation, other than during the period of a schedule award, and payments under Civil Service retirement concurrently.[5] Appellant was so advised by letter of August 18, 1978. He was further advised that at the end of the schedule award he could again elect to receive compensation from the Office. However, appellant was restored to the Office's automatic rolls upon expiration of the schedule award prior to any such election. Under these circumstances, it was proper for the Office to discontinue payment of compensation benefits until such time as appellant has made his election.

However, the Board finds that appellant was not in the position to make an informed election and the amount of the overpayment resulting from any prohibited concurrent payments could not be determined until such time as his wage-earning capacity and its effective date, subsequent to the schedule award was determined. On remand, therefore, appellant must be given the opportunity, based on pertinent information, to elect benefits from the time of the expiration of the schedule award until the effective date of any wage-earning capacity determination, and again, after such date if the effective date is later than the termination date of the schedule award. Thereafter, the overpayment resulting from payment of dual benefits should be processed in accordance with Chapter 2–1000 of the Federal Procedure Manual.

The decision of the Office of Workers' Compensation Programs, dated October 27, 1983, is set aside and the case remanded to the Office for further proceedings as outlined above, to be followed by a *de novo* decision.

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[4] It is noted that an Office claims examiner did call the state employment service in Las Vegas, but chose to make a decision that the selected position was reasonably available in Denver.

[5] *Nelson Holmes*, 27 ECAB 409.

In the Matter of VICTOR M. GARCIA *and* DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Bayonne, N.J.

Docket No. 84–1254; Submitted on the Record;
Issued July 30, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for futher merit review pursuant to 5 U.S.C. section 8128(a) constituted an abuse of discretion.

This is the third appeal in this case, the facts of which are set forth in the Board's June 30, 1983 decision.[1] In that decision the Board affirmed the Office of Workers' Compensation Programs' January 25, 1983 decision and found that the evidence did not establish that appellant's disability commencing July 7, 1979 was causally related to the June 10, 1979 injury.

In a letter dated October 14, 1983 appellant requested reconsideration of his claim, and submitted a copy of a decision of the Social Security Administration showing that that agency had granted him disability insurance benefits and supplemental security income benefits based on his inability to engage in any form of work activity. In addition, appellant submitted copies of medical reports from the U.S. Public Health Service (USPHS) which were duplicates of those already part of the file.

By compensation order dated December 16, 1983 the Office found that the evidence submitted was partly repetitious in nature and partly irrelevant, and therefore denied review of the previous decision.

The only decision before the Board on this appeal is the December 16, 1983 decision which found that the evidence submitted in support of the application for reconsideration was insufficient to require review of the January 25, 1983 decision. Since more than one year elapsed from the date of the Office's January 25, 1983 decision determining the merits of appellant's claim to the date of filing of appellant's appeal on April 16, 1984 the Board lacks jurisdiction to review that decision on this appeal.[2]

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128.[3]

In his reconsideration request, appellant did not submit any relevant evidence not previously of record. He did advance the legal contention that he had been adjudicated totally disabled under the provisions of the Social Security Act for the period he claimed benefits under the

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[1] Docket No. 83-1014, issued June 30, 1983.

[2] 20 CFR 501.3(d)(2). See *Nicholas Gatto*, 25 ECAB 300.

[3] *Eladio Joel Abrera*, 28 ECAB 401.

Federal Employees' Compensation Act. Material which is duplicative of that already in the case record is of no evidentiary value and does not constitute a basis for reopening a case.[4] The reports from the USPHS were duplicative of previous reports submitted by appellant and already a part of the record at the time of the Office's merit decision.

With respect to appellant's contention that he was totally disabled under the Social Security Act provisions, the Board notes that 42 U.S.C. section 423(d), for the purposes of the Social Security Act, defines disability as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . ." That disability may be due to any cause. That provision has no application to appellant's entitlement to compensation under the Federal Employees' Compensation Act, where appellant must establish a causal relationship between his disability commencing July 7, 1979 and his employment injury before he is entitled to benefits.

The function of the Board on this appeal is to determine whether there has been an abuse of discretion. The Board finds that the refusal of the Office to reopen the case for further consideration on its merits did not constitute an abuse of discretion.[5]

The December 16, 1983 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[4] *Daisy M. Tharp*, 27 ECAB 377.

[5] *Karl Doern*, 28 ECAB 173.

In the Matter of JOHN W. SLONAKER *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, PHILADELPHIA INTERNATIONAL CONTROL TOWER, Philadelphia, Pa.

Docket No. 84–851, Submitted on the Record;
Issued July 30, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's disability after June 27, 1980, due to arteriosclerotic heart disease, is causally related to factors of his employment.

On July 13, 1974 appellant, then a 38-year-old air traffic controller, developed a sharp burning pain in his chest. He was hospitalized that day for acute myocardial ischemia of the anterolateral wall of the left ventricle. Dr. M. Price Margolies, a Board-certified cardiologist, diagnosed arteriosclerotic heart disease, possible old healed inferior wall myocardial infarction, and possible type IV hyperlipoproteinemia.

In an August 12, 1974 report, Dr. Margolies stated:

> "The x-ray film of the chest was within the limits of normal. The x-ray of the gall bladder was also normal. The electrocardiogram on admission was essentially normal. However, serial ECG's revealed acute ischemia involving the anterolateral wall of the left ventricle.
>
> "He was hospitalized from July 13, 1974 to July 27, 1974, with the following cardiac diagnosis:
>
> > 'Arteriosclerotic Heart Disease. No cardiac enlargement. Normal sinus rhythm. III C.'
>
> "Mr. Slonaker has been a ATCS [air traffic controller specialist] for the last ten years. During the last six of these years, two years at the Atlanta ARTCC [air route traffic control center] and the last four years at the Philadelphia Tracon he was subjected to high density air traffic and therefore to long periods of increased emotional stress. This is most probably the precipitating cause of his present problem."

The Office of Workers' Compensation Programs accepted appellant's claim and began payment of temporary disability compensation, effective July 14, 1974. Appellant returned to work on April 28, 1975.

Appellant was hospitalized from October 22, 1976, to October 27, 1976 for cardiac testing. In an October 27, 1976 report, Dr. Walter L. Floyd, a Board-certified cardiologist of professorial rank, stated:

> "Mr. Slonaker was admitted to my care on 10-22-76 and discharged on 10-27-76. Briefly, he is a 40-year-old air traffic controller who has a history of mild hypertension since 1974 and has been markedly overweight most of his adult life. In July 1974 following dietary indiscretion he developed crushing substernal pain for which he was hospitalized. He was felt to have electrocardiographic changes of inferior wall ischemia but serum enzymes were negative apart from mild elevation of SGOT [serum glutamic oxalacetic transaminase]. A GI [gastrointestinal] series and gall bladder series were both negative. He was noted to have Type IV hyperlipidemia. He remained out of work for approximately nine months and subsequently was transferred from the Philadelphia airport to Wilmington because of the diagnosis of coronary artery disease. Over the past year he has experienced chest pain which occurs primarily with emotional stress. He has not experienced exertional angina and has been able to carry out fairly vigorous physical activity such as playing football and baseball. Within the month prior to his admission

he describes more severe episodes of pain as being substernal ascending to the base of the neck and accompanied by a feeling of heaviness in both arms. He notes definite prompt relief with nitroglycerin. He does not feel his pain has been particularly modified by propranolol.

"The physical examination demonstrated a blood pressure of 150/90. The pulse was 60 and regular. He was markedly obese. There were no cutaneous manifestations of hyperlipidemia. The fundi were benign. The heart size was indeterminate. The rhythm was regular. A very soft mid-frequency systolic ejection murmer was audible at the apex in the base. No gallop was heard. There were no vascular bruits."

* * *

"On 10-25-76 Mr. Slonaker underwent right and left heart catheterization combined with coronary angiography. I am including a copy of the computerized report of that examination. You will note that he has normal ventricular function. You will note that he demonstrates definite coronary atherosclerosis but the disease is minimal in all three coronary arteries with lesions which we did not feel compromised the lumen by more than 25 percent. An incidental finding was the presence of a bicuspid aortic valve which unquestionably is the source of his murmur.

"In summary, it is evident that Mr. Slonaker has coronary atherosclerosis but the degree of disease which we can define angiographically is not one which we generally associate with symptoms, either angina pectoris or the occurrence of myocardial infarction. The pain which he describes is certainly consistent with ischemic myocardial pain in its character and distribution but it is most atypical in its lack of relationship to exertional activity. Furthermore, we are not able to define objective evidence of myocardial ischemia by stress testing. At this point in time I can only state that the cause of his pain is not defined. However, even if it does represent ischemic myocardial pain we can state on the basis of the angiographic findings that his prognosis is quite good and that he is not a high risk for morbid events in the foreseeable future.

"Mr. Slonaker clearly had major predispositions to progressive vascular disease including very heavy smoking, progressive obesity and severe hypertriglyceridemia.

"I have reassured Mr. Slonaker concerning his prognosis. On the basis of the angiographic findings, I don't think we should place restrictions on his occupational activity and I personally would see no objection to his returning to unrestricted responsiblities as an air traffic controller. He is extremely anxious to do this because he finds his present job boring and he finds much greater gratification

> in his work when he is presented with challenging situations and is busy. Likewise, I would place no restrictions on his activity level. He has enjoyed horseback riding in the past and I have encouraged him to return to this because I think this will be most helpful in his problem of weight control.
>
> "I have emphasized to Mr. and Mrs. Slonaker the necessity of his stopping smoking and modifying his diet in order to cut down the predisposition which he has to the development of vascular disease. He was instructed in a 1500 calorie type IV diet."

On June 27, 1980 appellant was at home watching television when his left hand, thumb, forefinger and index finger, upper lip and left cheek became numb. He was hospitalized that day. In a June 28, 1980 report, Dr. Roy T. Moser, an internist, stated:

> "This 44-year-old traffic controller was admitted to St. Elizabeth South on June 22, 1980, with the diagnosis of TIA [transient ischemic attack]. The patient was in stable health until the day of admission, when he experienced about a 15-minute episode of numbness of the left face and arm, and according to his son, also some slurring of his speech. He had never had any of these episodes in the past."
>
> * * *
>
> "He is a type IV hyperlipidemia, but does not adhere to a diet. He has been an excessive smoker, also. He has had elevated blood pressure for some time. He was told that he had an aortic valve, also. He had coronary angiography in the past, showing 25 percent coronary occlusion. He gets chest pain if he is tense. He has had none in a number of months. His electrocardiograms never demonstrated any definite infarction pattern. He has intermittent chest pain associated with emotional stress. Some chest pain associated with prolonged, heavy exertion, and is relieved by nitroglycerin. He had angiography at Duke University Medical Center in 1976, also stress testing at the time. He said the stress test was negative and the angiography showed the minimal atherosclerosis in all three coronary arteries, with 25 percent occlusion of the left circumflex. He smoked about a pack of cigarettes a day for 28 years. Occasional use of alcoholic beverages. He has had medication occasionally for blood pressure elevation."
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> * * *
>
> "IMPRESSION: (1) Transient ischemic attack, right hemisphere. (2) History of left urethral calculus. (3) Hyperlipidemia, type IV. (4) Labile hypertension. (5) Arteriosclerotic heart disease, per history. (6) Significant smoking history."

Appellant was discharged on July 3, 1980 and returned to work on July 8, 1980, performing administrative duties.

In an August 7, 1980 report, Dr. Moser stated:

> "Mr. Slonaker has fat blood pattern featuring elevation of his serum lipids. It is well known that the blood fat levels are rendered high under stress. Mr. Slonaker's stressful occupation could therefore be expected to cause chronic elevation of his blood fat levels and contribute significantly to the arteriosclerosis and atherosclerosis from which he has suffered. This would be related also to his previous heart condition and that is in the same etiologic category. To support this contention further it is our strong feeling that Mr. Slonaker does not belong in a stressful occupation. To continue to perform the tasks involved in control tower activities would further jeopardize his health by aggravation of his atherosclerosis."

The employing establishment, in an October 17, 1980 letter, advised appellant that he was medically disqualified for air traffic control duties. He received disability retirement effective April 29, 1981.

The Office referred the case record to Dr. Susan Williams, an internist and Office consultant, for her opinion. Dr. Williams noted that the diagnoses were a history of transient ischemic attack, type IV hyperlipidemia, hypertension, history of left urethral calculus and chest pain of unclear etiology. She concluded that none were job-related. She stated that studies indicated that one-third of the increase in blood lipids was due to genetic disorders while the remaining two thirds were caused by cultural influences, particularly diet. Dr. Williams stated that emotional stress played little or no role in the increase in blood lipids. She noted that appellant had essential hypertension and commented that stress would cause a transient aggravation in essential hypertension only in susceptible individuals. She stated that it was not stress that caused hypertension but an individual's personality. She noted that, in regards to appellant's chest pain, he had an abnormal electrocardiogram and pain typical of ischemia. She pointed out that he had four of the major risk factors for coronary artery disease, a history of smoking, a family history of heart disease, hypertension and hyperlipidemia. She indicated that an angiogram showed little coronary artery disease. Dr. Williams noted that the chest pain could be caused by spasm of the arteries but this was not demonstrated. She stated that there was no scientific evidence that stress worsened coronary artery disease or precipitated transient ischemic attacks. She concluded that factors of appellant's employment did not aggravate his condition. She also concluded that appellant's disability was due solely to nonemployment-related factors. Dr. Williams recommended that appellant be referred to a cardiologist.

The Office referred appellant with the case record and a statement of accepted facts to Dr. Noble O. Fowler, a Board-certified cardiologist and Director of the Division of Cardiology at the University of Cincinnati

Medical Center, for an examination to resolve the conflict in the medical evidence between Dr. Williams and Dr. Moser. The Office requested Dr. Fowler's response to the following questions:

> "(1) Diagnosis of preexisting condition.
>
> "(2) Diagnosis of employment-related conditions. Please specify whether the conditions were caused, precipitated, accelerated or materially aggravated by factors of employment for the F.A.A. (Use the attached definitions of causal relationship as a guide.) Please provide full medical rationale for opinion expressed.
>
> "(3) If a preexisting condition was aggravated, was such aggravation temporary or permanent? If temporary, on what approximate date did such aggravation cease? If permanent, what are the irreversible effects?
>
> "(4) Diagnosis of conditions with date of onset subsequent to June 1980 (date that disability began for work as an Air Traffic Controller).
>
> "(5) If conditions are job related, has maximum improvement been reached? If so, on what approximate date?
>
> "(6) If conditions are job related, is claimant totally or partially disabled for work? If partially disabled, please complete the attached form OWCP-5, taking into consideration all job related and preexisting conditions.
>
> "(7) Is disability for work due solely to an underlying disease or condition?"

Dr. Fowler, in a report received by the Office on June 12, 1981, stated:

> "(1) Diagnosis of preexisting conditions. These would include: obesity; history of cigarette smoking; hypertriglyceridemia; family history of coronary artery disease.
>
> "(2) Diagnosis of employment-related conditions. These would include: coronary artery disease with angina pectoris, and cerebrovascular disease with transient ischemic attacks. The coronary disease and cerebrovascular disease were not caused by his employment. A review of stress and heart conditions published in CIRCULATION 63:1, 1981 (copy attached) pointed out that air control-tower workers have an increased incident of hypertensive disease. Hypertensive disease is known to aggravate cerebral and coronary arteriosclerosis.
>
> "(3) If the aggravation exists it is presumed to be permanent, thus leading to a persistent tendency to angina pectoris and transient ischemic attacks, and the possibility of future heart or cerebral damage of a more severe nature.
>
> "(4) None.
>
> "(5) Yes, June of 1980.

"(6) The claimant is disabled for work in air traffic control; he is not disabled for administrative work, which he is currently performing.

"(7) I am uncertain as to the intent of this question. Disability for air traffic control work is due to underlying coronary and cerebrovascular disease, probably aggravated by stress-aggravated hypertension."

Dr. Williams reviewed Dr. Fowler's report and, in a July 5, 1981 report, stated:

> "I do not agree with Dr. Fowler. It is true that the study of Rose, Jenkins and Hurst concludes that the incidence of [increased blood pressure] in air traffic controllers is 5-6 times that in other aviation workers and postulates job stress as the cause. However, balanced against this one study are several other studies showing no statistically significant correlation between job stress or transient acute elevation in blood pressure which occur at work ([due to] stress) and chronic hypertension or arteriosclerosis. Several of such studies are also described in the paper quoted by Dr. Fowler. In fact, this same attached paper concludes that the balance of studies at the present time is in favor of no relationship between chronic environmental stress and cardiovascular disease, particularly atherosclerosis and increased blood pressure. There is no question that the claimant has hypertension, but the balance of scientific evidence would indicate no relationship to his employment."

The Office, in a September 2, 1981 letter, informed appellant that Dr. Fowler's report did not contain sufficient medical rationale to have convincing probative value. It indicated that he would be referred to a new impartial specialist, Dr. Stanford Courter, a Board-certified cardiologist of professorial rank. Appellant, in a September 8, 1981 letter, protested the referral, contending that if the Office searched long enough, it would find a doctor who would agree with it. The Office, in accordance with its Program Memorandum No. 229, cancelled the examination with Dr. Courter and requested from Dr. Fowler a clarification of his report.

Dr. Fowler, in a December 10, 1981 report, stated:

> "Question #1, Comments and Medical Rationale—I agree with the statement of the Office Medical Advisor [Dr. Williams] that in general the relationship between stress, either physical or emotional, and cardiovascular disease is not generally accepted as being established. However, in the case of Mr. Slonaker, it is important to point out that we are dealing with a specific situation, namely the relationship of work as an air controller in aggravating or causing heart disease. Selye's book on 'Stress in Health and Disease,' Page 320, indicated that air traffic controllers experience considerable

stress, especially during busy work periods, because they have to concentrate continuously and are personally responsible for the lives of many people. They also show objective indicators of stress, such as tachycardia, plasma phospholipid changes, and increase in catecholamine excretion. The latter is roughly proportional to the number of aircraft operations supervised. It is concluded that there is no doubt about predisposition to hypertension and peptic ulcers in this population.

"Page 321 of this book refers to a study of air traffic controllers at O'Hare Tower, Chicago indicating that tachycardia and increased catecholamine excretion and corticoid elimination are related to the number of operations supervised.

"Sympathetic stress is recognized to raise blood pressure, to raise blood lipid concentrations, and to alter blood coagulability—all of these are factors that increase the risk of coronary artery disease.

"Question #2—What specific factors of his employment aggravated his arteriosclerotic process?

"The specific factors are those alluded to in question #1; namely, the necessity for long periods of concentration, the high sense of personal responsibility for the lives of other people, the stimulation of the sympathoadrenal system leading to tachycardia, and increase catecholamine excretion among other effects.

"Question #3,—What part did claimant's risk factors play in his development of coronary disease and cerebrovascular disease? Would these factors lead to the diagnosed conditions regardless of employment?

"One cannot answer this question as far as this individual is concerned. Coronary vascular disease is a multifactorial disease in which a number of risk factors play a part in its development. It must be recognized that not everyone who is exposed to the stresses of air traffic control develops coronary disease. Therefore, the individual's own personal situation, his genetic background, his inheritance of hyperlipidemias, and his smoking all play a role in the process. It is certainly possible that these factors may have led to the diagnosed conditions in spite of his employment, but it seems probable that the employment aggravated materially the condition.

"Question #4—If aggravation exists, it is presumed to be permanent. The rationale for this statement is that hypertension and coronary vascular disease and cerebrovascular disease are nearly always lifelong conditions. There is no certain evidence that coronary or cerebrovascular arteriosclerotic narrowings of blood vessels have ever been shown to regress under any kind of treatment."

Dr. Christopher A. Long, an Office medical adviser, reviewed Dr.

Fowler's report and, in a January 21, 1982 memorandum, expressed his disagreement with it. He stated that the effect of stress on blood pressure is short lived and has never been shown to be a risk factor in the development of atherosclerosis. He indicated that studies that had demonstrated an increased risk for development of atherosclerosis due to hypertension had done so only for chronic hypertension. He commented that although acute changes in blood pressure, lipid profiles and blood coagulability might be demonstrated in air traffic controllers, it had not been shown that any of these changes were sustained or that air traffic controllers were at increased risk of atherosclerotic disease on the sole basis of occupation. Dr. Long stated that appellant's atheroclerosis was most probably related to some genetic predisposition, his smoking, his chronic hypertension which was not job-related, and possibly his type IV hyperlipidemia. He stated that he agreed with Dr. Fowler that appellant's hypertension, atherosclerotic coronary artery disease and cerebrovascular disease were permanent but declared that none of these conditions was related to appellant's occupation.

In a February 11, 1982 memorandum Dr. Long stated that stress had not been shown convincingly to affect coronary atherosclerosis. Dr. Long also stated that no employment related aggravation had been demonstrated.

The Office referred appellant to Dr. Courter for an examination. In an April 2, 1982 report, Dr. Courter stated:

> "(1) Preexisting conditions include (a) coronary arteriosclerosis found to be '25%' severity in 1976, (b) angina pectoris relieved by nitroglycerin, (c) obesity, (d) history of type IV hyperlipidemia (adult form of elevation of serum cholesterol and triglycerides), and (e) history of labile hypertension.
>
> "(2) The only condition which is employment-related is the episode of 'acute myocardial ischemia' occurring in 1974. The reason this is employment related is that occupationally induced stress produces catecholamine excretion which in turn produces coronary artery spasm and, when superimposed upon coronary arteriosclerosis, is sufficient to result in insufficient coronary blood flow ('coronary insufficiency') leading to 'acute myocardial ischemia.' I see no other conditions which are definitely employment related.
>
> "Coronary arteriosclerosis is not related to employment but to heredity or other risk factors. It is accepted that he demonstrated certain risk factors including cigarette smoking, obesity, gouty state, hyperlipidemia of the adult type, and possible labile hypertension. Coronary arteriosclerosis must have been present before the attack of 'acute myocardial ischemia' in 1974. The employment factors which may contribute to disease are emotional stress and physical fatigue

from long hours. Such employment factors may contribute to specific acute illnesses but not necessarily to the development of chronic disease, i.e., coronary arteriosclerosis.

"(3) On June 22, 1980, patient suffered an illness which is typically a 'transient ischemic attack.' This is an illness resulting from spasm of an artery which may or may not be superimposed upon arteriosclerosis. Arteriosclerosis was not demonstrated during the hospital examination for this illness and, therefore, cannot be proven to be employment related. The episode occurred while at home and not at work, and the acute 'transient ischemic attack' (probably from cerebral arterial spasm) does not seem to be related to a specific work factor or condition by virtue of the absence of any temporal relationship to work. There are no conditions which exist with a date of onset subsequent to June 22, 1980. It can be assumed that preexisting conditions may have progressed but this is an assumption not proved by any fact. He has continued to have angina pectoris requiring nitroglycerin, but this results only from somewhat excessive physical activity (such as walking one mile).

"(4) The only job-related condition is the attack of 'acute myocardial ischemia' ('coronary insufficiency') in 1974. This had not recurred so, in my opinion, maximum improvement has been reached and was reached in 1975. The only other possible job-related condition is the presence of angina pectoris which appears to be stable, as nitroglycerin has not been increased.

"(5) Claimant is partially disabled for work, in that it is demonstrated that he has coronary arteriosclerosis. I do not feel that coronary arteriosclerosis is job related. He is able to perform administrative work. Form OWCP-5 completed and attached.

"(6) I see no evidence that employment factors aggravated any of the disease states or diagnoses mentioned above, with the sole exception of the episode of 'acute myocardial ischemia' suffered in 1974. Labile hypertension can occur in the presence of job-related stress as well as in the presence of stress resulting from activities of daily living. There is no specific job-related event documented to precipitate labile hypertension. The 'transient ischemic attack' occurred at home and not at work, and is not demonstrably job related.

"(7) Disability for work is due solely to the presence of underlying disease, coronary arteriosclerosis. In my opinion, this renders him disabled for continuing employment as an Air Traffic Control Specialist. He is capable of performing administrative work and, thus, would not jeopardize the well-being of anyone but himself if coronary arteriosclerosis progressed to result in coronary occlusion and resulting myocardial infarction while at work."

The Office, in an August 3, 1982 compensation order, found that appellant's disability beginning June 22, 1980 was not causally related to his employment.

Appellant, in an August 19, 1982 letter, requested a hearing before an Office hearing representative.

In an October 22, 1982 letter, appellant contended that Dr. Williams and Dr. Long were not qualified to comment on his case as they were not Board-certified cardiologists. He submitted a September 25, 1982 report from Dr. John C. Holmes, a Board-certified cardiologist of professorial rank, who stated:

> "There has been adequate laboratory testing to conclude that there is little doubt in my mind, that one is justified in making the diagnoses in this man, of coronary artery disease, primarily on the basis of the history, the recording of the electrocardiographic changes during his hospitalization in 1974, for the acute myocardial ischemia, and subsequently the performance of the coronary arteriogram in 1976, at the Duke University Medical School. In addition, I think it is established that he has hypertension, and had required therapy for a number of years to control the hypertension, and this goes back to 1972, when it was first documented. Also the diagnosis of cerebrovascular insufficiency, at least on an intermittent basis, perhaps related to intermittent spasm of the cerebrovascular disease, within the cranial vault, I think is a definite diagnosis, and finally there has been no question that he has had documented elevation of his fasting triglycerides, and that his lipoprotein electroporesis is consistent with a Type IV hyperlipidemia.
>
> "Therefore, one could conclude that he had the following preexisting conditions. These would include: obesity; history of cigarette smoking; hypertriglyceridemia; and family history of coronary artery disease.
>
> "I think it is also evident that he has the following diagnoses of employment-related conditions. These would include coronary artery disease with angina pectoris, and cerebrovascular disease with transient ischemic attacks. I do not feel that his coronary artery disease, or his cerebrovascular disease were caused by his employment, but I think the evidence that has been published to date, would indicate that, in air traffic control employees or technologists, there is evidence that the stress, both emotional and physical, in this job would aggravate and accelerate the rate of progress of both hypertensive disease as well as cerebral and arteriosclerosis. I would refer to a review of stress and heart conditions, published in Circulation, 63: 1, 1981.
>
> "I would conclude that there is no doubt that the aggravation of the job resulted in a permanent impairment in relationship to his coronary artery disease, as well as his cerebrovascular disease, and

> that had he not been employed in this particular occupation, he may even to this date, have no clinical manifestations of either coronary atherosclerosis, or cerebrovascular disease, despite the fact that neither one of these conditions was directly caused by his employment.
>
> "I believe that this maximum improvement was reached when he discontinued his duties as an air traffic controller.
>
> "In summary, it is my opinion that all of his medical problems at this point, in particular, his coronary artery disease, and his cerebrovascular insufficiency as well as his chronic hypertension, are related to his previous employment as an air traffic controller, and that the duties as an air traffic controller over the years, aggravated and accelerated his current medical problems. I justify this on the basis of the fact that I think Mr. Slonaker, as in all air traffic controllers, that we are dealing with a specific situation, namely a type of work which because of the considerable stress both emotional and physical, that these people undergo, and the known fact that their heart rate is elevated and the plasma also lipid changes that have been documented, and in addition the increase in catecholamine excretion, all point to the fact that there is definite hard evidence, that this specific type of work is an aggravating factor and accelerating factor in causing heart disease."

At the February 18, 1983 hearing, appellant indicated that he had undergone surgery on October 26, 1982 for a bypass graft from the left femoral artery to the distal popliteal artery. He contended that Dr. Fowler had submitted specific, well-rationalized reports which were supported by Dr. Holmes. He argued that Dr. Williams and Dr. Long, who were residents at the time they wrote their reports, were not qualified to make expert statements on the case. He stated that Dr. Williams was specializing in nephrology and Dr. Long was specializing in internal medicine. Appellant also submitted at the hearing a February 1, 1983 report from Dr. Moser who reiterated his August 7, 1980 report and cited medical studies in support of his opinion.

The Office hearing representative, in an August 15, 1983 decision, indicated that Dr. Courter's report was based on an assumption that an event had to occur at work to be related. The hearing representative stated that this reduced the probative value of his report because appellant was contending that his disability beginning June 22, 1980 was due to occupational factors and not an incident at work on that day. The hearing representative also indicated that the case record did not contain a statement from appellant stating what specific employment factors he considered to be stressful. He also noted that the case record did not contain a statement of the physical requirements for the position of an air traffic controller. The hearing representative directed the district office of the Office to obtain appellant's statement and a description of appellant's job and its physical requirements. He directed the Office to prepare a new statement of accepted facts including appellant's stress factors and the job description and physical requirements. He instructed the Office to refer appellant, together with the statement and the case record, to a specialist to resolve the question of causal relationship. He indicated that the case should then be referred to an Office medical adviser for interpretation only.

The Office secured from the employing establishment a description of the duties and physical requirements of the position of air traffic controller. The Office requested from appellant a description of the specific factors of his position which he believed cause his condition. Appellant, in a September 12, 1983 response, cited the responsibilities he and other air controllers had for the safety of large numbers of people. He described the rotating schedule he worked under which curtailed sleep. He indicated that his workload shifted from idleness to intense traffic within short periods of time. He stated that his most stressful duty was serving as an instructor giving on the job training to new controllers. He commented that he could not take over too soon from a trainee because it would destroy the trainee's self confidence. He could not wait too long to take corrective action and he had to be correct when he did it because he had no margin for error. Appellant's former supervisor agreed with appellant's statement.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David Tondow, a Board-certified cardiologist. In a November 26, 1983 report, Dr. Tondow stated:

> "I believe that Mr. Slonaker has coronary artery disease. In 1976, it was documented that he had minimal coronary arteriosclerosis. It was felt by the investigators that this was not severe enough to cause either angina or a myocardial infarction. This has probably progressed at the present time although it's difficult to say. As recently as 1981, it was not thought that his treadmill test was abnormal. His symptoms are not classic for angina. I do not believe that his coronary artery disease, hypertension or obliterative arterial disease was caused by his employment.
>
> "I also do not believe that the TIA or cerebrovascular disease is necessarily caused by his present employment. I would think that he is disabled from the standpoint of his cerebrovascular disease from his present employment. His present treatment appears to be correct. I personally do not believe the coronary artery disease was caused or in fact exacerbated by his job. I think he should be able to perform administrative work. He should be restricted from lifting anything over 50 pounds. He has no restrictions on using his hands or reaching above his shoulders. He does have some cardiac re-

> strictions in that he has mild to moderate coronary atherosclerosis. I would suggest that he not be exposed to excessive heat or cold. He should be able to work eight hours a day and he should be a candidate for vocational rehabilitation. I believe he has reached maximal improvement."

The Office, in a January 31, 1984 decision, found that appellant's disability beginning on June 22, 1980 was not causally related to his employment.

The Board finds that the weight of the medical evidence establishes that appellant's disability beginning June 22, 1980 is causally related to factors of his employment.

In this case, the Office found a conflict in the medical evidence between Dr. Williams, an Office medical adviser and nephrologist, and Dr. Moser, an internist, on whether appellant's disability was causally related to his employment. The Office, therefore, referred appellant to Dr. Fowler, a Board-certified cardiologist of professorial rank. Dr. Fowler concluded that appellant's employment aggravated his hypertension which caused a permanent aggravation of his cerebral and coronary arteriosclerosis. Dr. Williams reviewed the report and disagreed with Dr. Fowler's opinion. The Office initially attempted to refer appellant to Dr. Courter, a Board-certified cardiologist of professorial rank. However, after appellant objected, the Office properly requested clarification from Dr. Fowler. Dr. Fowler, in a well-rationalized report, reaffirmed his earlier conclusion that appellant's condition was causally related to his employment. Dr. Long, an internist, diasgreed with Dr. Fowler's opinion. The Office then referred appellant to Dr. Courter who concluded that appellant's condition was not causally related to his employment. The Office denied appellant's claim but the hearing representative set aside the Office's decision and remanded the case for referral to another physician. In between the Office's decision and the hearing representative's decision, Dr. Holmes, a Board-certified cardiologist of professorial rank, submitted a report which supported Dr. Fowler's conclusion that appellant's arteriosclerosis was permanently aggravated by his employment. After the hearing representative's remand, the Office referred appellant to Dr. Tondow, a Board-certified cardiologist, who concluded that appellant's coronary artery disease was not caused or aggravated by his job.

Where the Office secures an opinion from an impartial specialist to resolve a conflict in the medical opinion, as required by section 8123(a), it is improper for it to send appellant to a second impartial specialist merely because one of its medical advisers disagrees with the conclusion reached by the impartial specialist. Such action is open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view.[1]

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[1] *Charles Feldman*, 28 ECAB 314.

Dr. Fowler's first report required further explanation which the Office properly requested.[2] Dr. Fowler's second report, however, was well-rationalized and fulfilled his role as an impartial specialist. It was improper to send the case to another impartial specialist. Nevertheless, since the Office did secure an opinion from a second specialist, and later a third specialist, their opinions are entitled to some weight.

Dr. Courter concluded that appellant's employment did not cause or aggravate appellant's coronary arteriosclerosis. But, as the hearing representative pointed out, Dr. Courter's opinion appeared to be based on his assumption that since appellant's transient ischemic attack occurred at home instead of the work place, it was not causally related to his work. Dr. Courter's report concentrated on the specific incident of June 22, 1980 and not on appellant's claim for an occupational disease. His report therefore has diminished probative value because it does not address appellant's entire claim. Dr. Tondow concluded that appellant's employment did not aggravate his coronary arteriosclerosis. He, however, did not provide any rationale in support of his opinion. His report therefore has diminshed probative value. Although Dr. Williams and Dr. Long disagreed with Dr. Fowler's opinion, Dr. Fowler is a Board-certified specialist of professorial rank in the relevant field. Dr. Williams and Dr. Long are not Board-certified and do not specialize in cardiology. Dr. Fowler's well-rationalized report represents the weight of the medical evidence. His opinion is corroborated by Dr. Holmes' well-reasoned report which reaches the same conclusion as Dr. Fowler's report.

The decision of the Office of Workers' Compensation Programs, dated January 31, 1984, is hereby reversed and the case remanded for payment of appropriate compensation.

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[2] The Office, however, acted inappropriately in referring Dr. Fowler's report to Dr. Williams for her review. Dr. William's report had caused the conflict in the medical evidence. She therefore, should not be allowed to comment on the report of the impartial specialist who was resolving that conflict.

In the Matter of EDGAR L. PAKE *and* DEPARTMENT OF THE NAVY, NAVAL AIR REWORK FACILITY, Cherry Point, N.C.

Docket No. 84–1051; Submitted on the Record;
Issued July 31, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether appellant is entitled to a schedule award for his employment-related heart condition.

On April 26, 1977, appellant, then a 45-year-old quality inspection specialist, filed a claim alleging that his "coronary heart condition, myocardial infarction, [and] coronary artery disease" were causally related to factors of his employment. He claimed compensation for the period commencing November 4, 1974.

By letter dated March 10, 1983, the Office of Workers' Compensation Programs informed appellant that it had "accepted permanent aggravation of coronary artery disease as employment-related." Appellant received compensation for total disability, retroactive to November 1974.

In a letter to the Office dated January 18, 1984, appellant, by his attorney, raised the issue of his entitlement to a schedule award for loss of functional capacity of his cardiovascular system.

In a letter dated February 24, 1984, the Office informed appellant's attorney that the Federal Employees' Compensation Act does not provide for a schedule award for the loss of coronary capacity.

The Board finds that appellant is not entitled to a schedule award for his loss of coronary capacity. The Board has repeatedly held that a schedule award is not payable for the loss or loss of use of a part of the body or function not specifically enumerated in the Federal Employees' Compensation Act.[1]

The Board has held that this principle applies equally to body members which are not enumerated in the schedule provision as it read before the 1974 amendment and to organs which are not enumerated in the regulations[2] promulgated pursuant to the 1974 amendment.[3] Since the heart is not a body part specifically enumerated in either the Act or the regulations promulgated thereunder, there is no schedule award available in this case.

The February 24, 1984 decision of the Office of Workers' Compensation Programs is affirmed.

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[1] *Thomas E. Montgomery*, 28 ECAB 294.

[2] *William Edwin Muir*, 27 ECAB 579; 20 CFR 10.304.

[3] 88 Stat. 1143, section 4.

In the Matter of BRUCE A. ROMEO *and* U. S. POSTAL SERVICE, POST OFFICE, Detroit, Mich.

Docket No. 84–1193; Submitted on the Record;
Issued July 31, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's injury in a softball game on May 13, 1981, constituted an injury in the performance of duty.

Appellant, a 24-year-old postal letter carrier, filed a claim dated May 27, 1981 alleging that on May 13, 1981 he sustained an injury to his left knee when "rounding 2nd base" while playing softball after working hours. He was treated the following day by Dr. Jerry H. Rosenberg, a Board-certified orthopedic surgeon, for a "tear of the anterior cruciate ligament Lt. [left] knee." Dr. Rosenberg performed a lateral meniscectomy on appellant's left knee on May 19, 1981, and indicated that he would be disabled from work "through September 1981."

In a statement accompanying the claim form appellant contended that he was entitled to benefits for the following reasons: the injury occurred while playing softball in "a Post Office sanctioned league"; that the employing establishment posted the schedules of the games on its bulletin boards; that funds for the purchase of bats and balls and the umpires' salaries were appropriated from the Detroit Postal Employees Social and Recreational Committee; that this Committee received funds from the vending machines, contracted by the procurement office, located on the employing establishment's premises; that games scores were posted on the bulletin boards and articles concerning the games were reported in the *Riverview*, an employing establishment publication; that the Director of Mail Processing presented the trophies to the winners; and that ball players were permitted to either take the day off to play or to reschedule their shifts for that day.

The Office of Workers' Compensation Programs sent the employing establishment a questionnaire asking it whether appellant was required by it to participate in the softball game in question; whether the employing establishment derived a "specific benefit" from appellant's participation in the game; whether other employees were "required, persuaded, or permitted to participate in the activity"; whether the injury occurred on "government property" and during appellant's working hours; and "what leadership equipment, or facilities did the employer provide for the activity." The questionnaire also asked the employing establishment to obtain a statement from appellant responding to similar question.

By letter dated July 23, 1981 the employing establishment's injury compensation specialist stated that appellant was not required to participate in the softball game; that the employing establishment did not derive any "specific benefit" from appellant's participation; that the softball team's entry fee was paid by the Detroit Postal Employees Social and Recreational Committee; and that the Committee's charter, constitution and by laws were separate from that of the employing establishment.

Appellant responded on August 18, 1981 stating that he was "motivated and encouraged" to participate on the team due to the information posted on the bulletin boards; that the Detroit Post Office Vending Committee sanctioned and sponsored the softball and other athletic teams "to promote better relations throughout the Detroit Postal System"; that the committee sponsored annual banquets honoring "outstanding teams and individuals in the Detroit Post Office Athletic Programs"; that the score results were published in the *Riverview*, an agency newsletter; and that the awards and trophies were displayed in a trophy case located near the cafeteria. Appellant added that management occasionally revised work schedules to allow employee participation in the various athletic programs; that his injury occurred on a ball field assigned by the "Vending Committees Baseball Commissioner"; and that the injury occured after working hours.

By letter dated September 22, 1981, a second employing establishment injury compensation specialist reiterated the first specialist's responses and in addition stated the following: the sports activities were not organized by the employing establishment; the team entry fees were paid by the Detroit Postal Employees Social and Recreational Committee, a separate entity from the employing establishment; any employee could participate without violating agency regulations; the sports activities were not conducted on postal property; the agency did not supply "leadership, equipment, or facilities" for the softball team but the Recreational Committee did; that although the employing establishment published the game schedules and results, and provided a space for trophy displays and bulletin boards for announcements, the agency "does not solicit participation in any sports activity." The specialist further stated that management did not and "does not encourage participation in any sports activity," that schedules were not revised to allow employees to participate in the sports activities, that if schedules were revised it was done "for their own personal reasons," the request form had to be signed by both management and union officials, and that the "U. S. Postal Service has no baseball program."

By letter decision dated October 30, 1981 the Office determined that appellant was not entitled to continuation of pay for his absence from work on the ground that he had not sustained an injury in the performance of duty.

Appellant requested a hearing before an Office hearing representative, which was held on October 25, 1983. He submitted the following documents into evidence: a game notification to be posted on the agency bulletin board; a January 21, 1983 letter from the postmaster notifying the union president, for the postal letter carriers, of a scheduled meeting of the Postal Employees Social and Recreational Committee and informing him that "representation of your craft is necessary"; a copy of a page from the newsletter regarding the purpose of the Social and Recreational Committee and articles on the various athletic tournaments and championship games; a 1982 financial report from the Committee; and a decision of the Board regarding recreational activities. Appellant also submitted a two-page document containing a general policy statement for food service operations and social and recreational funds, which stated, among other things, that the employing agency was "constrained by national policy and law from permitting discrimination based on union affiliation in the disbursement of social and recreational funds." Also included in this document was a portion of the statement concerning the responsibility of the installation or agency head, which revealed that these individuals "have a management responsibility for proper operation of social and recreational fund activities . . . operated in facilities under their control for the benefit of Postal Service employees."

At the hearing, a union representative, who served on the Committee, testified, among other things, that the Social and Recreational Committee received its funds to pay for umpires and equipment from a contract "negotiated by the Procurement Committee"; that the Social and Recreational Committee obtained a percentage of its funds from the vending machines "located throughout the post office"; that "all the other expenditures of this committee have been audited from the United States Post Office Inspector; they dictate all policies for this committee"; that as a result of appellant's injury, the Committee required that members of the team complete "a form where they will waive all requests for compensation due to an injury that they received while playing ball"; that "there is a member of every craft, including the supervisors organization" serving on the Committee; and that if the agency did not approve of a request for funds "it just is not spent."

By a decision dated February 7, 1984, finalized February 15, 1984, the hearing representative affirmed the October 30, 1981 decision. She found that the injury did not occur "during a lunch or recreation period as a regular incident of employment"; that the employing agency neither recruited nor influenced its employees to participate in the athletic programs; and that there was no evidence that the agency derived "any substantial direct benefits" from appellant's participation in the softball game, "other than that of health and morale."

The Board finds that the case is not in posture for decision.

The general criteria for performance of duty as it relates to recreational and social activities is set forth in *Larson* as follows:

> "Recreational or social activities are within the course of employment when (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the in-

> tangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."[1]

Larson specifically addresses the issue of athletic teams, stating that the pertinent performance of duty test involves the following criteria:

> "[O]n or off the premises and in or out of working hours; varying shades of employer initiative; differences in amount of employer contribution of money or equipment; differing quantities and types of employer benefit." [2]

Larson states that the outcome of such recreation cases turns on the "different 'mix' in the fact situation."

The record in the instant case has not been adequately developed for a decision regarding the issue of whether appellant sustained an injury in the performance of duty. In that regard, the Board notes that both appellant and the union representative who served on the Postal Employees Social and Recreational Committee contended that the Committee was appropriated funds from a percentage of the money derived from the vending machines located on the employing establishment's premises, which were in turn negotiated under contract by the agency's procurement office. The union representative further stated that the U.S. Post Office Inspector audited the Committee's expenditures, "dictate[d] all the policies," and stated that if the agency is disapproved of an allotment of funds, "it just is not spent." The record also contained a policy statement for food service operations and social and recreational funds stating that the agency was prohibited from discriminatory practices "in the disbursement of social and recreational funds," and describing the installation head's reponsibility to ensure proper operation of the Committee's activities.

On remand, the Office should develop the record (including securing the comments of the employing establishment with respect to the specific allegations made by appellant and his union representative) to determine whether the connection between the Committee and the employing establishment was so substantial as to give the employing establishment direct control over the recreational activity as in the cases of the organizations in *Stephen H. Greenleigh,*[3] *Lester W. Dustin,*[4] and *Michael*

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[1] Larson, *Workmen's Compensation Law*, section 22.00.

[2] Larson, section 22.24.

[3] 23 ECAB 53. In this case, appellant injured himself while playing softball on the employing establishment's premises after working hours. The Board found that appellant injured himself in the performance of duty because the employing establishment recognized and encouraged the association, primarily consisting of its employees; that it made substantial contributions to the association, directly and indirectly; that it exercised control over the association; and that appellant's participation on the team was in accord with Office policy in that it increased his rapport with the employing establishment officials for whom he acted as legal counsel in agency-related legal matters.

[4] 33 ECAB 571. In this case the Board found that the appellant, who injured his back in a softball game on government property after working hours, was within the performance of duty when injured. The Board found that since the employing establishment was regarded as controlling the Civilian Welfare Fund, which administered to the softball team, it was deemed to have control over the recreational activity in which appellant was injured. See also *Eileen Anita Byrnes*, 35 ECAB 843.

J. Kearney,[5] or whether there was only a minimal causal connection between the Committee and the employing establishment as in the cases of *Donald C. Huebler*[6] and *Kermit T. Bryant*.[7] It is noted that the softball game in which appellant was injured was not played on the employing establishment's premises. While this factor is not controlling, it is one of those to be considered.[8]

After such further development as is necessary, the Office should determine the "mix" in the fact situation in the case at hand of types and amount of employer "initiative," "contribution of money or equipment," and "benefit," within the meaning of the above-mentioned discussions from *Larson*.[9] The Office should then issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated February 7, 1984, finalized February 15, 1984 is hereby set aside; the case is remanded for further proceedings consistent with this decision of the Board.

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[5] 34 ECAB 1380. The Board found that appellant, who injured himself in a softball game, sustained an injury in the performance of duty since the employing establishment, through the Civilian Welfare Council, controlled the softball league to which appellant belonged. The Board found that in accordance with certain regulations, the agency instituted a directive describing the procedures necessary in establishing a recreational activity, such as a softball team, using its facilities and funds. See also *Eileen Anita Byrnes*, *supra*.

[6] 28 ECAB 17. In this case, the Board found that the appellant was not engaged in the performance of duty when injured in a softball game, even though the game was played on employing establishment premises shortly after appellant's working hours, when there was only a "minimal connection of the game with the employment" (such as the printing of score results in the employing establishment's newspaper, the displaying of trophies on the premises, the photographing of the players during working hours and the printing of admissions tickets for security reasons). See *Larson*, section 22.00-22.30.

[7] 30 ECAB 893. The Board found, as in *Huebler*, that appellant, who injured his back in a softball game on the employment premises after working hours, was not within the performance of duty when injured. The Board found that with the exception of the fact that the game was played on the employment premises, there was no showing of a "substantial causal connection with the employment" i.e., the evidence did not demonstrate that the employing establishment sponsored, financially assisted, or exercised control over the softball program, or that it derived a substantial direct benefit from the activity beyond the intangible value of improved employee health and morale.

[8] See *Larson*, section 22.11 p. 5-63.

[9] See notes 1 and 2, *supra*.

In the Matter of CHARLES J. CORTESE, Executor of the Estate of ANTHONY L. CORTESE, employee *and* DEPARTMENT OF THE ARMY, TOBYHANNA ARMY DEPOT, Tobyhanna, Pa.

Docket No. 84-1012; Submitted on the Record;
Issued July 31, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that the date of maximum medical improvement for the residuals of the employee's October 28, 1976 employment injury to his eyes was May 7, 1981, thus commencing the running of the schedule award on that date for the permanent impairment of his eyes.

The employee, then a 57-year-old electroplater, filed a claim on October 28, 1976 alleging that on the same date he sustained alkalai burns to both eyes.

On an Office of Workers' Compensation Programs "Attending Physician's Report" dated December 10, 1976, Dr. Dominick A. Gruciani, a Board-certified ophthalmologist, diagnosed "Bilateral chemical burns of cornea and conjunctiva, herpetic ulcer-cornea of O. S. [left eye]."

In a report dated May 31, 1977, Dr. Michael W. Rosiecki, a Board-certified ophthalmologist and an associate of Dr. Gruciani, stated:

> "The above named fifty-seven-year-old . . . male was initially examined on October 28, 1976, following a bilateral chemical burn of the cornea which allegedly occurred at the Tobyhanna Army Depot. The chemical was a lye composition. He was hospitalized at the Mercy Hospital for a period of time and then followed in the office. After a period of a few months, during which time he was evaluated at the Corneal Department of the Wills Eye Hospital, Philadelphia, the corneas apparently healed from the burn with a resultant slight haze present bilaterally.
>
> "Mr. Cortese complained of continuing blurred vision during the period of treatment and afterwards. On subsequent examinations it was determined he had some changes secondary to diabetes mellitus which was present in the retina of both eyes. He has subsequently been evaluated at the retinal department of the Wills Eye Hospital and it was determined he was in need of some laser therapy to the retina in an attempt to control the diabetic changes in the eyes.
>
> "Mr. Cortese was last evaluated in the office on May 20, 1977, following laser therapy to the left eye performed at the Wills Eye Hospital. His best corrected visual acuity was 20/50 in the right eye and 20/400 in the left eye. Slit lamp examination revealed moderate to marked dystrophic changes present in the cornea of both eyes, secondary to the lye burns. Ocular funduscopy revealed some diffuse hemorrhages and exudates in the right papillomacular area. In the left eye there was a moderate vitreous haze, therefore it was difficult to visualize the fundus.
>
> "Because of the two coexistent problems, one being the corneal injury and subsequent changes to the cornea and the other the diabetic retinopathy, it is difficult to ascertain how much of visual loss is due to the injury and how much may have been preexistent and secondary to the diabetic retinopathy. The diabetic condition of Mr. Cortese apparently flared up and became worse following

> the corneal injury. Whether this would have occured if he had not sustained the corneal injury, or whether the corneal injury caused an exacerbation of the diabetes and subsequent diabetic retinopathy, is a difficult question to answer. Chronologically, the diabetic retinopathy began to affect the eyes following the lye burns to the corneas.
>
> "We cannot determine the final visual acuity since Mr. Cortese must undergo additional laser therapy, although we can definitely state that the vision will be compromised significantly both due to the corneal burn and subsequent corneal damage as well as the diabetic retinopathy. The vision will be compromised permanently to some extent."

On May 13, 1977, the Office accepted the employee's claim for bilateral chemical burns of the cornea and conjunctiva and herpetic ulcer of the cornea. In view of Dr. Rosiecki's above-mentioned report, the Office on July 25, 1977 accepted that the employee's diabetic retinopathy was aggravated by the work injury of October 28, 1976.

In a report dated October 30, 1977, Dr. William H. Annesley, Jr., a Board-certified ophthalmologist, stated:

> "Mr. Cortese has bilateral diabetic retinopathy for which he has had laser therapy. On his last evaluation, his vision was 20/100 in the right eye and 20/40 in the left eye.
>
> "1. 20/100 - 49.9%
> 20/40 - 83.6%
>
> "2. The above visual acuity is for distance and was not measured for near. I suggest that you contact Dr. Dominick Gruciani, his referring physician for this information.
>
> "3. It is possible that the vision may improve in the right eye following laser therapy. This was recently completed, in September, and takes many months to realize."

On April 22, 1980, Dr. Gruciani submitted a report in response to Office questions. The doctor stated in part:

> "1. DATE OF MAXIMUM IMPROVEMENT. Review of our records indicated that at one time on March 1, 1977, we were able to obtain a 20/30 vision in each eye. At this particular point of last examination, dated 4/21/80, the best correctable vision is 20/400 in the right eye, and 20/100 in the left eye.
>
> "2. PERMANENT IMPAIRMENT OF EACH EYE EXPRESSED IN PERCENTAGE USING THE AMA GUIDE TO THE EVALUATION OF PERMANENT IMPAIRMENT. Again, reports dated 4/21/80, right eye 20/400, percentage of loss, 90%. Left eye 20/100, percentage of loss, 50%.
>
> "3. MEASUREMENT OF VISUAL ACUITY FOR BOTH CLOSE

> AND DISTANCE SIGHT IN EACH EYE. As of recent evaluation of 4/21/80, right eye 20/400, near vision J 14, left eye 20/100, near vision J 10.
>
> "4. WHETHER ANY FURTHER IMPROVEMENT IS ANTICIPATED IN THE ABOVE. IF SO, GIVE APPROXIMATE DATE OF MAXIMUM IMPROVEMENT. It is hopeful that there will be further improvement particularly in regards to the visual acuity in the left eye. However, insofar as there is significant evidence of diabetic retinopathy and diabetic scarring, in addition to central corneal haziness and scarring, I cannot ascertain this with any degree of certainty.
>
> "5. THAT THE EVALUATION SHOULD ACCEPT CONDITION OF THE BILATERAL CHEMICAL BURNS RATHER THAN THE DIABETIC RETINOPATHY. In clear conscience, I cannot make the distinction between these two particular entities. My criteria of evaluation must be based upon Mr. Cortese's statement that prior to said injury, visual acuity was 'good and normal in each eye.' I must assume therefore, that the chemical burn to the eye both precipitated and aggravated the potential diabetic retinopathy that is indeed now present, and contributing significantly to the vision loss."

An Office medical adviser reviewed Dr. Gruciani's report and on June 25, 1980 stated that further evaluation by an ophthalmologist was necessary.

On April 16, 1981, the Office referred the employee, along with a statement of accepted facts and the case record, to Dr. William J. Jordan, a Board-certified ophthalmologist, for an opinion regarding the employee's condition.

In a report dated July 2, 1981, Dr. Jordan stated in part:

> "Regarding your first question as to whether there is progressive loss of vision in each eye and whether this is attributable to both corneas having been chemically burned, certainly, this is a combination of both factors. At this point in time his diabetic retinopathy is far advanced and accounts for a considerable loss of his visual acuity. However, there is indeed interstitial keratitis and some corneal scarring secondary to the previous alkalai burn of each cornea. Assuming that this patient had no diabetic retinopathy at all, I could only guess as to what his visual acuity might be secondary to his corneal haze. I repeat that this would only be a guess—I feel his vision loss would be approximately 30% or approximately 20/70.
>
> "You ask whether the corneal burn was an aggravating factor for his preexisting diabetic retinopathy. Review of his record shows that this gentleman felt that he saw perfectly normal prior to the accident. Most likely, the corneal lye burn was indeed a precipitating

factor, which produced worsening of his diabetic retinopathy which has progressed up to this point.

"I feel there will be no progression of loss of vision due to his corneal lye burn at this point. So this particular injury could be considered healed. The major question, of course, revolves around whether or not this lye burn precipitated the deterioration of his retina secondary to diabetes. By history, this seems to be the case though I certainly could not be sure that his diabetic retinopathy would not have progressed anyway whether or not the lye burn had occurred.

"You question the permanency of his loss of vision or whether any treatment would be advisable. I feel that his loss of vision is most likely permanent though some slight improvement might occur if the macular edema resolves. However, this is unlikely. Any further treatment to his retina should be determined by the Retinal Service at Wills Eye Hospital.

"Your last question deals with the loss of vision due to corneal lye burn and whether the corneal lye burn has since healed sufficiently as to no longer be a cause of his impaired vision. I feel that the corneal lye burns are no longer the cause of his impaired vision except as stated previously when I estimated what I felt would be his vision had diabetic retinopathy not been present. I feel safe in saying that his poor vision is due to his diabetic retinopathy to a great extent and not to residual scarring of his cornea secondary to his previous injury. However, again the question arises as to whether the diabetic retinopathy would have progressed at such a rapid rate had not the corneal injury occurred. Unfortunately, I am not able to provide that answer with certainty.

"His history indicates that the diabetic retinopathy progressed only after the injury and, therefore, probably secondary to the injury—though I certainly could not rule out mere coincidence.

"The date of maximum improvement has probably been past when Dr. William Annesley recorded his vision at 20/100 in the right eye and 20/40 in the left eye on October 31, 1977.

"At the time of my examination, his visual acuity was as little as 5% to 10% of his effective vision remaining—essentially traveling vision. I feel this is mostly due to his diabetic retinopathy. If the macular edema should subside or further contemplated therapy by Wills Eye Hospital is performed, some minimal improvement might occur, but I feel it would be very slight.

"In conclusion, this is a gentleman with two disease entities coexistent. The job related injury certainly has caused impairment of his vision. The major question is did this precipitate a worsening of his diabetic retinopathy. In my opinion, because of the timeliness of each incident, I can feel that, yes, indeed, the cornea lye burn

> probably precipitated some worsening of his diabetic retinopathy. To what extent, I cannot be certain. To state categorically that the cornea lye burn was definitely the cause of his worsening of his diabetic retinopathy would be impossible. Any further improvement is probably unlikely. Any further treatment should be decided by the Retinal Service at Wills Eye Hospital. I provided further treatment in the form of tinted lenses for control of his photophobia, which is related to his corneal scarring secondary to corneal lye burns.
>
> "I am aware that this is a very difficult case for the determination of the final degree of impairment of vision from said occupational injury. Unfortunately, I am not able to provide absolute answers for some questions. I do feel that some definite consideration should be given to medical disability retirement for this occupational injury, which probably aggravated his diabetic retinopathy with result in severe impairment of vision."

On July 31, 1981, the Office medical adviser reviewed Dr. Jordan's report and stated that it was her opinion that the employee's work injury of October 28, 1976, corneal lye burns, "*precipitated* and *probably aggravated* his loss of vision in both eyes, *superimposed* to the preexisting and progressive loss of vision attributable to his underlying diabetic retinopathy." The medical adviser concluded that the employee had a 100 percent loss of vision in each eye. With respect to the date of maximum improvement, the medical adviser stated: "*Regard* date of *last* central vision evaluated is 5/7/81 [Dr. Jordan's examination]."

In a decision dated September 2, 1981, the Office awarded the employee a schedule award for a 100 percent impairment of the right eye and left eye for the period May 7, 1981 through June 24, 1987.

On September 10, 1982, the employee's son notified the Office that the employee died on September 3, 1982 as a result of causes unconnected to his employment injury.

On December 15, 1982, the Office informed appellant's son of the following:

> "Under the Federal Employees' Compensation Act, the balance of a schedule award is payable only to the dependents, as claimed for compensation purposes. As your father had no dependents as defined by the law, there are no provisions for payment of the balance of the award beyond 9/3/82."

In a letter dated April 22, 1983, appellant, by his attorney, requested that the schedule award should be modified so that the "effective date of the award is May 11, 1977" the date the employee filed for the schedule award.

By compensation order dated December 2, 1983, the Office found that

"[T]he evidence submitted in support of the application is not sufficient to warrant modification of the prior decision.

The Board finds that the case is not in posture for a decision.

It is well-established principle that the period covered by a schedule award commences on the date that the employee reaches maximum improvement from the residuals of the employment injury. Maximum improvement means that the physical condition of the injured member of the body has stablilized and will not improve further. The determination of the date of maximum improvement is factual in nature and depends primarily on the medical evidence. These rules apply to permanent impairments covered by the schedule award provisions of the Federal Employees' Compensation Act.[1]

In a report dated May 31, 1977, Dr. Rosiecki stated that "[w]e cannot determine the final visual acuity since Mr. Cortese must undergo additional laser therapy . . ." Dr. Annesley stated on October 31, 1977 that "[i]t is possible that the vision may improve in the right eye following laser therapy. This was recently completed in September, and takes many months to realize." On April 22, 1980, Dr. Gruciani stated under the heading of "DATE OF MAXIMUM IMPROVEMENT" that "[r]eview of our records indicated that at one time on March 1, 1977, we were able to obtain a 20/30 vision in each eye. At this particular point of last examination, dated 4/21/80, the best correctable vision is 20/400 in the right eye, and 20/100 in the left eye."

In his comprehensive report of July 2, 1981, Dr. Jordan stated: "In my opinion, because of the timeliness of each incident, I can feel that, yes, indeed, the cornea lye burn probably precipitated some worsening of his diabetic retinopathy. To what extent, I cannot be certain . . . Any further improvement is probably unlikely." Dr. Jordan also stated: "The date of maximum improvement has probably been past when Dr. William Annesley recorded his vision at 20/100 in the right eye and 20/40 in the left eye on October 31, 1977." An Office medical adviser reviewed Dr. Jordan's report and stated that May 7, 1981, the date of Dr. Jordon's examination, was the date of maximum improvement. The Office subsequently used May 7, 1981 as the date the employee's schedule award would commence.

The question of maximum improvement has not been properly determined by the Office in this case. The standard to be used in determining the date of maximum improvement is when the physical condition of the injured member of the body has stabilized and will not improve further. Dr. Gruciani stated that the date of maximum improvement was March 1, 1977. Dr. Annesley stated on October 31, 1977 that it was possible for the employee's vision to improve following laser therapy but that it takes "many months to realize." Dr. Jordan stated that

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[1] *Franklin L. Armfield*, 28 ECAB 445.

October 31, 1977, the date of Dr. Annesley's report, was the date of maximum improvement in view of the recorded visions Dr. Annesley got at that time. An Office medical adviser then stated that May 7, 1981 was the correct date, but did not provide any rationale for determining that date as the date of maximum improvement.

In view of the foregoing, further development by the Office is necessary to determine the correct date of maximum improvement. The Office should refer the case record, along with a statement of accepted facts, to a Board-certified ophthalmologist of professorial rank for a rationalized opinion regarding the proper date of maximum improvement.

The compensation order of the Office of Workers' Compensation Programs, dated December 2, 1983, is set aside and the case remanded to the Office for further proceedings as outlined above, to be followed by a *de novo* decision.

In the Matter of JERALD H. MILLER *and* U. S. POSTAL SERVICE, POST OFFICE, Fort Worth, Tex.

Docket No. 84-1070; Submitted on the Record;
Issued July 31, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issues are: (1) whether appellant's disability causally related to his April 21, 1975 employment injury ended by January 28, 1982, and (2) whether appellant has a disabling psychiatric condition causally related to his employment.

On April 22, 1975 appellant, then a 28-year-old clerk, filed a claim for a pulled muscle in the left side of his back sustained on April 21, 1975 when loading a belt with sacks of mail. Appellant had been examined at the employing establishment's dispensary on April 21, 1975 where he gave a history of lifting a sack of mail and feeling pain between his shoulders going up to his neck. He stopped work on April 28, 1975. On April 28, 1975 appellant was examined by Dr. Marion J. Brooks, a general practitioner, who diagnosed an acute lumbodorsal strain and indicated that the expected period of disability was two to four weeks. In a June 10, 1975 report Dr. Brooks stated that appellant continued to complain of low back pain, that he had muscle spasm and limited motion, that he was disabled for regular and limited duty, and that he would be able to return to duty in two weeks.

Beginning April 29, 1975 appellant received continuation of pay for

45 days, followed by compensation for temporary total disability until his return to work on January 27, 1976. The employing establishment stated that appellant was placed on light duty with no lifting over 30 pounds and no repeated bending or stooping. These limitations were in accordance with a January 26, 1976 report from Dr. Brooks.

Appellant stopped work on February 17, 1976 and filed a claim for a recurrence of disability. The Office of Workers' Compensation Programs resumed payment of compensation for temporary total disability.

In May 7, 1976, June 18, 1976 and July 2, 1976 reports Dr. Brooks diagnosed a chronic lumbosacral strain and indicated appellant would be able to perform light duty after a course of therapy. In an October 13, 1976 report Dr. Clarence J. Brooks, an associate of Dr. Marion Brooks, diagnosed "Chronic low back syndrome with involvement of left L5 root distribution." Dr. Clarence Brooks had referred appellant to Dr. Margarita C. Solis, who is Board-certified in physical medicine and rehabilitation, for an evaluation including electromyography. In an October 8, 1976 report Dr. Solis stated that electromyographic studies of the paraspinous muscles of appellant's low back and of the key muscles of both lower extremities revealed normal insertional activity without denervation but that voluntaries showed some polyphasic potential units in the muscles of appellant's left lower extremity. Dr. Solis stated that these "electromyographic changes are suggestive of involvement of the left L5 root distribution which appear to be acute and chronic."

In a February 4, 1977 report Dr. Brooks stated that appellant told him that, after his April 21 1975 injury, he had had "interceding incidents which have added to his diagnosis in the form of injury to his knee which is and has caused prolonged disability."Dr. Brooks stated that appellant could return to light duty with no lifting over 30 pounds.

Appellant returned to work on February 7, 1977. The employing establishment indicated that he was placed on light duty with no lifting over 30 pounds and no repeated bending or stooping.

Appellant stopped work on March 6, 1977 and filed a claim for a recurrence of disability. An employing establishment nurse indicated the recurrence was due to pain, swelling, and numbness of appellant's left leg. In April 13, 1977 reports Dr. Brooks indicated appellant was disabled beginning March 6, 1977 due to a sprain of his left knee with hydroarthrosis. In a June 15, 1977 report Dr. Clarence Brooks stated that the L5 nerve root involvement shown by Dr. Solis' electromyogram accounted for the pain and weakness of appellant's left leg. In a September 13, 1977 report and in an October 27, 1977 report diagnosing a chronic strain, Dr. Clarence Brooks stated that appellant could return to light duty on September 26, 1977.

Appellant did not return to work following the March 6, 1977 recurrence, and the employing establishment separated him effective August 31, 1977.

In a December 28, 1977 report Dr. Clarence Brooks stated that appellant told him that on March 6, 1977 he picked up a sack of mail and aggravated his back condition and began having pain and swelling in his left knee. Dr. Brooks stated that his March 7, 1977 examination showed spasm and tenderness of appellant's lumbosacral paraspinous muscles, limited lumbosacral motion, and left knee swelling and tenderness.

In a January 10, 1978 report Dr. Solis stated that her October 8, 1976 examination showed some evidence of possible L5 nerve root irritation, and that the cause of this irritation could not be determined by electromyography but only by a myelogram. Dr. Solis also stated that appellant's left knee condition was a different clinical entity and did not have any possible relationship to the findings on electromyography.

On February 3, 1978 the Office granted appellant a schedule award for a 13 percent permanent partial loss of use of his left leg.

In an October 17, 1978 report Dr. Solis stated that her October 8, 1976 electromyogram showed "minimal involvement of the left L5 motor nerve root distribution, which was acute and chronic." Dr. Solis stated that an October 17, 1978 electromyogram showed there were "still acute and chronic changes along the left L5 motor nerve root distribution." In an October 23, 1978 report Dr. Clarence Brooks stated that appellant had a 25 percent permanent impairment of his left lower extremity due to pain and numbness. In a December 1, 1978 report Dr. Solis stated that appellant had normal strength and that his sensation was normal except in his lateral left leg.

On January 4, 1979 the Office granted appellant a schedule award for an additional 12 percent permanent loss of use his left leg (for a total of 25 percent).

In a November 13, 1978 report Dr. Swen Helge, Ph.D., a clinical psychologist, stated that appellant's major complaints of weakness, easy fatigue, and back pain were all symptomatic of a psycho-neurotic conversion reaction, that appellant probably received secondary gain consisting of sympathy and attention from his symptoms, and that most of his defensiveness was worked out via a physiological component. Dr. Helge diagnosed hysterical neurosis, conversion type.

Dr. Clarence Brooks referred appellant to Dr. Warren D. Wilson, a neurosurgeon, for an evaluation. In a May 1, 1979 report Dr. Wilson stated that his examination showed a full range of lumbar motion, no paravertebral muscle spasm, a negative straight leg raising test, no evidence of weakness on motor examination, no atrophy of any muscle group, and hypalgesia in a stocking distribution of the left foot. Dr. Wilson concluded:

> "In effect, I am unable to find any objective evidence of neurological dysfunction in this patient. He does have complaints suggestive of

> left lower extremity radiculopathy. If that is the case, it is of a mild degree and without neurological deficit."

On May 7, 1979 the Office referred appellant, with a statement of accepted facts and copies of past medical reports, to Dr. Raymond J. West, a Board-certified orthopedic surgeon, for an evaluation of his orthopedic condition and its relation to his employment injury.

In a July 26, 1979 report on an Office form Dr. West set forth work tolerance limitations including lifting no more than 20 pounds, indicated that appellant had reached maximum improvement, and diagnosed a lumbar sprain superimposed on a transitional lumbosacral vertebra, and mild degenerative arthritis of his left knee unrelated to his employment injury.

On August 3, 1979 the Office requested Dr. West to submit a supplemental report on appellant's orthopedic condition and its relation to his employment injury. In an October 11, 1979 report Dr. West stated that appellant's prognosis was poor and that he continued to be disabled for prolonged sitting, standing, bending, and lifting.

In a September 10 1979 report Dr. Wilson stated that he was unable to explain appellant's persistent neck and back pain.

On October 13, 1979 the Office referred appellant, with a statement of accepted facts and copies of prior medical reports, to Dr. Stanley Weisz, who is Board-certified in psychiatry and in neurology, for an evaluation of his neurologic impairment and its relation to his employment injury.

Dr. Weisz referred appellant to Dr. Robert N. Muckleroy, who is Board-certified in physical medicine and rehabilitation, for evaluation including electrodiagnostic studies. In a November 8, 1979 report Dr. Muckleroy stated that appellant had no paralumbar spasm, that sensory examinations showed "subjective diminution in peculiar fashion," and that muscle testing showed no weakness of any major muscle group. Dr. Muckleroy stated that electromyography showed no fibrillations or positive waves, and a few motor unit action potentials of a polyphasic character but that these were within normal limits. Dr. Muckleroy concluded that he could "find no objective evidence for any neuromuscular or musculoskeletal pathology."

In a November 16, 1979 report Dr. Weisz noted no tenderness or spasm of any muscles, and stated that an MMPI (Minnesota Multi-phasic Personality Inventory) showed that in the face of emotional stress and pressures appellant may tend to develop somatic symptoms. Dr. Weisz stated that appellant's condition appeared to fall within the neurotic range. The doctor concluded:

> "At this time, he had normal EMG. The neurologic examination was objectively negative, some of his responses suggested a functional overlay. Considering the time element, namely, that he got hurt in

> April 1975 and considering the type of injury he had, the present findings would indicate that he has followed the usual course, that his neurologic status returned to normal and that his present complaints are best explained on the basis of emotional preoccupation and a secondary gain reaction. The MMPI yielded some observations to support the emotional factors in this case. Improvement in the type of injury he had is the rule rather than the exception, and the interplaying of secondary, mainly, emotional factors and secondary gain, are responsible for the prolongation and extension of his complaints. That is the reason why Dr. Warren D. Wilson, a Board-certified specialist, was also unable to find any 'physical deficit to account for any permanent impairment for neurologic reasons.' The EMG is a very sensitive instrument and may show some findings, particularly polyphasic activity, the significance of which is best validated with clinical correlation and not as an isolated finding per se.
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> "My conclusion is that Mr. Miller has no neurologic deficit, no neurologic impairment, there is no need of further neurologic treatment, and he is capable to carry on his usual duties. Whatever possible injury there was it has cleared. What is present is not an organic neurological condition but a secondary gain reaction that allows him to pursue a different line of activity he would prefer to do. Therefore, as long as his claim will continue unresolved it is unlikely that he will return to his normal duties. Because of the type of reaction we are dealing with he will use all available avenues, medical and non-medical, to support his contentions. The complaint of pain in its various forms without objective correlations would indicate the presence of a symbolic mechanism which is, of course, characteristic of the secondary gain mechanism."

Dr. Susan K. Blue, a neurologist, stated that an October 29, 1979 electromyogram showed some polyphasics in appellant's left L4 paraspinous muscles, but concluded that this electromyogram "did not demonstrate evidence of any significant nerve root compression, and it was considered essentially a normal test".

In a November 20, 1979 report of appellant's work tolerance limitations, Dr. Weisz stated that appellant could lift 10 to 20 pounds and that he could perform the job he held when injured.

By a compensation order dated November 30, 1979 the Office set aside its schedule awards for a total of a 25 percent impairment of the left leg and paid appellant compensation for temporary total disability for the periods covered by the schedule awards. The Office terminated appellant's compensation effective January 3, 1980 on the grounds that he had no permanent impairment due to factors of his employment and no disabling residuals of his April 21, 1975 employment injury.

Appellant requested reconsideration, contending that the Office's statement of accepted facts contained statements prejudicial to his case, that the medical evidence showed he still had neurologic deficits, that Dr. West's reports supported his claim for continuing disability, and that Dr. Weisz' report showed that he had a disabling emotional reaction or neurosis casually related to his April 21, 1975 employment injury.

By a compensation order dated February 15, 1980 the Office found appellant's request not sufficient to require review of its prior decision.

Appellant appealed to the Board, which, by an order dated May 27, 1980, found that the Office did not adequately consider the orthopedic impairments set forth by Dr. West. The Board remanded the case to the Office for, among other matters, further development on the issue of appellant's orthopedic impairments.[1]

On July 10, 1980 the Office referred appellant, with prior medical reports and a new statement of accepted facts, to Dr. Farooq Selod, a Board-certified orthopedic surgeon. Appellant objected to this referral, alleging that Dr. Selod was biased in favor of the Office.

The Office resumed paying appellant compensation for loss of wage-earning capacity effective January 3, 1980.

On July 21, 1980 the Office requested Dr. West to submit a report answering the questions it had previously posed to him regarding appellant's orthopedic impairments and their relation to his employment injury. In a September 5, 1980 report Dr. West stated that his initial, June 7, 1979 examination of appellant was essentially normal except for diminished sensation in the L5 distribution of his left leg, that on his October 11, 1979 examination appellant's complaints mostly referred to his knee, that on neither of these examinations was there definite evidence of nerve root irritation, and that his July 30, 1980 examination showed a tender lumbosacral joint, negative straight leg raising, no motor or sensory loss in the upper or lower extremities, and a transitional lumbosacral vertebra by x-ray. Dr. West concluded:

> "This man continued to have evidence of a chronic soft tissue injury to his low back. This may represent a sprain, but it could represent a L5 nerve root irritation from a herniated disc. At the time I last saw him, he was not having any evidence of active nerve root irritation in the upper or lower extremities. If progression of his symptoms warrants it, it might be well for him to have a lumbar myelogram to try and rule out an L4-5 herniated nucleus pulposus. The most likely diagnosis that I would be able to make at this time, however, is a chronic lumbar strain with a transitional lumbosacral vertebra. In addition, the patient has a chronic cervical sprain and probable mild degenerative arthritis of the left knee.

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[1] Docket No. 80-636.

> "It would be my impression that this man could not do work that required repeated bending at the waist or lifting over twenty pounds. He also probably will be unable to do work that required use of his arms overhead, because of his neck problem. His ability to squat and climb is limited by his degenerative arthritis of the left knee."

In a September 29, 1980 report Dr. Clarence Brooks diagnosed chronic lumbar and cervical strains and sprains and a sprained knee with degenerative arthritis; the doctor stated that all of these conditions "directly resulted from his [appellant's] on-the-job injury of April 21, 1975." Dr. Brooks stated that appellant's degenerative arthritis of his left knee was caused or accelerated by falls appellant experienced due to weakness of his left leg related to his lumbar strain.

In a November 11, 1980 report Dr. West indicated, in response to questions posed by appellant, that his chronic lumbar and cervical sprains were casually related to his April 21, 1975 employment injury. Dr. West stated that his rationale for this opinion was that appellant's symptoms had persisted since the injury and there was no evidence of lumbar nerve root irritation or a cervical neurologic loss, leading the doctor to believe appellant's lumbar and cervical injuries were ligamentous. Dr. West stated "The mild degenerative changes in the knee could be related to the fall but this is questionable. The symptoms however date to the time of the fall and there is an aggravation relationship."

In a November 14, 1980 telephone call to the Office appellant contended that his April 21, 1975 employment injury involved 400 pounds of mail sacks falling on him after he tried to catch them, rather than only a lifting incident.

In a March 2, 1981 report Dr. West stated that his December 22, 1980 examination of appellant showed a complaint of left thigh pain, and tenderness of his lumbosacral joint and left thigh. Dr. West concluded that appellant was still suffering from a chronic sprain of the lumbar spine and that his activities were restricted.

On March 13, 1981 the Office referred appellant to a physician in San Antonio for an examination. Appellant requested incidental expenses for this examination, and requested an explanation why this examination was scheduled in San Antonio, over 300 miles from his residence. Appellant did not undergo the examination as scheduled.

By an April 1, 1981 compensation order the Office suspended appellant's compensation effective March 26, 1981 on the ground that he had obstructed a medical examination.

Appellant appealed this decision to the Board. By an order dated July 8, 1981 the Board granted the Director of the Office's motion to set aside the Office's April 1, 1981 decision and remand the case to the Office for referral of appellant to a specialist within his commuting area, with a new statement of accepted facts, to determine the nature and extent of any disability resulting from his April 21, 1975 injury.[2]

Appellant filed a petition for reconsideration with the Board, contending that a verbal agreement with an official of the Office had not been carried out. On October 5, 1981 the Board issued an order granting the petition for reconsideration and reaffirming the prior decision of the Board. The Board found that its July 8, 1981 order remanding the case for referral to a medical specialist in his commuting area was proper in all respects, and further found that an August 26, 1981 compensation order of the Office (again suspending appellant's compensation for obstruction of a medical examination) was null and void as the Office did not have jurisdiction to issue this decision while the case was before the Board on a petition for reconsideration on the same issue.

On November 10, 1981 the Office submitted to appellant a copy of its rotation list of orthopedic specialists in his area, and listed three physicians as next in line on the rotation list. Appellant objected to Dr. Selod, the first physician listed.

On December 22, 1981 the Office referred appellant, with prior medical reports and a new statement of accepted facts, to the second physician listed, Dr. J. John Stasikowski, a Board-certified orthopedic surgeon, for an evaluation of his orthopedic impairments and their relation to his April 21, 1975 employment injury.

In a December 22, 1981 report Dr. Stasikowski stated that appellant noted "back pain with variable extension into the left leg, but not in dermatomal distribution." The doctor stated that his December 18, 1981 examination of appellant showed excellent strength, no sensory deficits, no pathological reflexes, a negative straight leg raising test, a stable left knee with full range of motion, and, on x-ray, connection of appellant's last lumbar vertebra with his sacrum. Dr. Stasikowski stated that appellant did not demonstrate any positive objective clinical abnormalities, that since the last electromyogram in 1979 was normal there was no contraindication to returning to work, that there was no objective evidence of a permanent orthopedic impairment related to the April 21, 1975 injury, that appellant's back x-ray showed a variation of normal which was not related to his employment injury, and that he (the doctor) was unable to explain why there should be any restrictions on appellant's activities given the absence of positive objective clinical abnormalities and confirmation by other tests.

An Office medical adviser reviewed the medical evidence and stated that Dr. Solis' finding of polyphasics in the L5 root distribution was not impressive in the absence of fibrillations, increased insertional activity, or a preponderance of polyphasics, that 1+ polyphasics have been reported in muscles with no pathology and that a diagnosis of nerve root involvement based on 1+ polyphasics was questionable. This medical adviser also stated that Dr. West's diagnoses of soft tissue injury and ligamentous strain was based on subjective evidence, and that Dr. West's reports showed no objective findings on physical examination.

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[2] Docket No. 81-1121.

By a compensation order dated January 21, 1982 the Office found that the weight of the medical evidence negated current residuals of the accepted injury, and that appellant had not sustained his burden of proving that he had an employment-related neurosis. The Office terminated appellant's compensation effective January 28, 1982.

Appellant requested a hearing before an Office hearing representative, which was held on April 27, 1982. Appellant testified that he worked regular, not light duty from February 7 to March 6, 1977 despite his doctor's limitations, and that when he was injured on April 21, 1975 the pain was first in his neck and shoulders before it moved to other areas.

By a decision dated July 13, 1982 and made final on July 16, 1982 an Office hearing representative found that the weight of the medical evidence did not support residuals of appellant's April 21,1975 employment injury after January 28, 1982.

Appellant requested reconsideration, and submitted reports from Dr. James E. Elbaor, a Board-certified orthopedic surgeon. Dr. Elbaor stated that a July 31, 1982 myelogram showed a delay in filling of appellant's right L5-S1 root sleeve compared to the left, which "may indicate a herniated nucleus pulposus." In a September 22, 1982 report Dr. Elbaor stated that an electromyogram showed "mild irritative changes L5 distribution, mainly on the left, and to a lesser extent in the left S1 distribution,"and that a July 28, 1982 CAT (computerized axial tomography) scan showed "partial lumbarization of S1, with focal herniation of L5-S1 to the left of midline." Dr. Elbaor stated "This is consistent with [appellant's] symptoms and complaints and physical findings and, therefore, I feel he has a herniated disc at L5-S1."

By a compensation order dated October 20, 1982 the Office found the evidence in support of appellant's request for reconsideration to be lacking substantial probative value and not sufficient to warrant reveiw of its prior decision.

Appellant appealed to the Board, requesting review of the Office's October 20, 1982 decision and the Office's October 1, 1982 decision regarding overpayments of compensation and the Office's August 11, 1982 and September 3, 1982 decisions regarding the rate of pay used in computing his compensation.

Appellant subsequently requested a hearing before an Office hearing representative on the issue of the rate of pay used in computing his compensation. By a decision dated December 10, 1982 an Office hearing representative set aside the Office's August 11, 1982 and September 3, 1982 decisions and remanded the case for further developement and a *de novo* decision on the rate of pay issue.

By a decision and order dated July 19, 1983 the Board found that the Office did not have authority to issue its December 10, 1982 decision on the rate of pay issue and that this decision was null and void, that the Office's October 20, 1982 decision refusing to further consider the merits of appellant's claim upon the submission of Dr. Elbaor's reports constituted an abuse of discretion, and that the case was not in posture for a decision on whether appellant had a psychiatric condition casually related to his employment.The Board set aside the Office's December 10, 1982, August 11, 1982 and September 3, 1982 decisions, which addressed the issue of rate of pay. The Board dismissed appellant's appeal of the Office's decision concerning waiver of post premiums for appellant's health benefits plan, and in all other respects set aside the Office's January 21, 1982, July 13, 1982 and October 20, 1982 decisions. The Board remanded the case to the Office for *de novo* decisions, after appropriate development, on the issues of whether appellant's employment-related disability ended by January 28, 1982 and whether he had a psychiatric condition causally related to his employment.[3]

The Director of the Office filed a petition for reconsideration with the Board. By an order dated October 19, 1983 the Board denied appellant's petition for reconsideration and granted the Director's petition for reconsideration; the Board modified its July 19 1983 decision and order to reflect that the Office's January 21, 1982 and July 13, 1982 decisions, insofar as they terminated appellant's compensation, were not set aside.

Appellant filed a petition for reconsideration, which the Board denied on December 12, 1983 on the ground that it failed to establish any error of fact or law warranting further consideration.

On January 2, 1984 an Office medical adviser reviewed the medical evidence and stated that the CAT scan and myelogram submitted by Dr. Elbaor suggested a problem at L5-S1 but did not agree on the location, that appellant's symptoms and physical findings were not compatible with a herniated L5-S1 disc which generally caused a compression of the S1 root resulting in loss of ankle reflexes, numbness and pain in the lateral aspect of the foot, difficulty in walking on the toes but not on the heels, and atrophy of the gastroc muscle. This medical adviser stated that it was not apparent that appellant's abnormality at L5-S1 as shown by x-rays had anything to do with his problems, and recommended another evaluation including repeat CAT scan and electromyogram, and a request to the evaluating physician to correlate appellant's x-ray findings with his symptoms and physical findings.

On January 6, 1984 the Office referred appellant, with prior medical

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[3] Docket No. 83-424.

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reports and a new statement of accepted facts, to Dr. Tom G. Mayer, a Board-certified orthopedic surgeon, for an evaluation including a CT scan and electromyography and an opinion on appellant's back condition and its relation to his employment.

In a report dated January 17, 1984 Dr. Mayer stated that his examination of appellant showed ability to toe and heel walk without much difficulty, a somewhat tender back, quite good back motion with only mild pain, no muscle spasm, straight leg raising to 80 degrees bilaterally, entirely normal strength and deep tendon reflexes, and sensation diffusely decreased in a glove and stocking distribution. Dr. Mayer diagnosed chronic pain syndrome, and chronic lumbar and cervical radicular syndromes without evidence of active radiculopathy.

Dr. Mayer referred appellant to Dr. Charles R. Crane, who is Board-certified in physical medicine and rehabilitation, for electromyography which was performed on January 23, 1984. Dr. Crane stated that this electromyogram showed evidence of ongoing electromyographic abnormilty affecting the L5 nerve root distribution bilaterally and consisting of grade 2 small and medium amplitude polyphasic potentials.

In a February 7, 1984 report Dr. Mayer stated that appellant's lumbar CT scan showed a slight central and left disc protrusion at L5-S1 and was otherwise normal, and that the electromyogram showed some nerve irritation but no specific denervation changes at L5 and at C4 or C5. Dr. Mayer stated:

> "When comparing this to the patient's symptoms and physical findings, these tests are found to be inconsistent for any surgical pathology, and no surgical treatment is necessary. Answer to specific questions: (1) The patient's diagnoses are listed previously. His ability to work is limited by a degree of effort and chronic deconditioning changes. (2) The patient's present problems are based on degenerative changes primarily. It is not specifically related to a work related injury. The injuries described were most likely of soft tissue injury type and should have healed by now. However, deconditioning changes resulting from those problems could persist to the present. (3) It is possible that the condition was aggravated by the work related injuries. (4) I do not believe that the patient's long term problems have ceased, because of persistent deconditioning and emotional changes. I believe, however, that a reasonable 'healing period' has reached a conclusion, and that if the patient is not a candidate for appropriate rehabilitation services, that a final impairment determination can take place. (5) If the patient was genuinely interested in returning to work and improving his status, a functional restoration program such as is available at PRID might be helpful. I have my doubts, however, whether such a program

> will impact on this patient. I do *not* feel that a conventional 'pain program' will prove cost effective in his case."

By a February 28, 1984 letter the Office requested Dr. Mayer's reasoned responses to the following questions:

> "(1) Is the claimant's current physical condition the result of residuals of his original injury, or is it due to poor physical conditioning as a result of voluntary inactivity?
>
> "(2) At what point in time could the claimant, if he had so desired, resume physical activity?
>
> "(3) Was the claimant capable of performing his regular duties after 01/28/82, and had any work related disability resolved by that date? If not, what prevented him from performing his regular duties?
>
> "(4) Is the current condition of the claimant's spine causally related to his injury on 04/21/75?"
>
> In a March 5, 1984 report Dr. Mayer responded:
>
> "(1) The present deconditioning syndrome is a result of voluntary inactivity.
>
> "(2) I believe the patient could have been expected to return to normal physical activity, or at least participate in a brief physical rehabilitation program, within 6 months after injury.
>
> "(3) I believe the patient had certainly reached a stable medical situation, and the point of maximum medical recovery had been reached well before 1-82.
>
> "(4) This question is difficult to answer specifically. Again, after an adequate healing period and a persistently stable medical situation, I believe that the original injury, disability question should have been resolved many years ago, and that there is little direct relationship between his present condition and the 1975 injury."

By a letter dated February 27, 1984 the Office requested Dr. Weisz to review his medical reports on appellant and to provide a reasoned opinion whether appellant exhibited a disabling psychiatric condition causally related to his employment or to his April 21, 1975 employment injury, whether appellant was aware of his secondary gain reaction, and whether appellant was disabled for work by a psychiatric or neurological condition. In a March 5, 1984 report Dr. Weisz responded:

> "In reference to your questions about [appellant], I would like to state that he did not exhibit any disabling psychiatric condition causally related to his employment or to the injury on 4/21/75. I do not think that one is consciously aware of a secondary gain reaction, it is not a conscious reaction. There were no neurologic deficits and

> no neurologic impairment. I didn't feel that further neurologic treatment was indicated. A secondary gain reaction is not uncommon following a compensable injury or any injury for that matter. It is based on an unconscious mechanism that allows the patient to derive a primary social advantage from the fact that he had an injury."

On March 19, 1984 the Office medical adviser who had reviewed the medical evidence on January 2, 1984, again reviewed the medical evidence and stated that several examiners found entirely normal physical examinations, that appellant's electromyograms and CT scans, when positive, were so only to a mild degree, that a stocking or glove pattern of sensory loss did not indicate nerve root involvement, that appellant's 1984 electromyogram was not significantly changed from the one done on October 8, 1976, and that one would expect significant changes if there were significant pressure on his L5 nerve root. This medical adviser stated:

> "My own opinion as stated earlier (January 2, 1984) is that of Dr. Mayer's. The claimant's physical findings are not characteristic of a herniated disc at L5-S1. He has no reflex changes, reproducible muscle atrophy or weakness, significant loss of range of motion or characteristic sensory changes. The mere findings of a bulge at L5-S1, on CT scan and mild irritative changes at L5 on EMG is not proof of a pathologic state at L5-S1, without correct correlation of the physical findings in the patient. Upwards of 40% of normal people may have these same CT findings. They are therefore meaningless by themselves.
>
> "Dr. Mayer's opinion is therefore quite clear that there is no evidence of on-going disability from the 1975 injury. The soft tissue injury which he sustained would have been expected to resolve by 6 months and had certainly resolved by January 28, 1982. His current condition is the result of voluntary inactivity with loss of muscle strength and aerobic endurance."

By a compensation order dated March 23, 1984 the Office found that the weight of the medical evidence did not support any employment-related disability after January 28, 1982, or any disabling psychiatric condition causally related to his employment.

The Board finds that appellant's disability causally related to his April 21, 1975 employment injury ended by January 28,1982.

The initial diagnosis of appellant's condition following his April 21, 1975 injury was a lumbodorsal strain, which was diagnosed by Dr. Brooks seven days after the injury. Beginning in May 1976 Dr. Brooks' diagnosis changed to a chronic lumbosacral strain.

Dr. Clarence Brooks referred appellant to Dr. Solis for an electromyogram which showed polyphasics in the muscles of appellant's left lower extremity. Appellant underwent several other electromyograms, by Drs. Muckleroy, Blue, Elbaor, and Crane, none of which demonstrated an abnormality other than polyphasics.

Dr. Clarence Brooks stated that the pain and weakness of appellant's left leg were accounted for by the findings on Dr. Solis' electromyogram. However, Dr. Brooks does not specialize in the relevant field of medicine, and several physicians who do so specialize attributed little significance to the finding of polyphasics on electromyography. Dr. Muckleroy, who is Board-certified in physical medicine and rehabilitation, stated that the few polyphasics seen on his electromyogram were within normal limits, and concluded that appellant had no objective evidence of neuromuscular or musculoskeletal pathology. Dr. Blue, a neurologist, noted polyphasics on her electromyogram but stated that it was considered essentially a normal test. Dr. Weisz, a Board-certified neurologist, stated that polyphasics on electromyography were of little significance without clinical correlation, and concluded that appellant had no neurologic impairment or deficit. Similarly, Dr. Wilson, a neurosurgeon, was unable to find any objective evidence of a neurologic dysfunction, and concluded that if appellant had left lower extremity radiculopathy, it was of a mild degree without neurologic deficit.

The Office terminated appellant's compensation effective January 3, 1980. Appellant appealed this decision to the Board, which remanded the case on the ground that the Office had not adequately considered the orthopedic impairments reported by Dr. West, a Board-certified orthopedic surgeon, who had diagnosed a lumbar sprain superimposed on a transitional lumbosacral vertebra.

On remand the Office secured a supplemental report from Dr. West stating that there was no definite evidence of nerve root irritation, and diagnosing a chronic soft tissue or ligamentous injury in the nature of a chronic lumbar strain. Dr. West's physical examination of appellant was essentially normal, and his diagnosis was based on appellant's subjective complaints. Dr. West similarly based his support of causal relation on the persistence of appellant's symptoms since his employment injury.

Dr. Stasikowski, a Board-certified orthopedic surgeon to whom the Office referred appellant, noted that appellant had leg pain which was not in a dermatomal pattern, and found no positive objective clinical abnormalties on physical examination. Considering this absence of objective abnormalities and a normal electromyogram, Dr. Stasikowski was unable to explain any restrictions on appellant's activities and concluded he could return to his regular work.

The reports of Dr. Elbaor, a Board-certified orthopedic surgeon, concluded that appellant had a herniated disc at L5-S1. However, as pointed out by an Office medical adviser, Dr. Elbaor's myelogram and CAT scan both suggested a problem at L5-S1 but did not agree on the location.

This Office medical adviser disagreed with Dr. Elbaor's statement that appellant's symptoms and complaints were consistent with a herniated disc, and, unlike Dr. Elbaor, the Office medical adviser set forth specific findings on physical examination which would be consistent with a herniated disc at L5-S1.

Dr. Mayer, a Board-certified orthopedic surgeon, had access to Dr. Elbaor's reports and had a repeat CAT scan performed. Dr. Mayer concluded that appellant had a chronic pain syndrome and chronic lumbar and cervical syndrome but that he had no evidence of radiculopathy. Dr. Mayer further concluded that appellant's ability to work was limited by a degree of effort and chronic deconditioning changes, and that the deconditioning was due to voluntary inactivity. Dr. Mayer also attributed appellant's problems to emotional changes, which Dr. Weisz, a Board-certified psychiatrist, had characterized as emotional preoccupation and secondary gain.

Dr. Mayer stated that appellant's problems, when he saw him, were primarily based on degenerative changes, that his injuries sustained on April 21, 1975 should have healed, that a reasonable healing period for these injuries had ended, and that appellant had reached maximum medical improvement long before January 1982.

The Office properly terminated appellant's compensation based on Dr. Stasikowski's report, which was corroborated by the reports of Dr. Mayer. These physician's reports are consistent with those of Drs. Muckleroy, Wilson and Weisz, all of whom found no objective evidence of disability. Only Dr. Elbaor supported appellant's claim of disability beyond January 28, 1982 and Dr. Elbaor did not indicate that appellant's condition when he saw him in 1982 was causally related to his April 21, 1975 employment injury. The medical evidence establishes that appellant's disability causally related to his April 21, 1975 employment injury ended by January 28, 1982.

The Board finds that the evidence does not show that appellant has a disabling psychiatric condition causally related to his employment.

Dr. Helge, Ph.D., a clinical psychologist, concluded that appellant probably received secondary gain from his symptoms, and that his diagnosis was hysterical neurosis, conversion type. Dr. Weisz, a Board-certified psychiatrist, stated in a November 16, 1979 report that emotional factors and secondary gain were responsible for the prolongation and extension of appellant's complaints. When asked for an opinion whether appellant had a disabling psychiatric condition, Dr. Weisz noted appellant's secondary gain reaction which allowed appellant to derive a primary social advantage from his injury, and concluded that appellant did not exhibit a disabling psychiatric condition causally related to his employment or to his April 21, 1975 employment injury.

On appeal, appellant contends that the Office improperly withheld, from compensation payments due him, an alleged overpayment in the amount of $983.87. Appellant contends that this overpayment was created by an Office decision that it had paid him compensation based on an incorrect rate of pay, and that the Office refused to return the alleged overpayment after it determined that the rate of pay it had used was, in fact, correct.

The Board notes, however, that the Office's decision which is the subject of the present appeal does not address this contention. The Board finds that the case should be remanded to the Office for a decision regarding this contention.

The decision of the Office of Workers' Compensation Programs dated March 23, 1984 is hereby affirmed. The case record is remanded to the Office for a decision, with detailed findings of fact and a statement of reasons, regarding appellant's contention concerning the alleged overpayment of compensation addressed above.

In the Matter of WILLIAM J. TIDMORE *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, Tuscaloosa, Ala.

Docket No. 84-976; Submitted on the Record;
Issued July 31, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether appellant's disability due to acute anemia and a gastrointestinal condition was causally related to factors of his federal employment.

On June 25, 1979 appellant, then a 63-year-old electrician, filed a claim for repurchase of sick leave used from November 30, 1978 through March 25, 1979, for intermittent periods of disability causally related to PCB [polychlorinated biphenyl] exposure at work. In support of his claim appellant submitted a statement from his supervisor, an employing establishment circular on the subject of PCBs, and his own statement in which he detailed his employment-related PCB exposures

In an August 1, 1979 report on an Office of Workers' Compensation Programs form, Dr. William S. Corley, a Board-certified family practitioner, diagnosed "anemia, severe; secondary to hemorrhagic gastritis and duodenitis; pruritis; probably secondary to the anemia and chemical exposure; laryngitis; diverticulosis of the colon." He concluded that appellant's disability was causally related to PCB exposure at work, and stated that "because of the toxic nature of the [PCBs], it is my opinion that the hemorrhagic gastritis, in all probability was secondary to the repeated exposure to [PCBs]. I also believe that the pruritis, shortness of breath and weakness were also related." Dr. Corley also submitted copies of appellant's 1978 hospitalization reports for these conditions.

On October 10, 1979 an Office medical adviser reviewed the evidence and negated any causal relationship between appellant's "minimal" PCB exposure and his diagnosed conditions. He stated that "The attending physician's report is speculative and without probative value, as he is indicating a thing that is relatively new, that no adequate human study or findings have been postulated . . . " In an October 19, 1979 preliminary letter decision, the Office notified appellant that his claim was not adequately supported by medical evidence of a causal relationship between PCBs and his various conditions. The Office subsequently requested appellant to submit additional medical evidence. He did not respond.

In a February 4, 1980 compensation order the Office rejected appellant's claim on the ground that he had "not discharged his burden of proof."

By letter dated September 5, 1980 appellant requested reconsideration of the Office decision. In support of his request he submitted a September 4, 1980 report by Dr. Corley, who enclosed copies of appellant's 1978 hospitalization reports, and concluded:

> "In summary, this case represents a gentleman who was exposed to a toxic substance, which, by the above reports, has been shown to cause multiple abnormalities, many of which he has demonstrated beyond question. The gastrointestinal findings, anemia, skin changes, fatigue, cough, pruritus, headaches, leg cramps and dyspnea, all of which improved following his removal from the exposure to the toxin, indicate to me that [appellant's] disorders were not coincidental, but were causally related to the prolonged and excessive exposure to PCBs at work. Further, it is my opinion that [appellant] should be followed very closely for the development of an even more serious problem as result of his exposure, namely, carcinoma, which does not always lend itself to early diagnosis. If this should be detected in the future, then, I feel that the claimant has an excellent argument in favor of relating his exposure to PCBs and the development of the carcinoma."

On January 19, 1981 the Office determined that a conflict in the medical evidence existed between Dr. Corley and the Office medical adviser, necessitating a referral to an impartial medical examiner to resolve the conflict. Therefore, on June 1, 1981 the Office referred appellant, together with a statement of accepted facts and the medical evidence of record, to Dr. Alan J. Greenwald, a Board-certified gastroenterologist, for examination and evaluation. In his July 6, 1981 report Dr. Greenwald submitted hospitalization and consultation reports, and concluded:

> "(1) The secure diagnosis is angiodysplasia of the cecum and ascending colon.
>
> "(2) I do not believe the claimant's condition is causally related

> to his exposure to PCBs as given in the Statement of Accepted Facts.
>
> "(3) A computerized search of the English literature on adverse effects of PCB exposure upon the human digestive tract was performed for me at the Lister Hill Medical Library here in Birmingham. No such references were identified extending back at least three or four years.
>
> "(4) I have not identified any permanent condition affecting the claimant's digestive tract which I can relate to his exposure to PCB, and I do not believe the diagnosis I have made is related to his employment."

In a July 31, 1981 compensation order the Office denied appellant's request for reconsideration, on the ground that "The evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

On January 28, 1982 appellant again requested reconsideration of the February 4, 1980 Office decision. In support of his request he submitted a December 18, 1981 report by Dr. Corley. Dr. Corley included copies of medical articles, hospitalization reports, office progress notes, and stated the following:

> "[Appellant] has basically the same symptoms which he had two years ago, with the severe, generalized itching, severe jerking sensations of his legs and feet particularly at night and sometimes involving his hands and arms. He continues to have a burning sensation in his feet, weakness, fatigue, dizziness, gum irritation, impairment of mental acuity, slowness of judgment, and gastric irritation."
>
> * * *
>
> "I agree with Dr. Greenwald that the angiodysplasia is not causally related to [appellant's] exposure to PCBs and I likewise agree that any search of the literature on adverse effects of PCB exposure would not include angiodysplasia. The hemorrhagic gastritis which we first diagnosed in 1978 would by nature be an intermittent problem and I disagree with Dr. Greenwald's comment that [appellant] has no permanent condition affecting his digestive tract which could be related to his exposure to PCBs.
>
> "The final diagnosis which Dr. Greenwald made and which he stated was not related to [appellant's] employment, I cannot question. However, I am quite convinced in my feeling and thinking that [his] upper intestinal tract problems were, in all likelihood, definitely related to his exposure to the PCBs, since this relationship has been documented in the literature over and over. Almost every article which is written about the toxic effects of long term PCB exposure

> will include hemorrhagic gastritis as a possible side effect, and I do not believe that we are wrong in continuing our argument in this direction. Since Dr. Greenwald is a gastroenterologist, naturally, I would not expect him to delve into the other problems with which [appellant] was complaining. However, I do disagree with [the Office medical adviser's] application of Dr. Greenwald's conclusions to [appellant's] case without taking into consideration the other problems with which [he] has been bothered repeatedly over the past few years."
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> * * *
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> "As you can see, the literature repeatedly mentions the toxicity of PCBs and the potential symptoms caused in humans. I have no difficulty in relating [appellant's] symptoms to those effects of PCBs which are outlined repeatedly in the literature. I have no other complaints which were in existence prior to his present problems."
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> * * *
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> "I believe I failed to clarify or emphasize one point which I think is vitally important. When I hospitalized [appellant] in 1978, Dr. Jim Jackson, a local gastroenterologist, did an esophagogastroduodenoscopy and confirmed the diagnosis of hemorrhagic gastritis. Dr. Clyde McDonald, a local proctologist, did a colonoscopy, and reported a normal study, with the exception of diverticulosis. There was no reported evidence of bleeding from the cecal area as reported by Dr. Greenwald.
>
> "I believe quite strongly that this further supports my contention that [appellant's] anemia was coming from the gastritis and not from any lesion in the cecum."

In a March 17, 1982 report a second Office medical adviser reviewed Dr. Corley's report and stated that it "refuted" Dr. Greenwald's July 6, 1981 report. Subsequently, on April 8, 1982 the Office referred a statement of accepted facts and the medical evidence to Dr. Edith R. Welty, a Board-certified family practitioner and an Office medical consultant, for her opinion on causal relationship.

On August 19, 1982 Dr. Welty submitted a report in which she briefly reviewed appellant's history and stated:

> "My review of [appellant's] medical records reveals that his symptoms and physical findings are indeed consistent with those of previously described PCB intoxication cases, with the exception of his angiodysplasia, which is probably unrelated. We could find no reported cases in the medical literature of angiodysplasia following PCB exposure.
>
> "The most extensive human exposure described in the literature

> is that which occured in Yusho, Japan, in 1968 following oral ingestion of contaminated rice . . . [Appellant] exhibited several similar findings including itching, erythematous skin rash, cramps and burning sensation in his extremities, jerking sensation in his feet and legs, weakness, abdominal pain, nausea and diarrhea. His cough, dizziness, arthralgias and respiratory symptoms were consistent with symptoms described in several cases of occupational PCB exposure. His anemia and gastritis are reminiscent of anemia and ulcerative gastritis found in monkeys fed low doses of . . . PCB for 8-12 months... His liver function tests were generally normal, and reported occupational exposures have not been associated with consistent changes in liver function.
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> "The problem with making a purely medical diagnosis of PCB intoxication is that similar symptoms and physical findings can also result from other etiologies."
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> * * *
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> "For further medical confirmation of PCB exposure, I recommend that serum PCB levels be drawn. Ideally this should have been drawn when he first complained. However, some PCBs have persistent adipose and blood levels for prolonged periods. Secondly, an adequate biopsy of an erythematous skin lesion, including a hair follicle, could be obtained and sent to a pathologist within the VA system who is competent in diagnosing chloracne.
>
> "The amount of occupational exposure sounds low in comparison to much more extensive exposures of asymptomatic workers in capacitor and transformer plants, but is not adequately documented."

In a February 7, 1983 response to an Office request for a serum sample, Dr. Corley noted the uncertainties inherent in PCB-level testing after removal from exposure, and submitted the requested sample. On August 25, 1983 Dr. Corley submitted a follow-up report in which he noted that appellant had "scaling-like lesions over his arms and legs which apparently have been itching." Dr. Corley reported a blood serum PCB concentration of 10 ug/L, and concluded that appellant's condition was causally related to PCB exposure at work.

On September 21, 1983 the Office again referred a statement of accepted facts and the medical evidence of record to Dr. Welty for her opinion on the existence of any causal relationship. In her October 21, 1983 response, she stated the following:

> "[Appellant's] serum PCB level, as reported by Tuscaloosa Pathology Laboratories, Tuscaloosa, Alabama on June 7, 1983, was 10 ug/L. This is within background range for persons with no unusual exposure to PCBs. Although there has been a 5-year lagtime since [appellant's] last alleged exposure in 1978, one cannot assume that

> his levels were higher in the past and, therefore, caused his illness; some PCB congeners may be excreted over months to a few years, but others persist in fat and serum at a fairly constant ratio for many years. On the other hand, the low level does not prove that he did not have higher levels in the past. In general, adverse health effects have been reported mainly at serum levels exceeding 50-100 parts per billion, and in some reported studies, symptoms have cleared after PCB exposure ceased.
>
> "The description of [appellant's] rash does not seem compatible with chloracne. In Dr. Corley's medical summary stamped with the date July 11, 1983 he describes the rash as 'scaling-like lesions over his arms and legs which apparently have been itching since there are scratch marks.' This could be consistent with several types of dermatitis other than chloracne. In the materials I reviewed, there was no record of skin biopsy to confirm the diagnosis of this rash. One cannot assume that the rash is caused by PCB.
>
> "The clinical syndrome described is nonspecific and could have a variety of causes other than PCBs.
>
> "Therefore, on the basis of the information provided, [appellant's] illness cannot be attributed to PCB exposure."

In a December 21, 1983 compensation order the Office rejected appellant's request for reconsideration, after a merit review, on the ground that "The evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

The Board finds that the case is not in posture for decision.

Subsequent to the Office's referral of appellant to Dr. Greenwald for an impartial medical examination, appellant requested reconsideration and submitted additional medical evidence in the form of a December 18, 1981 report by his attending physician. Dr. Corley reviewed Dr. Greenwald's report and the medical literature on the effect of PCB exposure, and concluded in his rationalized report that appellant's conditions were causally related to his employment-related PCB exposure. An Office medical adviser reviewed Dr. Corley's report and concluded that it "refuted" Dr. Greenwald's report, therefore necessitating further development.

The Office subsequently referred the case record and a statement of accepted facts to Dr. Welty, an Office medical consultant, for her opinion on causal relationship. Dr. Welty was unable to state a diagnosis without further evidence, and requested that additional testing take place. Dr. Corley submitted the requested serum sample and continued to state that appellant's conditions were causally related to PCB exposure at work. In her October 21, 1983 supplemental report, Dr. Welty noted the low serum PCB level found and negated any causal link between appellant's conditions and his employment-related PCB exposure.

Under these circumstances, the Office should further develop the medical evidence. The augmented case record and appellant should be referred to a specialist for examination and an opinion on whether appellant's conditions are causally related to his employment-related PCB exposure.[1] He should be advised that consultation with other specialists, including toxicologists, is authorized if he deems such consultation appropriate.[2] After such further development as it may deem necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated December 21, 1983 is hereby set aside and the case is remanded to the Office for further proceedings consistent with this decision.

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[1] See *Paul H. Connolly*,Docket No. 84-361, issued May 11, 1984

[2] *Martin O. Phillips*, Docket No. 83-1754, issued January 25, 1984.

In the Matter of LUIS D. ALAMO *and* VETERANS ADMINISTRATION, VETERANS ADMINISTRATION CENTER, San Juan, P.R.

Docket No. 84-693; Submitted on the Record;
Issued July 31, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not "without fault" with respect to an overpayment of compensation benefits and that therefore the overpayment was not subject to waiver.

On January 2, 1973 appellant, then a 41-year-old hospital guard, injured his back while restraining patients in three separate incidents that day. He stopped work the following day and used sick leave until his return to work on January 10, 1973. On September 14, 1973 he sustained a recurrence of disability and stopped working the following day.[1] The Office of Workers' Compensation Programs approved compensation for temporary total disability effective September 15, 1973.

By letters dated February 14, 1974, the Office informed appellant that every four weeks he would be paid $466.04 minus health insurance premiums, or a net payment of $442.82 until further notice. The Office stated that this compensation was computed on the basis of total disability and that the amount of compensation would be redetermined if his condition improved and allowed him to perform some work.

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[1] Appellant had had previous employment injuries to his back on March 3, 1971 and September 17, 1972 and had had a lumbar laminectomy for a herniated nucleus pulposus on March 17, 1971.

By letter dated June 19, 1974, the Office informed appellant that the medical evidence of record showed his employment injury was no longer causing total disability. The Office stated it would determine his wage-earning capacity in his partially disabled condition and that this would probably cause a reduction in his compensation.

By decision dated May 5, 1975, the Office informed appellant that the position of receptionist represented his wage-earning capacity. The Office stated after comparing the then current salary of a receptionist with that of a hospital guard that appellant had a 53 percent loss of wage-earning capacity and was entitled to reduced compensation of $263.00 every 28 days minus the cost of health insurance premiums beginning May 29, 1975.

On April 18, 1975 appellant informed the Office that he did not agree with its reduction of his compensation. The Office stated in May 22, 1975 and March 3, 1976 letters that there was no basis for changing its decision.

By letter dated January 21, 1975, appellant stated he wished the Office to reopen his case and restore his temporary total disability compensation. He submitted additional medical evidence in support of his request. By compensation order dated November 8, 1978, the Office rejected appellant's request for reconsideration on the grounds that the evidence submitted was "irrelevant and immaterial, and not sufficient to require review of the prior decision."

Appellant again submitted additional medical evidence. The Office in a November 19, 1980 compensation order denied modification of its May 1975 decision, which had reduced appellant's compensation, on the ground that the evidence submitted was not sufficient to warrant modification.[2]

An Office summary sheet shows that appellant's compensation based on his loss of wage-earning capacity gradually increased from $263.00 every 28 days, minus the cost of health insurance premiums, effective May 29, 1975 to $430.00 every 28 days, or $408. 84 after deducting health insurance premiums, effective September 1, 1980. These increases were due to consumer price index increases and to occasional reductions in health insurance premiums.

An undated Office memorandum in the case record states that an entry into the Office's automated payment system in March 1981 incorrectly listed appellant as entitled to temporary total disability compensation instead of compensation for partial disability based on his loss of wage-earning capacity. The memorandum states appellant received monthly compensation of $835.00 instead of $445.00. A January 22, 1982 Office worksheet states that appellant was overpaid $3,174.50 during the period March 1, 1981 through June 27, 1982.

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[2] The Office originally mailed the November 19, 1980 compensation order to an incorrect address. On June 10, 1981 it mailed a copy to appellant's correct address.

By letter dated March 5, 1982, the Office informed appellant that an overpayment of $3,174.50 had occured because "[d]uring the process of automation we inadvertently paid compensation for temporary total [disability] instead of loss of wage-earning capacity." The Office stated "A preliminary finding has been made that you were with fault in this matter for the following reason(s): You should have been aware of the sharp increase of compensation paid to your check." The Office informed appellant that this did not represent a final decision and that he had the right to submit additional evidence if he disagreed with the fact or amount of overpayment and had the right to an Office hearing concerning the questions of fault and waiver of any overpayment. The Office explained the circumstances under which recovery of an overpayment may be waived by the Office. The Office advised appellant to submit financial information to assist it in deciding whether the overpayment should be waived or the method of any recovery of the overpayment. No response was forthcoming from appellant.[3]

By letter dated May 31, 1983, the Office informed appellant it had made a preliminary finding that an overpayment of compensation had occured in the amount of $3,174.50 because "from June 1981 to January 1982 you were paid at an erroneous compensation rate." The Office stated that "A preliminary finding has been made that you were with fault in this matter for the following reason(s): the increase in your compensation was so great, you should reasonably have known that an error had been made." The Office reiterated the information in its March 5, 1982 letter.

Appellant replied on June 23, 1983 requesting that the Office reevaluate its preliminary finding of fault and to grant waiver of any overpayment. Appellant also stated that he disagreed that there had been an overpayment because he believed the amount involved "was owed to me and more than that because my benefits were cut from $488 to $230 in 1974 by mistake of this office." He submitted financial information which showed his monthly expenses as $875.00 and his monthly income as $313.00.

An August 9, 1983 Office memorandum stated as follows:

> "The claimant's benefits were cut from TTD [temporary total disability] to LWEC [loss of wage-earning capacity], based on a 47% WEC [wage-earning capacity] on 5/29/75. When ACPS [automatic compensation payment system] was initiated, in June 1981, the WEC was not entered and the claimant was paid based on TTD through January 1982, creating an overpayment of $3,174.50.
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> "The increase was so great, that the claimant should reasonably have been aware that an error had been made and a CA-2201 [form

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[3] The Board notes that the Office letter was mailed to an incorrect address.

> letter concerning preliminary finding of fault] was sent. He responded by saying he was not at fault as he believed he was entitled to compensation based on TTD and was entitled to all the money he got. At the time of the original LWEC determination, the claimant was sent a formal decision explaining our decision. On 11/8/78 and 11/19/80 he was sent compensation orders affirming our original decision. The original finding of fault should be made final. Deductions of $125.00 per 28 days (just under 25%) should be made."

A supervisory claims examiner stated that appellant had a monthly income of $1,049 and monthly expenses of $875, or a surplus of $174 and that the Office's withholding of $125 monthly from further compensation payments was not unreasonable.

By letter decision dated August 25, 1983, the Office determined that an overpayment of $3,174.50 had occurred because "from June 1981 to January 1982, you were paid at an erroneous compensation rate," and that appellant was at fault in the matter of the overpayment for the following reasons:

> "The increase you received was so great, you should reasonably have known that an error had been made. You were never sent any letters overturning our decision of 5/5/75 to reduce your benefits. In fact on 11/8/78 and 11/19/80 you were sent comp[ensation] orders affirming our decision of 5/5/75 to reduce your benefits."

The Office stated that the overpayment would be recovered by withholding $125.00 from his continuing compensation until the overpayment was absorbed in approximately September 1985.

In a letter received by the Office on September 20, 1983, appellant stated he disagreed with the August 25, 1983 decision to withhold part of his compensation. He asserted that the Office has incorrectly reduced his compensation in May 1975 from $488.00 to $230.00, that the Office therefore owed him more than $3,174.50 and that there was no overpayment. He stated that three family members were full-time college students and that he needed his "full compensation." He submitted an August 4, 1983 letter by Dr. Jose Suarez Alvarez concerning his lumbosacral condition.

By letter decision dated October 12, 1983, the Office stated that appellant's letter "neither raised substantive legal questions, nor was it accompanied by new and relevant evidence," and was insufficient to warrant a review of the August 25, 1983 decision.

By letter dated October 14, 1983, the Office was notified that its withholding of $125.00 every 28 days was causing appellant "severe financial hardship." In a November 28, 1983 memorandum, the Office stated the following:

> "In view of the financial hardship claimant is experiencing, we can

> lower the monthly deduction to $88.00. This will not adversely affect this Office. We should be able to recover the full overpayment of $3,174.50 within three years."

By letter dated December 2, 1983, the Office informed appellant that it would lower the monthly deductions from his check to $88.00.

On appeal, appellant states that he has "never agreed with the decision of those offices to reduce my monthly pay on a 55% (percent) since 1975," and that the Office has refused to restore his temporary total disability compensation in spite of the medical evidence he has submitted.

Since the Office decisions concerning reduction of appellant's compensation based on his wage-earning capacity were issued more than one year prior to the docketing of this appeal on January 19, 1984, the Board lacks jurisdiction over those decisions.[4] The only merit decision before the Board is the August 25, 1983 decision and the only issue concerns whether appellant was not "without fault" with respect to an overpayment of compensation.

The Federal Employees' Compensation Act, 5 U.S.C.section 8129(b), states that: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Conversely, no waiver of overpayment is possible if the claimant is with fault in helping to create the overpayment, even though the overpayment was paid by the Office because of an error of fact or law.[5]

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show the incorrect payment resulted from: "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[6]

In the present case it is apparent that the Office applied the third standard to appellant, acceptance of a payment which the payee either knew or should have been expected to know was incorrect, in finding appellant at fault in creating the overpayment.

The Board finds that appellant was not "without fault" with respect to the overpayment of compensation benefits and that therefore the overpayment was not subject to waiver.

Because of an error by the Office in entering appellant's compensation into the automatic compensation payment system, appellant was paid monthly compensation from June 1981 to January 1982 based on temporary total disability compensation of $835.00 gross instead of partial disability compensation of $445.00 gross based on his 53 percent loss of wage-earning capacity. The increase in appellant's monthly checks was so great that he should have known the payment was incorrect. Appellant accepted such payment and stated that he believed the Office owed him the money because it had mistakenly reduced his compensation from temporary total to partial disability compensation. Appellant, however, was informed by the Office on June 19, 1974 that he was no longer temporarily totally disabled, but only partially disabled and was informed on May 15, 1975 that his compensation would be reduced based on his 53 percent loss of wage-earning capacity. He was further informed in May 22, 1975 and March 3, 1976 letters that there was no basis for the Office to change its decision reducing compensation. In its November 19,1980 compensation order issued to appellant at his correct address on June 10, 1981, the Office denied modification of its 1975 decision which had reduced his compensation. Appellant was aware or should have been aware that his compensation was based on partial disability and that his monthly checks from June 1981 to January 1982 which he accepted were incorrect. Appellant was not "without fault" with respect to the overpayment of compensation and therefore the overpayment must be recovered.

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[4] See 20 CFR section 501.3(d)(2).

[5] *Walter Wasiluk*, 33 ECAB 286; *William W. Rodgers*, 30 ECAB 809.

[6] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2-claims.

The August 25, 1983 decision of the Office of Workers' Compensation Programs is hereby affirmed.

In the Matter of JACOB H. SAMAAN *and* DEPARTMENT OF STATE, AGENCY FOR INTERNATIONAL DEVELOPMENT, Amman, Jordan

Docket No. 83–1696; Hearing July 10, 1984;
Issued July 31, 1984

Appearances: *Jacob H. Samaan*, appellant, on his own behalf; *Brenda Stovall, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether the refusals of the Office of Workers' Compensation Programs to reopen appellant's case for further merit review pursuant to 5 U.S.C. section 8128(a) were proper.

This is the second appeal in this case. In the previous appeal, the

Board, in a decision dated February 9, 1978,[1] set aside the determination of the Office of Workers' Compensation Programs that under section 8137[2] of the Federal Employees' Compensation Act,[3] appellant's compensation should be determined in accordance with the provisions of local law (in this case, the law of Jordan) rather than under the provisions of the Act. The Board directed the Office to consider on remand whether appellant's special circumstances warranted the exercise of the discretion granted the Secretary of Labor by section 8137 to pay compensation according to the compensation provisions of the Act rather than under local law.

Following remand, the Office determined that appellant's compensation should be determined according to the computation provisions of the Act. In order to obtain a report on his current condition, the Office referred appellant to Dr. Richard Pearson, a Board-certified orthopedic surgeon, for examination and evaluation. In a July 27, 1981 report of his examination of appellant on June 25, 1981, Dr. Pearson related his findings on physical examination and stated:

> "My impression is that the patient has a resolved low back injury. I feel that he should be able to resume any activities and resume work that does not require lifting of greater than 50 lbs. repetitively. He should be able to stand, sit or walk for prolonged periods without difficulty.
>
> "The diagnosis is status post acute low back strain with no evidence of herniated disc, with essentially complete resolution. I feel that the patient's back condition is resolved and his previous condition was certainly related to his injury, but there is no sequelae at this point.
>
> "It is my opinion that the patient should be able to return to any type of duties that do not require heavy lifting of greater than 50 lbs. Prognosis is good. Recommendations for further medical care-none."

The Office accepted that appellant was totally disabled from April 29, 1971 through August 2, 1971 and from October 25, 1973 through November 13, 1973, during which periods he was hospitalized for gastrointestinal problems caused by medication taken for his employment-related back injury. The Office accepted that he had an employment-related loss of wage-earning capacity from August 3, 1971 through October 24, 1973 and from November 14, 1973 through June 25, 1981[4] and selected the position of skip tracer as reasonably representing his wage-earning capacity during those periods. Dr. Ira E. Kaplan, a Board-certified internist and an Office medical consultant, reviewed the case record, including a copy of the physical requirements of the position selected, and opined that appellant was capable of performing the duties of that position during the periods of partial disability.

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[1] 29 ECAB 247. The facts of the case as set forth in the Board's decision are hereby incorporated by reference.

[2] U.S.C. section 8137.

[3] U.S.C. section 8101 *et seq*.

[4] The Office selected June 25, 1981 as the date compensation should terminate, as Dr. Pearson found appellant fit for work with relatively minor restrictions in his June 26, 1981 examination.

By compensation order dated February 12, 1982, the Office awarded compensation for the above-mentioned periods of total and partial disability, finding appellant had a wage-earning capacity of 59 percent during the periods of partial disability. The compensation order found he was not entitled to compensation after June 25, 1981. He was paid compensation in a lump sum of $34,035.39, which accounted for $1,964.09 in compensation previously received.

Appellant requested reconsideration and submitted an April 7, 1982 report of Dr. Raymond A. Newgard, a chiropractor. This report diagnosed post-traumatic chronic lumbosacral syndrome with L5 radiculitis and sciatic neuralgia in the lower extremities, complicated by degenerative L5 disc and myofibrositis of surrounding tissues. The report stated that the prognosis was "unknown" and that "remissions and exacerbations are the rule." Appellant also submitted a March 3, 1982 report of Dr. Lawrence S. Levin, a chiropractor, stating that x-rays of the lumbar spine indicated "levoscoliosis, osteoporosis, incomplete transitional L-5, congenital anomaly, spondylosis and disc pathology with foraminal deformity of the lumbar spine.

By compensation order dated September 27, 1982, the Office denied appellant's request for reconsideration on the ground that the evidence submitted in support of the request was "found to be lacking substantial probative value . . ."

Appellant again requested reconsideration and resubmitted the April 7, 1982 report of Dr. Newgard, along with a letter from the executive director of the Illinois Chiropractic Society, Inc., asserting that chiropractors are considered physicians and their opinions should be given weight. He also submitted a November 4, 1982 report of Dr. F. Yashar, a family practitioner, which stated that appellant was "under active medical care for peptic ulcer disease and discogenic disease, lumbar spine," and that August 27, 1982 x-rays indicated "postbulbar ulcer with hypersecretion in the stomach, as well as thickened fold, suggesting gastritis."

By compensation order dated May 10, 1983, the Office denied appellant's request for reconsideration, finding the additional evidence "to be immaterial, of no probative value, and repetitive . . ." Appellant filed an appeal with the Board on July 15, 1983.

The Board notes that the only decisions before it are those of the Office dated September 27, 1982 and May 10, 1983 in which it found that the evidence submitted in support of the requests for reconsideration was insufficient to require review of its February 12, 1982 merit decision. Since more than one year has elapsed from that decision until the filing of appellant's appeal on July 15, 1983, the Board lacks jurisdiction to review that decision.[5]

The Board finds that the Office's refusal to reopen the case for further merit review was improper.

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128.[6] Accordingly, as is well established under Board precedent,[7] the Office is required to reopen a case on its merits when such evidence or contentions are presented.

In the present case, appellant submitted relevant medical evidence sufficient to require the Office to reopen the case for reconsideration. Following the September 27, 1982 denial of reconsideration, appellant submitted a November 4, 1982 report of Dr. Yashar, a family practitioner, which stated he was still "under active medical care for peptic ulcer disease and discogenic disease, lumbar spine," and that August 27, 1982 x-rays indicated "postbulbar ulcer with hypersecretion in the stomach, as well as thickened fold, suggesting gastritis." The Board notes that the Office had accepted appellant's claim for a duodenal ulcer, as well as for a back condition, as employment related, and thus evidence on appellant's current gastrointestinal condition is relevant to whether he has a continuing employment-related condition.[8]

Following remand, the case record, including Dr. Yashar's November 4, 1982 report, should be reviewed by an Office medical adviser. After such further development of the record as is necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated May 10, 1983 is hereby set aside and the case remanded for further proceedings consistent with this decision.

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[5] 20 CFR 501.3(d)(2). See *Nicholas Gatto*, 25 ECAB 300.

[6] *Eladio Joel Abrera*, 28 ECAB 401.

[7] See, e.g., *Cynthia L. Lee*, 15 ECAB 425; *Leopold J. Gunston*, 18 ECAB 149; *Billy F. Carter*, 32 ECAB 1987.

[8] The Board notes that the reports of Drs. Newgard and Levin, chiropractors, were not sufficient to require the Office to reopen the case. Under the Federal Employees' Compensation Act, chiropractors are included in the definition of "physican" only insofar as "their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist..." 5 U.S.C. section 8101 (2). No such demonstration of a subluxation was made in this case.

In the Matter of KAREN K. CASSEL *and* U. S. POSTAL SERVICE, POST OFFICE, Houston, Tex.

READEX FICHE

Docket No. 84-1414; Submitted on the Record;
Issued August 6, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly rejected appellant's claim for compensation on the ground that she refused to undergo a medical examination as directed; and (2) whether the Office properly denied appellant's request for reconsideration of its November 30, 1982 decision after a review of the merits.

On March 27, 1982 appellant, then a 21-year-old postal clerk, filed a claim in which she alleged that on March 26, 1982 she sustained "pain in lower back" when she was struck by a mailcart.[1] Appellant stopped work on March 26, 1982, and was hospitalized for an evaluation on that date. She began to receive continuation of pay as of March 27, 1982.

In a March 26, 1982 admission report Dr. George K. Drake, a general practitioner, related appellant's history and his findings made on physical examination. He diagnosed "Trauma to the cervical, lumbosacral vertebrae with muscle spasm. Severe contusion of the lumbosacral area with radiculopathy of right leg. Possible herniated lumbosacral disc. Five months intrauterine pregnancy, threatened premature delivery."

Appellant was discharged from the hospital on April 2, 1982. In his discharge summary Dr. Drake stated the following:

> "FINAL DIAGNOSIS: Strain of ligament of cervical and lumbosacral vertebrae with muscle spasm, contusion in the lumbosacral region. Intrauterine pregnancy, six months. Threatened premature delivery.
>
> "BRIEF HISTORY: The patient was injured on job working in the post office where she injured her back and was sent over to Riverside General Hospital. After I talked to the nurse on duty at the post office, she was admitted to Riverside General Hospital.
>
> "OPERATIVE PROCEDURES: None.
>
> "COURSE IN HOSPITAL: The patient was seen in consultation by Dr. Hollins who followed her threatened premature delivery. She was also seen in orthopedic consultation by Dr. Hume who felt that the patient had contusion of the lower back in the sacral region. The patient had ultrasonography which showed that she was approximately 24 weeks pregnant. O negative type. CBC was within normal limits. The patient is totally disabled at the present time, will be followed in the office and will determine in the future if there is permanent disability at a later date. She was given physical therapy consisting of heat packs in the office two or three times a week.

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[1] The Board notes that appellant was on light duty at the time of her March 26, 1982 employment injury due to pregnancy complications.

> My impression is that the patient will be disabled until after delivery because of the severe injury to the lower portion of the back.
>
> "PROGNOSIS: Fair."

In an April 13, 1982 duty status report Dr. Drake diagnosed "severe lumbosacral strain and contusions" and noted appellant's pregnancy. He concluded that she was totally disabled commencing March 26, 1982. In April 26, 1982 follow-up reports on Office of Workers' Compensation Programs forms, Dr. Drake continued to diagnose "severe lumbosacral strain" and causally related appellant's condition to the March 26, 1982 employment injury. In each report he concluded that she was totally disabled, and noted that he was unable to determine when she could return to light duty work.

On May 7, 1982 Dr. William U. Giessel, a Board-certified specialist in preventive medicine, submitted a fitness-for-duty report with work restrictions in which he related a brief history. He stated that appellant could have returned to light duty work as of the date of his May 5, 1982 examination. He concluded:

> "When slightly touched on the low back area with the tip of the finger the patient jumps and jerks and displays a large functional element as regards to her back injury. The physical examination shows no evidence of a serious back injury at this time. There is no evidence of nerve root irritation or limitation of motion in the lumbar spine except that associated with her pregnancy.
>
> "*OPINION*: It is my opinion based upon this patient's medical history and physical examination that she is pregnant; however, I find no evidence of serious injury as regards her back. I feel that she could do sedentary work with lifting of 0-10 pounds without restrictions. In order to give her the benefit of any doubt in my mind in that she actually had a back injury sometime in the past I am requesting that full restriction be placed on light to moderate to heavy lifting, pushing, pulling, carrying, walking, standing, sitting, stooping, and kneeling. She should not operate a motor vehicle at this time. In my opinion the diagnosis is normal pregnancy with large functional element and no evidence of serious back injury at this time."

In a May 13, 1982 letter the employing establishment notified appellant that she had been found fit for limited duty. Her continuation of pay was therefore terminated by the employing establishment, effective May 10, 1982, and she was instructed to report for sedentary work "on the day following your receipt of this letter..."Subsequently, on May 20, 1982 appellant submitted a disability certificate from Dr. Drake in which he noted that she remained totally disabled due to a "severe lumbosacral strain."

On June 7, 1982 appellant claimed compensation after May 10, 1982, the date the employing establishment terminated her continuation of pay. In support of her claim she submitted copies of her hospitalization notes. Thereafter, Dr. Drake submitted a June 23, 1982 form report in which he diagnosed "severe lumbosacral strain and muscle spasm." He noted that appellant remained totally disabled as of that date, and checked the box marked "yes" in response to the question "Do you believe this disability is in any way related to the history of the injury as given above?"

In an August 24, 1982 letter the Office referred appellant, together with the medical evidence of record and a statement of accepted facts, to Dr. Robert A. Fulford, a Board-certified orthopedic surgeon of professorial rank, to resolve the conflict in the medical evidence between Drs. Drake and Giessel. This letter also informed appellant that under 5 U.S.C. section 8123(a),[2] any obstruction of the examination would result in a suspension of her entitlement to any compensation, and a forfeiture for the period of the obstruction. The examination was scheduled for September 16, 1982. On September 8, 1982 appellant was examined by Dr. Drake, who submitted an Office form report of the same date in which he repeated his earlier dignosis and concluded that appellant remained totally disabled from work.

On September 10, 1982 appellant returned to light-duty work. She did not keep her appointment with Dr. Fulford. In an undated letter received by the Office on November 10, 1982, appellant stated that she had not kept the appointment because she had believed that it was a fitness-for-duty examination that was no longer necessary since she had previously been released to return to light-duty work by Dr. Drake. She also submitted copies of her admission and discharge reports by Dr. Drake, and a note from him in which he stated:

> "Patient responded slow to therapy. Her delivery date was July 31, 1982. After delivery ultrasound physical therapy was used to neck and back. She was released from the March 26, 1982 injury on September 9, 1982 to return to work at that time. However, patient was involved in an nonjob-related injury on May 30, 1982, fracture of right tibia, and is currently disabled due to that injury."

On November 30, 1982 the Office issued a compensation order in which it rejected appellant's claim for compensation, on the ground that "The claimant has obstructed this Office's efforts to determine whether her condition was causally related to the March 26, 1982 incident."

In a December 10, 1982 conversation with an Office claims examiner appellant inquired as to what further action she could take. She was advised that she could appeal, or could have Dr. Fulford examine her at her own expense and submit a report to the Office with objective findings and rationale supporting causal relationship. The claims examiner reminded her that she was not entitled to compensation from the date of the first examination on September 16, 1982 to the date of the rescheduled examination, due to her obstruction.

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[2] 5 U.S.C. section 8123(d) reads as follows:

> "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstructions is deducted from the period for which compensation is payable to the employee."

On January 25, 1983 the employing establishment notified appellant that a pay adjustment was being initiated by it to recover the continuation of pay for the period from March 27, 1982 through May 10, 1982, based on the November 30, 1982 Office decision rejecting her claim.[3]

In a January 28, 1983 fitness-for-duty evaluation [4] Dr. Hipolito F. Hermida, an employing establishment Board-certified general surgeon, noted the following:

> "On May 13, 1982 [appellant] was walking in her backyard and stepped in a hole. She was pregnant and had severe right leg pain above the ankle. Taken to Riverside General Hospital, Houston. In the emergency room x-rays demonstrated a fracture of bones of the right leg just above the ankle joint. This was a closed undisplaced fracture which did not require manipulation and was set on cast immediately.
>
> "She delivered on July 31 a normal child and returned to work on September 9 working light duty. About December 14, 1982, she was standing at work when another worker accidently pushed a hamper into her back and for this she filed a claim of back injury and has been on light duty until today. No standing, no lifting over 10 lbs.
>
> "The cast has been removed a week ago from her right leg. After the removal of the cast, the patient did not wear elastic stocking and swelling was noticed to start from the ankle to the toes. This examination reveals that there is some swelling. The fracture has healed well with a solid and unpainful bone callus. Walking is permitted and at the most she could use a cane when going upstairs or downstairs for some extra help. At this time, I advised her to discard the crutches which are an impediment delaying her rehabilitation. I also told her to purchase a good quality elastic stocking of heavy construction to fit below the knee and gave her instructions to wear them.
>
> "This should solve the problem of the ankle and foot swelling, at this stage of the healing of her fracture. The restrictions from the

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[3] The case record indicates that on July 12, 1983 the employing establishment charged the period of continuation of pay to Leave Without Pay.

[4] On December 14, 1982 appellant sustained a second employment-related back injury for which she received continuation of pay. However, since the Office has not issued a final decision on appellant's claim for compensation after May 21, 1983, the Board has no jurisdiction over this claim. See Board's *Rules of Procedure*, section 501.2(c) (20 CFR section 501.2(c)).

> treating physician as to no lifting over 10 lbs., no standing and related to the swelling could be extended for 3 weeks. After that time I expect that the swelling will disappear and that her physician will release her for regular duty in reference to the fracture.
>
> "It is to be mentioned that this person has also filed a claim for back injury, giving the date of occurrence as December 14, 1982. This should not present any problems now since she is fully recovered from that and has no back complaint nor are there any of the work restrictions related to the back injury claim.
>
> "In reference to the past complaint on the neck, she has no neck complaint at this time and no restrictions apply to any neck complaint. So in summary the restrictions are related to the leg injury and they are in reference to the healing of the fracture which is found to be progressing normally. The swelling noticed is not due to complications but to the fact that the removal of the cast was one week ago and no external compression has been advised to this patient, and this I expect should solve her problem."

On September 22, 1983 appellant requested reconsideration of the Office's prior decision. She alleged that she had attempted to reschedule her appointment with Dr. Fulford, but to no avail. In support of her request she submitted an undated disability certificate from Dr. Drake, who diagnosed "strain of ligaments of cervical and lumbosacral vertebrae with muscle spasm; herniated lumbosacral disc L5–S1 with displacement of left nerve anteriorally."

In an October 21, 1983 letter the Office noted that appellant's reconsideration request had been received, and stated:

> "Upon further review of your file, specifically your referral to Dr. Robert Fulford, please take note of our letter of August 24, 1982, paragraph two. It is your responsibility to reschedule, if circumstances were to prohibit your making the initial exam.
>
> "The evidence of record reveals that you had injured yourself at home on May 13, 1982. Please make available to us the hospital and other medical records. When this information is received, we will make arrangements for you to be examined and evaluated by a specialist."

On February 24, 1984 the Office issued a compensation order in which it denied modification of its prior decision after a review on the merits, on the ground that "The evidence submitted is not sufficient to warrant modification." In an accompanying memorandum the Office noted that it had requested information about appellant's May 1982 leg injury three times with no response; therefore, appellant had not met her burden of proof "necessary to sustain her request."

With respect to the first issue, the Board notes that 5 U.S.C. section 8123(d) states:

> "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

The Board finds that this section does not provide a basis for the rejection of a claim for compensation; rather it suspends the right of an employee to compensation during the period she refuses to submit to an examination. The Board therefore finds that the Office improperly rejected appellant's claim for compensation under this section.[5]

As for the second issue, the Board notes that the Office initially rejected appellant's claim because it found that she had obstructed the impartial medical examination of Dr. Fulford. However, the record indicates that subsequent to the November 30, 1982 Office decision appellant requested reconsideration and noted that she had attempted to reschedule an appointment with Dr. Fulford, with no success. She also submitted additional medical evidence from Dr. Drake.

Thereafter, the Office requested that appellant submit medical records relating to her May 1982 nonemployment-related leg injury, and when she did not respond, the Office denied her request for modification after a review of the merits. In determining the merits of appellant's request for reconsideration, an Office claims examiner recommended that modification of the Office's prior "obstruction" decision be denied on the ground that appellant had not sustained her burden of proof to establish her claim, in that she had not submitted the requested medical evidence. A second claims examiner agreed, and noted that the evidence of record was insufficient to establish appellant's claim.

The Board finds that the Office's February 24, 1984 compensation order denying appellant's request for modification is inconsistent with the Office's initial decision of November 30, 1982. The Office's February 24, 1984 compensation order denied modification based on burden of proof grounds, and not on grounds of obstruction as was the case in the November 30, 1982 decision. When appellant submitted new medical evidence the Office should have made a merit decision regarding appellant's back injury claim and not merely have affirmed an "obstruction" decision. Therefore, a *de novo* decision on all aspects of the case should be made.[6]

The decisions of the Office of Workers' Compensation Programs dated November 30, 1982 and February 24, 1984 are hereby set aside; the case is remanded to the Office for further proceedings consistent with this decision.

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[5] See *Joseph L. Ellis*, 33 ECAB 183.

[6] See *Clayton L. Hall*, 33 ECAB 826.

In the Matter of CHRISTINE L. KIELB *and* U. S. POSTAL SERVICE, VESTAL POST OFFICE, VESTAL, N. Y.

Docket No. 84–1056; Submitted on the Record;
Issued August 7, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellant is entitled to medical benefits for the treatment rendered by her chiropractors.

On December 16, 1980, appellant, then a 27-year-old substitute carrier, felt a pull in her back after catching a bundle of mail that was heavier than she expected. She did not stop work at that time. Dr. John Goree, a Board-certified radiologist, stated in a January 20, 1981 report that x-rays of the dorsal spine showed:

> "Alignment is normal. There is no fracture or other injury present. The vertebral bodies, innerspaces and articulation are well maintained with nothing found to account for symptoms."

Appellant stopped working on March 20, 1981, claiming that work in casing mail caused pain and discomfort. Dr. Benjamin M. Bartolotto, a chiropractor, stated in an April 24, 1981 duty status report that appellant could resume light work on April 27, 1981. He diagnosed a right cervical strain and a "right thoraco-lumbar myalgia with intersegmental dysarthria."

Dr. Bartolotto referred appellant to Dr. Jeffrey A. Ribner, a Board-certified neurologist of professorial rank, for an examination. In a May 11, 1981 report, Dr. Ribner stated that appellant's neurological examination was "largely within normal limits." He noted some minimal lumbosacral spasm over the right paraspinal area. He indicated that appellant was able to return to light work. In a May 27, 1981 report, Dr. Ribner indicated that appellant had returned to work but was limited in standing and heavy lifting. He stated that the neurological examination still revealed some lumbosacral spasm. In an August 5, 1981 report, Dr. Ribner indicated that appellant still had some lumbosacral spasm but had relatively well-preserved mobility with no point tenderness.

Dr. Ribner referred appellant to Dr. David N. Lisi, a Board-certified radiologist of professorial rank, for x-rays of the lumbosacral spine. In an August 14, 1981 report, Dr. Lisi stated:

> "There are no abnormalities of alignment. The vertebral bodies are intact and the disc spaces maintained. The posterior elements and sacroiliac joints are normal in appearance. Incidentally noted are 2 calcifications in the right upper quadrant which most likely represent calcified gallstones.
>
> "IMPRESSION:
>
> Calcified gallstones. The lumbar spine is normal."

In a September 2, 1981 report Dr. Ribner stated that appellant continued to have difficulty with prolonged sitting or standing in one position. He indicated that her examination remained stable with some lumbosacral spasm, good mobility, no tenderness and no focal neurological deficits. In a September 4, 1981 letter, Dr. Ribner recommended that appellant be off work for three to four months. He noted that appellant's symptoms had abated when she was off work previously but that her return to work seemed to exacerbate her symptoms.

Dr. Bartolotto submitted several form reports reiterating his diagnosis of right cervical strain and right thoracic-lumbar myalgia with intersegmental dysarthria.[1] In a September 9, 1981 letter, appellant's representative requested payment of Dr. Bartolotto's bills. In an October 12, 1981 letter, Dr. Bartolotto indicated that he was referring appellant to another chiropractor. The Office of Workers' Compensation Programs informed the doctor in an October 29, 1981 letter, that the only condition it had accepted as employment related was appellant's back strain. It stated:

> "Under the 1974 amendments to the Federal Employees' Compensation Act, the definition of the word 'physician' was included to mean chiropractors within the scope of their practice as defined by State Law.
>
> "This means that a chiropractor can examine a claimant, have an x-ray taken, interpret the x-ray, and if the x-ray confirms that a claimant has a subluxation of the spine the chiropractor can perform manual manipulation of the spine. This is the treatment to which a chiropractor is limited.
>
> "This Office is not responsible for payment of any medical claims and/or residuals incurred for treatment of recurrent disabilities not due to the accepted condition(s)."

Dr. Robert J. LaFave, Jr., a chiropractor, stated in an October 27, 1981 report that appellant had cervical dorsal spondylalgia with paraspinal myositis, anterior listhesis of the D2 and D3 and lumbar paraspinal myalgia with intersegmental dysarthria retrolisthesis of the L2 and L3. He indicated that appellant's spinal condition was possibly related to her employment injury. He stated that the "anterior displacement of the 2nd and 3rd dorsal" vertebrae warranted light duty with no lifting over 20 pounds, more sitting than standing and no work above the shoulders.

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[1] Dr. Bartolotto subsequently defined intersegemental dysarthria as "rotational subluxation of the 3rd thoracic vertebra."

The employing establishment referred appellant to Dr. Myron Ball, a gastroenterologist and employing establishment physician, for a fitness-for-duty examination. In a January 12, 1982 report, Dr. Ball stated that he could find no positive sign or symptom of any condition causing appellant's complaints. He found appellant fit for limited duty and recommended that she be referred to an orthopedic surgeon.

Dr. LaFave, in a March 23, 1982 report, stated that appellant had "cervical dorsal spondylalgia with paraspinal myositis" accompanied by "right lateral brachial neuritis," "spondylolisthesis D2, D3 subluxation," and "left lateral C5, C6 subluxation." He stated that progress had been made but with some exacerbation of symptoms.

The Office, in May 3, 1982 letter, informed Dr. LaFave and Dr. Bartolotto that under the Federal Employees' Compensation Act the services of a chiropractor were limited to manual manipulation of the spine to correct a subluxation as demonstrated by x-rays. The Office indicated that the only x-ray reports on file failed to demonstrate a subluxation. In a letter of the same date, the Office informed appellant that the reports of Dr. Bartolotto and Dr. LaFave could not be accepted as medical evidence of disability because x-rays failed to substantiate the diagnosis of subluxation.

In a May 18, 1982 report, Dr. LaFave, stated:

> "In your letter you stated your office is not responsible for payment of my bills. The reason stated 'failure to show subluxation.' In my opinion as a chiropractor subluxations are demonstrable by x-ray. The medical radiology report does rule out fracture or disease process, as I also stated in my report.
>
> "According to the Houston Conference for classification of subluxations, these malalignments do appear. In my records and reports, I have included these subluxations in my chiropractic diagnosis."

Dr. Bartolotto, in a July 22, 1982 report, stated:

> "Ms. Kielb was first presented to my office December 18, 1980 and was under my care through and including September 3, 1981. During the time, all the appropriate forms and necessary information were submitted as required by the U. S. Department of Labor. My diagnosis, per the above cases: 1. Right Cervical Strain. 2. Right Thoraco-Lumbar Myalgia with Intersegmental Dysarthria. My chiropractic interpretation of the lumbosacral series performed January 20, 1981 at the Binghamton General Hospital, demonstrates a rotational subluxation at the third thoracic vertebra level."

The Office, in an August 16, 1982 decision, rejected appellant's claim for payment of Dr. Bartolotto's and Dr. LaFave's bills on the ground that the weight of the medical evidence failed to establish that the December 16, 1980 injury resulted in a subluxation of the spine demonstrated by x-ray to exist.

Appellant requested a hearing before an Office hearing representative.[2] At the March 28, 1983 hearing, appellant contended that a radiologist did not have the training or expertise that a chiropractor did to diagnose a subluxation by x-ray. She submitted in support of her argument a March 22, 1983 letter from Dr. Bartolotto who stated:

> "As your file indicates, the above-captioned patient was a patient under my care. Subluxation has historically and clinically been an inherent chiropractic term. Chiropractic therapy is defined and licensed as a separate healing art from any Allopathic branch or specialty. The United States Federal Government recognizes this fact and has established precedent guidelines in this matter, i.e. medicare claims. The application, appropriateness and efficiency of chiropractic therapy can best be evaluated by the chiropractic profession by the use of board certified chiropractic consultants, radiologist, etc., which do exist. I find it unreasonable that a practitioner of one healing art can determine the appropriateness of another healing art when the examining doctor is not licensed in the health field he is evaluating, and which is in essence is outside his scope of practice."

Appellant submitted an April 21, 1983 report from Dr. Howard W. Bernsen, a chiropractic roentgenologist, who stated:

> "Review of the Thoracic and Lumbar spine taken at Binghamton General Hospital, January 20, 1981 and again August 14, 1981: There is no radiographic evidence of osseous pathology. The intervertebral spaces are well-preserved in both Thoracic and Lumbar areas. A spina bifida occulta is noted at the sacral base. Two small shaped opacities are noted in the right upper quadrant which are biliary calculi.
>
> "Bio-Mechanical Evaluation: The vertebral body of T-3 is rotated to the left. The spinous is off centered by 2 mm. The pedicles are not symmetrical. This is consistent for a radiographic appearance of subluxation. The body of T-12, L-1/2 are markedly rotated. L-1 and L-2 are misaligned by 5 mm. The spinous are all left of the midline. The pedicles are not symmetrical due to this rotation. These findings are consistent with rotational type subluxations.

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[2] Appellant also appealed to the Board but subsequently withdrew her appeal. Docket No. 82-1851.

> "According to the definition of subluxation, which originated at the H.E.W. Conference in Houston in 1963 and has been adopted by the A.C.A., and the Federal Government including Medicare, 'A subluxation is the alteration of the normal dynamics, anatomical or physiological relationships of contiguous structures.' Therefore, the alterations in Ms. Kielb's spine are radiographic evidence of rotational type subluxation.
>
> "I, being Chairman of Roentgenology at the New York College of Chiropractic, a C.C.E. University, and also being a Diplomate of the American Chiropractic Board of Roentgenology teach it this way at both the undergraduate and postgraduate levels. It seems to me, that the question is really semantics, the medical profession refuses to acknowledge that misalignments (subluxation) exist, except when it serves their purpose."

The hearing representative, in a November 21, 1983 decision, found that the weight of the medical evidence rested with the Board-certified radiologist who found no evidence of subluxation of the spine. She also found that Dr. Bartolotto and Dr. LaFave were entitled to payment for treatment given before the chiropractors were notified that the Office would not pay for such treatment.

The Board finds that the Office properly refused to pay medical benefits for chiropractic services after the date that appellant and the chiropractors were informed that payment would not be authorized.

Dr. Goree, a Board-certified radiologist, reported that dorsal x-rays taken on January 20, 1981 showed normal alignment with no other injury present. Dr. Lisi, a Board-certified radiologist of professorial rank, reported in an August 14, 1981 report that lumbosacral x-rays showed no abnormalities of alignment with the vertebral bodies intact and the disc spaces maintained. He concluded that the lumbar spine was normal. Dr. Ribner, a Board-certified neurologist of professorial rank, diagnosed lumbosacral spasm. Dr. Bartolotto, a chiropractor, diagnosed a subluxation of the dorsal spine. Dr. LaFave, a chiropractor, diagnosed a subluxation of the dorsal and lumbar spine. Both chiropractors and Dr. Bernsen, a chiropractic roentgenologist, contended that the January 20, 1981 and August 14, 1981 x-rays showed subluxations. They contended that chiropractors were more qualified to diagnose a subluxation than a radiologist. These x-rays, however, were taken and interpreted by Board-certified radiologists. Their interpretation of their own x-rays are entitled to greater weight that the interpretation given by the chiropractors who subsequently reviewed the x-rays. The weight of the medical evidence from Dr. Ribner, Dr. Goree and Dr. Lisi establishes that appellant did not have a subluxation.

The decision of the Office of Workers' Compensation Programs dated November 21, 1983, is hereby affirmed.

In the Matter of STANLEY K. TAKAHASKI *and* DEPARTMENT OF THE NAVY, NAVAL CIVIL ENGINEERING LABORATORY, Port Hueneme, Calif.

Docket No. 84–1330; Submitted on the Record;
Issued August 7, 1984

Before GEORGE E. RIVERS, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant's sudden neurosensory hearing loss was causally related to factors of his federal employment.

Appellant, a 51-year-old engineer, filed a claim on July 21, 1982 alleging that on May 12, 1981 he sustained a complete loss of hearing in the left ear. He stopped work on May 15, 1981 and returned to work on May 18, 1981.

The employing establishment submitted evidence that beginning on May 9, 1981 appellant was on TDY [temporary duty status] for a period of approximately 31 days. Appellant's itinerary included stops in Hawaii, Guam, Japan and Reston, Virginia.

In a note dated June 10, 1983, appellant stated that he was on official government travel to Guam, that he was hospitalized at an employing establishment hospital in Guam where he incurred a bill in the amount of $126.91, and that his illness occurred during his official travel from the U.S. to Guam.

In response to an Office of Workers' Compensation Programs June 28, 1983 request for information, appellant stated in part:

> "Injury occurred from plane flight from Honolulu, HI to Guam, M.I. Incumbent was on TDY in Honolulu to discuss progress of Contract Work prior to departure. Upon arrival at Guam, left ear became compeletly deaf. Left Honolulu on 11 May 81 and arrived in Guam on 12 May 1981. The incumbent went to Guam to install strong motion accelerographs at the NRMC. On 12 May 1981, I went to see a physician at the Guam Memorial Hospital (emergency room) and paid $22.00. I was advised to get a specialist help since there was no obstruction in the ear (such as wax). On May 13, 1981 I saw Dr. Bell at the NRMC Guam who referred me to Dr. Swanson. Arrangements to see Dr. Bell was made by Lt. Maggie White, EIC at NRMC Guam. On May 14, 1981 I saw Dr. Swanson, Ear Specialist at NRMC Guam, who confined me immediately to the hospital for treatment. I spent three days and four nights in the NRMC Guam.

> I was released on 18 May to continue my TAD. My hearing became normal about 19 May 1981.
>
> "Lifting was not the cause of injury. Deafness may have been caused by the plane ride. I was not on annual leave at any time during the TAD."

On October 27, 1983, the Office requested appellant to submit medical evidence supporting his decision.

In a January 12, 1984 letter decision rejecting appellant's claim, the Office found that appellant had not met his burden of proof by failing to submit medical evidence in support of his contention that he sustained an injury as a result of a May 12, 1981 traumatic incident.

On February 6, 1984, appellant requested reconsideration and in support thereof submitted emnploying establishment hospital notes regarding his above-mentioned period of hospitalization.

An Office medical consultant, Dr. Brian E. Schindler, a Board-certified otolaryngologist, reviewed the employing establishment hospital notes submitted by appellant and on March 5, 1984 stated in part:

> "On reviewing the file I find that the only medical information is from the U. S. Navy at the Naval Station in Guam. The history on this sheet, which apparently was May 14, 1981, stated that the claimant is a 50-year-old male who noted on awakening in Honolulu four days ago that he had decreased hearing in his left ear. He denied any history of having had dizziness, roaring, fullness, no heavy lifting, coughing, etc. He was admitted to the hospital for absolute bed rest, steroids and histamine therapy. Physical examination at that time showed clear tympanic membranes. There is a notation, 'no history of fistula or pressure on examination of fistula test.' Audiograms show severe left sensorineural hearing loss, internal auditory canal. X-rays apparently were taken which were normal and ice water calorics gave a good response on the left. There are followup notes on the 15th, 17th and 18th which stated on the 18th that he was probably better and will continue Hydrochlorothiazide and will place on Afrin. As noted above, I cannot read the physician's name. I do not have any of the audiograms on this claimant. It appears from the information that was given to me from this very sketchy file, this being the only medical evidence that I have, that the claimant sustained what is known as a sudden neurosensory hearing loss. According to the doctor he awoke one morning in Hawaii and could not hear out of his left ear. This event has been known to occur not only in Hawaii and Guam but elsewhere throughout the world and does go by its usual medical name in the literature as sudden neurosensory hearing loss. Its etiology is unknown. There have been a variety of etiologies postulated for this disease process but none of them have been proven. It is my opinion that Mr. Takahaski sustained a sudden neurosensory hearing loss

> while in Hawaii. I do not feel that any other factors involved, specifically his flying, contributed to this hearing loss. I base this on a record that I have which states that the claimant awoke in Hawaii and had decreased hearing in his left ear. I presume that he was in a hotel or another ground-based facility when this happened. If there is further evidence that can clarify this problem, I would be happy to review this file again in the future, but it is my opinion from the evidence supplied to me that the claimant has not established a causal relationship between his sudden neurosensory hearing loss and any factors involved in federal employment."

By compensation order dated April 20, 1984, the Office found that "[t]he evidence submitted in support of the application is not sufficient to warrant modification of the prior decision."

The Board finds that appellant has failed to meet his burden of proof in establishing that his sudden neurosensory hearing loss was causally related to factors of his federal employment.

An award of compensation may not be based on surmise, conjecture or speculation or on an employee's unsupported belief of causal relation. Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his hearing loss condition and resultant disability were causally related to factors of his federal employment. This burden includes the necessity of furnishing medical opinion evidence of a cause and effect relationship based upon a proper factual and medical background. The mere concurrence of a condition with a period of employment does not raise an inference of causal relation between the two.[1]

The only medical evidence in the case record submitted by appellant was employing establishment hospital notes. However, the hospital notes signed by a physician whose name is not given do not address the issue of causal relationship. Dr. Schindler, a Board-certified otolaryngologist and an Office medical consultant, was of the opinion that appellant's sudden neurosensory hearing loss was not causally related to his federal employment. Dr. Schindler stated that the hospital notes indicated a history of appellant awakening in the morning with hearing loss.

Where an employee is on a temporary duty assignment away from his regular place of employment, he is covered by the Federal Employees' Compensation Act 24 hours a day with respect to any injury that results from activities incidental to his temporary assignment. The fact that an employee was on a special mission or in travel status during the time a disabling condition manifested itself does not raise an inference that the condition was causally related to the incidents of the employment.[2] Thus, if appellant's hearing loss had resulted from activities incidental to his employment the injury would have been compensable. However, according to Dr. Schindler's interpretation of the history provided by appellant to the employing establishment hospital physician, his hearing loss appeared when he awoke from his sleep without any apparent relationship to the incidents of his employment; therefore, the condition cannot be regarded as employment related.[3]

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[1] *Robert M. Sanford*, 27 ECAB 115.

[2] *William B. Merrill*, 24 ECAB 215.

The decisions of the Office of Workers' Compensation Programs, dated January 12, 1984 and April 20, 1984, are hereby affirmed.

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[3] *Melvin E. Koon*, 2 ECAB 258.

In the Matter of CHARLES D. WATSON *and* DEPARTMENT OF AGRICULTURE, CONSUMER AND MARKETING SERVICE, West Point, Miss.

Docket No. 84-1241; Submitted on the Record;
Issued August 10, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs acted properly in denying appellant's request for a second hearing.

On September 4, 1969 appellant, then a 36-year-old meat inspector, filed a claim alleging he contracted brucellosis due to the factors of his federal employment. [1] His condition was subsequently accepted by the Office of Workers' Compensation Programs as employment related and he received compensation benefits for the period August 12 to September 7, 1969. Appellant returned to work on September 8, 1969.

On March 31, 1971 appellant complained of aching joints "similar to when I had brucellosis in 1969." Appellant was authorized to undergo a medical evaluation which was reported negative.

On February 9, 1973 the Office referred appellant, together with the case record, to Dr. Alan N. Bisno, a Board-certified internist, for an evaluation and opinion on whether his symptoms were related to the 1969 episode of brucellosis. In a report dated March 12, 1973 Dr. Bisno concluded that appellant had chronic brucellosis related to the 1969 episode.

By letter dated July 23, 1973 the Office notified appellant that it accepted his condition as employment-related chronic brucellosis.

On April 29, 1975 appellant was referred by the Office, together with the case record, to Dr. Robert F. Ackerman, a Board-certified internist, for an updated evaluation. In a report dated June 6, 1975, he diagnosed exhaustion; fibrositic rheumatism; labile hypertension asymptomatic; stasis edema, mild, allergic rhinitis and bronchitis, mild; and probable acute brucellosis from 1969 with residual positive agglutination test. He noted, however, that appellant's complaints were not specific for chronic brucellosis and disagreed with Dr. Bisno's conclusion that appellant's symptoms were caused by brucellosis. He concluded that appellant's symptoms were "a result of mild anxiety depression" which was common in adults of his age group.

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[1] Brucellosis is defined as a generalized infection of man involving primarily the reticuloendothelial system caused by a species of brucella derived from contact with goats, cattle, and pigs. *Dorland's Illustrated Medical Dictionary* 230 (25th ed. 1974).

On July 13, 1976 appellant filed notice of recurrence of disability and claim for compensation commencing that date, alleging joint pain, muscle soreness, and fatigue which he attributed to his brucellosis condition.

On November 18, 1976 an Office medical adviser reviewed the case record and concurred in Dr. Ackerman's conclusions.

By compensation order dated June 17, 1977 the Office rejected appellant's claim for compensation after July 13, 1976 finding that his disability after that date was not causally related to his federal employment.

Appellant thereafter filed an appeal with the Board. By motion dated October 21, 1977 the Director of the Office requested that the Board remand the case on the ground that there existed a conflict in medical opinion between the reports of Dr. Ackerman and Bisno, both Board-certified specialists. By order dated November 10, 1977 the Board granted the Director's motion and remanded the case for further development.[2]

On remand, the Office referred the case record and a statement of accepted facts to Dr. William R. Lockwood, a specialist of professorial rank in infectious diseases. In a report dated February 27, 1979, Dr. Lockwood stated that the original diagnosis of acute brucellosis was made on the basis of agglutination titers tests of which only one result was reported as being 1/160. He indicated that the diagnosis of brucellosis could not be made with confidence on the basis of one agglutination titer and that appellant's symptoms were not sufficient to establish the diagnosis. Dr. Lockwood noted that assuming appellant did have brucellosis in 1969, he was treated with antibiotics and subsequent medical examinations by Drs. Ackerman and Bisno were unable to substantiate the disease. He concluded that appellant's symptoms were "more likely to represent chronic depression than chronic brucellosis," and opined that appellant "does not have chronic brucellosis at this time and probably never did."

On March 12, 1979 the Office medical adviser reviewed Dr. Lockwood's report and concurred with his conclusion that appellant's complaints were not causally related to the bacterial infection of brucellosis.

By compensation order dated April 6, 1979 the Office rejected appellant's claim finding that the injury sustained on August 12, 1969 did not result in disability for work or loss of wages or loss of capacity to earn wages after September 7, 1969.

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[2] Docket No. 77-519

On April 17, 1979 appellant, through his representative, requested a hearing before an Office hearing representative which was held on February 13, 1980. At the hearing appellant submitted medical reports previously made part of the record and the January 23, 1979 report of Dr. Stanely B. Kaplan, a Board-certified internist, who stated: "Because of Mr. Watson's history dating back to his episode of acute brucellosis, it is possible that his complaints have some relationship to that problem. However this cannot be proven." Dr. Kaplan also submitted a February 29, 1980 report in which he indicated that brucella agglutinin tests were negative.

The Office hearing representative, in an April 15, 1980 decision, affirmed the April 6, 1979 compensation order finding that the weight of the medical evidence was represented by Dr. Lockwood, the impartial specialist who negated causal relationship.

By letter dated May 13, 1980 appellant, through his representative, requested reconsideration and requested permission to take the deposition of Dr. Lockwood and submit it as new evidence in support of the request for reconsideration. On June 24, 1980 an Office claims examiner informed appellant's representative of Dr. Lockwood's address and telephone number.

By letter dated February 11, 1982 appellant's representative requested that the case be reopened so the deposition of Dr. Lockwood could be obtained and additional medical evidence provided by appellant's treating physician. In a letter dated March 1, 1982 the Office notified the attorney that appellant's case would be reopened for reconsideration upon the receipt of relevant evidence not previously considered.

By letter dated April 14, 1983 appellant's representative submitted the January 19, 1983 report of Dr. Kaplan. In a letter dated May 16, 1983 the attorney requested a hearing be held "so we can provide additional lay testimony as to his current condition . . . " The Office notified appellant's representative on June 6, 1983 that the case was forwarded to the Branch of Hearings on Review for consideration of his request.

In a letter decision dated March 5, 1984 the Office denied appellant's request for a hearing stating that he had already received one hearing and finding "that a second hearing on the issue of continuing disability would serve no useful purpose." Thereafter appellant filed this appeal from the denial of the second hearing.

The Board finds that the Office properly denied appellant's request for a second hearing.

Section 8124(b) of the Federal Employees' Compensation Act provides that a claimant not satisfied with a decision on his claim is entitled, upon timely request, to a hearing before a representative of the Office. There is no provision in the Federal Employees' Compensation Act entitling a claimant to more than one hearing.[3] If a claimant has received a hearing on an issue or set of issues and the hearing representative affirms the Office's decision, a claimant is not entitled to another hearing on that issue or set of issues even if he proffers new evidence. He may receive a second hearing only if the Office, in its discretion, grants him a hearing.[4]

In this case the Office concluded that a second hearing would serve no useful purpose. The Office, by the letter decision dated March 5, 1984, pointed out that appellant could submit the new medical opinion of Dr. Kaplan in a request for reconsideration. Under these circumstances, the Office was not required to provide appellant a second hearing.

The March 5, 1984 decision of the Office of Workers' Compensation Programs denying a second hearing is affirmed. The case record is returned to the Office to act upon appellant's request for reconsideration of the Office's decision denying further compensation benefits.

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[3] *Booker T. Jackson*, 29 ECAB 29; *Pilar Costales*, Docket No. 82-982; issued October 29, 1982.

[4] *John A. Zibutus*, Docket No. 82-1501, issued September 9, 1982.

In the Matter of BARBARA J. HINES *and* ADMINISTRATIVE OFFICE OF U.S. COURTS, PROBATION OFFICE, Sioux Falls, S.D.

Docket No. 84-707; Submitted on the Record;
Issued August 13, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS,
DAVID S. GERSON

The issue is whether appellant has more than a seven percent permanent impairment of her right arm for which she received a schedule award.

On February 6, 1978 appellant, then a 45-year-old stenographer, filed a claim for a right arm and hand condition which she attributed to factors of her employment. Appellant left this employment on September 9, 1978 for a position as a district loan assistant, the position from which she retired effective August 12, 1980.

After developing the evidence, the Office of Workers' Compensation Programs determined that factors of appellant's employment caused her writer's cramp syndrome. The Office paid compensation for temporary total disability until February 26, 1981 on which date it began paying compensation for loss of wage-earning capacity.

On December 16, 1983 the Office issued appellant a schedule award for a seven percent permanant impairment of her right arm, to be paid from December 1, 1983 to May 1, 1984. Appellant filed an application for review of this decision with the Board.

The Board finds that the weight of the medical evidence establishes that appellant has a 20 percent permanent impairment of her right arm.

In a September 30, 1980 report Dr. James H. Dobyn, a Board-certified orthopedic surgeon who specializes in hand surgery, stated that appellant had writer's cramp manifested by pain, uncoordination, and eventual inability to control objects in her hand. Dr. Dobyn stated that he was "quite familiar" with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, but that there was nothing in the AMA *Guides* which directly pertained to appellant's type of problem. Dr. Dobyn estimated that appellant had a 20 percent permanent impairment of her right arm.

On December 8, 1980 Dr. William F. Stanek, a Board-certified orthopedic surgeon acting as an Office medical consultant in this case, reviewed the medical evidence and stated that Dr. Dobyn's report was "worthy of rather special attention in evaluation of [appellant]," as Dr. Dobyn was a recognized orthopedic and hand surgeon at the Mayo Clinic and had made a detailed evaluation of appellant's condition.

The Office referred appellant to Dr. Robert R. Giebink, a Board-certified orthopedic surgeon, for an evaluation and an opinion on the permanent impairment of her right arm, among other matters. In a September 19, 1983 report Dr. Giebink concluded that appellant had a 20 percent permanent impairment of her right arm, of which he attributed half to a cervical disc syndrome which he stated was aggravated by her employment.

On October 3, 1983 Dr. David C. Greenberg, a Board-certified orthopedic surgeon acting as an Office medical consultant in this case, reviewed the medical evidence and stated that the work-related diagnosis was tenosynovitis of the flexor tendons of appellant's right forearm, that Dr. Dobyn was an outstanding expert in the pertinent field of medicine and that strong emphasis should be placed on his evaluation and opinion, and that the AMA *Guides* were not applicable to appellant's condition.

The Office's determination that appellant has a seven percent permanent impairment of her right arm was based on the calculations of an Office medical adviser who is Board-certified in preventive medicine and in the subspecialty of occupational medicine. This medical adviser applied the AMA *Guides* in arriving at a seven percent impairment, but considered only loss of sensation in appellant's digits of her right hand in arriving at this figure.

The Board finds that the weight of the medical evidence is represented by the reports of the four Board-certified orthopedic surgeons. The two Board-certified orthopedic surgeons who examined appellant, Drs. Giebink and Dobyn, concluded that appellant had a 20 percent permanent impairment of her right arm. The two Board-certified orthopedic surgeons who acted as Office medical consultants stated that Dr. Dobyn's evaluation and opinion were entitled to great weight in determining the permanent impairment of appellant's right arm.

The decision of the Office of Workers' Compensation Programs dated December 16, 1983 is hereby set aside and the case remanded to the Office for payment of a schedule award for a 20 percent permanent impairment of the right arm (less the seven percent already paid.)

In the Matter of MACARTHUR CRENSHAW *and* U.S. POSTAL SERVICE, POST OFFICE, Washington, D.C.

Docket No. 84-1327; Submitted on the Record;
Issued August 17, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether appellant's injury in two falls at work on May 21, 1981 constituted an injury in the performance of duty within the meaning of the Federal Employees' Compensation Act.

On June 12, 1981 appellant, then a 35-year-old mail clerk, filed a claim alleging injury to his leg, head and arm which he attributed to a seizure at work on May 21, 1981. He stopped work that date and received treatment at the employing establishment medical unit.

In support of his claim appellant submitted the statement of F. A. Parker and W. Carpenter, coemployees, who stated that at about 6:57 p.m. on May 21, 1981 he was in an employing establishment restroom when he had a seizure. Both men indicated that they caught appellant before he fell to the floor and restrained him until a nurse arrived.

Appellant also submitted the July 17, 1981 report of Dr. William B. Russell, a Board-certified orthopedic surgeon, who treated appellant for complaints of head, left shoulder and leg pain which resulted from an injury sustained on May 21, 1981 during a succession of epileptic seizures. Dr. Russell obtained a history of seizures beginning "approximately three years ago," and noted a negative orthopedic examination with areas of localized pain. He recommended that appellant consult a neurologist in regard to his epileptic seizures.

By letter dated July 29, 1981 the employing establishment controverted appellant's claim and submitted the June 2, 1981 report of the employing establishment medical unit's head nurse who noted that following appellant's first seizure he was taken to the medical unit and his vital signs were checked. Thereafter, at 9:10 p.m. appellant started to have a second seizure in a standing position and he was lowered to the floor by the attending nurses and subsequently transported to the hospital.

By compensation order dated January 20, 1982 the Office rejected appellant's claim finding that the May 21, 1981 injury did not arise out of a risk connected with his employment and, therefore was not compensable.

By letter dated February 4, 1982 appellant, through his representative, requested a hearing before an Office hearing representative. At the hearing on May 26, 1982 appellant submitted the October 13, 1981 and February 9, 1982 reports of Dr. Russell, who stated that upon examination on November 17, 1981 appellant was released to return to light duty work and on January 12, 1982 he was released to return to his regular employment duties. Appellant also submitted a statement signed by Carrie B. Moore, who stated that at 9:30 p.m. on May 21, 1981 she had taken appellant's shirt to him in the medical unit. She alleged that appellant stood to put on the shirt when he screamed and fell to the floor and was not caught by the nursing staff before he fell. At the hearing Ms. Moore stated that she became frightened by the seizure and was unable to aid appellant.

By decision dated July 8, 1982 the hearing representative set aside the January 20, 1981 compensation order and remanded the case for further development on whether appellant fell to the immediate supporting surface without intervention or contribution by any hazard or special condition of employment.

On remand, the Office obtained the October 19, 1982 signed statements of Shirley Wright and Phyllis G. Riley, both nurses with the employing establishment medical unit, who indicated that they treated appellant on May 21, 1981. Both nurses stated that while in the medical unit they heard an aura or loud cry made by appellant and ran to appellant who was experiencing a seizure. They stated that appellant was lowered to the floor to protect him from falling and they turned his head to prevent him from choking on his tongue. They indicated that the seizure lasted approximately 60 seconds. Thereafter he was transported by ambulance to a local hospital.

By compensation order dated March 12, 1983 the Office rejected appellant's claim finding that his injury resulted from an idiopathic fall with no intervention or contribution by any hazard or special condition of employment and, therefore , the injury was not compensable.

By letter dated March 24, 1983 appellant, through his representative, requested a hearing before an Office hearing representative.

At the hearing held on December 3, 1983 appellant alleged that when he had his second seizure on May 21, 1981 in the employment establishment health station he fell and struck his head against the baseboard of the wall and had not been caught as alleged by the nurses employed in the health unit. Appellant also stated that he "blanked out"at the time of the second seizure and woke up on the floor.

By decision dated and finalized March 20, 1984 the hearing representative affirmed the March 17, 1983 Office compensation order.

The Board finds that the evidence establishes that the employee's falls were idiopathic in nature and did not constitute an injury within the meaning of the Federal Employees' Compensation Act.

It is a well-settled principle of workers' compensation law, and the Board has so held, that an injury resulting from an idiopathic fall—where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment—is not within the coverage of the Federal Employees' Compensation Act. Such an injury does not arise out of a risk connected with the employment and it, therefore, is not compensable.[1]

In the instant case, the medical evidence establishes that appellant had an epileptic condition and a history of seizures commencing three years prior to the May 21, 1981 incident. Dr. Russell, a Board-certified orthopedic surgeon, did not indicate the cause of the seizures; he recommended that appellant undergo consultation with a neurologist. His report does make it clear, however that the May 1981 episode was attributable to an abnormal physical condition.

It is well-settled, and the Board has recognized on numerous occasions, that although a fall is idiopathic, an injury or death resulting from it is compensable if "some job circumstance or working condition intervenes in contributing to the incident or injury; for example, the employee falls onto, into, or from an instrumentality of the employment,"[2] or where, instead of falling directly to the floor on which he has been standing, the employee strikes a part of his body against a wall, a piece of equipment, furniture, or machinery, or some like object.[3]

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[1] *Rebecca C. Daily*, 9 ECAB 255; *Gertude E. Evans*, 26 ECAB 195; *Martha G. List*, 26 ECAB 200; *Chunny Wong (George Wong)*, 31 ECAB 579.

[2] *Rebecca C. Daily*, *supra*.

[3] See *Rebecca C. Daily*, supra; *Wilford M. Smith*, 9 ECAB 259; *Pauline Finley*, 19 ECAB 481. See also Larson, *Workmen's Compensation Law*, sections 12.00, 12.11, 12.14.

Appellant contends that he struck the baseboard of the employing establishment wall during his second seizure on May 21, 1981.

Appellant has the burden of establishing his allegation that he struck an object connected with the employment during the course of his idiopathic collapse.[4] In the present case, the Board finds that the weight of the evidence is represented by the signed statements of two nurses on duty at the time in question who indicated that they caught and lowered appellant to the floor to keep him from injuring himself. As appellant testified at the hearing, he "blanked out" at the time of the seizure and did not regain consciousness until after the seizure had ended. The statements of Carrie B. Moore indicate that appellant fell to the floor but she did not state that appellant's head had hit an intervening object.

The March 20, 1984 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[4] *Gertude E. Evans, supra.*

In the Matter of EDMUND J. MARCINKIEWICZ *and* DEPARTMENT OF THE ARMY, FORT MONMOUTH, N.J.

Docket No. 84-1402; Submitted on the Record;
Issued August 22, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether appellant's fall on April 27, 1983 was sustained in the performance of duty.

On April 27, 1983 appellant, then a 24-year-old mechanical engineer, passed out and fell to the floor while at work. He was taken to the hospital emergency room where he was treated for a laceration of the chin. Appellant was released to return to his regular duties on April 28, 1983.

In a signed statement a witness to the fall stated: "Employee asked if it was warm during conversation. Answered 'yes', then said he felt dizzy. His eyes rolled and within three seconds he fell face down with legs straight. No one moved him as he laid [unconscious] for about one minute at which time his eyes moved and he talked. Aid reached him within five minutes."

In a report dated June 6, 1983 Dr. Ronald M. Weinberg, a Board-certified internist, stated that appellant had undergone an EEG (electroencephalogram) to rule out any sequelae from his injury sustained April 27, 1983.

On June 8, 1983 appellant submitted a statement to the Office of Workers' Compensation Programs in which he noted that he had no prior history of fainting spells or epilepsy. He also submitted the undated report of Dr. Paul J. Condello, a dentist, who treated appellant for fractures sustained to his jaw and teeth in the fall of April 27, 1983.

In a report dated August 17, 1983 Dr. Weinberg stated that his examination of appellant on May 5, 1983 revealed evidence of chin laceration, multiple left posterior chipped molars, and left tempero-mandibular joint pain. He indicated that appellant's neurological examination was normal and enclosed the May 12, 1983 EEG report of Dr. Martin N. Herman, a Board-certified neurologist, which was within normal limits.

By letter dated October 11, 1983 the Office requested appellant to advise whether he fell directly to the floor or if he struck an intervening object when he fainted and fell on April 27, 1983. In a response dated October 24, 1983 appellant, through his attorney, informed the Office that "[appellant] fell directly on the floor and did not strike any object than the floor." He also advised the Office that appellant had previously sustained a mild concussion at age 11 while playing football but indicated there had been no residual difficulties associated thereafter.

By compensation order dated December 13, 1983 the Office rejected appellant's claim finding that his disability was not due to factors of his federal employment.

By letter dated December 15, 1983 appellant, through his attorney, requested reconsideration and submitted photocopies of several federal statutes in support of his request.

By compensation order dated January 18, 1984 the Office denied appellant's application for review finding that the evidence submitted in support of the application was lacking substantial probative value and was not sufficient to warrant review of the prior decision.

The Board finds that the evidence establishes that the employees' fall was idiopathic in nature and did not consitute an injury within the meaning of the Federal Employees' Compensation Act.

It is a well-settled principle of workers' compensation law, and the Board has so held, that an injury resulting from an idiopathic fall—where a personal, nonoccupational pathology causes an employee to collapse and suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment—is not within the coverage of the Act. Such an injury does not arise out of a risk connected with the employment and it, therefore, is not compensable.[1]

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[1] *Rebecca C. Daily*, 9 ECAB 255; *Gertrude E. Evans*, 26 ECAB 195; *Martha G. List*, 26 ECAB 200. See also Larson, *Workmen's Compensation Law*, section 12.00, 12.11.

It is also well-established, and the Board has recognized on numerous occasions, that although a fall is idiopathic, an injury or death resulting from it is compensable if "some job circumstance of working condition intervenes in contributing to the incident or injury; for example, the employee falls onto, into, or from an instrumentality of the employment",[2] or where, instead of falling directly to the floor on which he has been standing, the employee strikes a part of his body against a wall, a piece of equipment, furniture, or machinery, or some like object.[3]

Appellant has the burden of establishing that he struck an object connected with the employment during the course of his idiopathic collapse.[4] However, in the present case, the evidence indicates that appellant lost consciousness while speaking with fellow employees and fell directly to the floor. There is no evidence indicating that he struck any object, other than the floor, during the course of his fall at work on April 27, 1983.

The January 18, 1984 and December 13, 1983 decisions of the Office of Workers' Compensation Programs are affirmed.

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[2] *Rebecca C. Daily*, *supra*.

[3] *Wilford M. Smith*, 9 ECAB 259; *Pauline Finley*, 19 ECAB 481; *Chunny Wong*, 31 ECAB 579.

[4] *Gertrude E. Evans*, *supra*.

In the Matter of AURORA L. PALALAY, claiming as widow of RICHARD P. PALALAY *and* DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Los Angeles, Calif.

Docket No. 84–1307; Submitted on the Record;
Issued August 23, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant's claim for death benefits, which was filed more than one year but less than five years after the date of the employee's death, is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

On March 10, 1978, appellant, the employee's widow, filed a claim alleging that the employee's death on July 15, 1974 from subarachnoid hemorrhage secondary to metastatic melanoma was causally related to his federal employment. This is the third appeal in this case. In the prior appeals,[1] the Board found that appellant's ignorance of the right to file a compensation claim for death benefits was not "sufficient cause or reason" to justify waiver of the one-year time limitation.[2]

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[1] Docket No. 80-6 (decision and order issued January 9, 1980); Docket No. 81-1877 (decision and order issued October 30, 1981). The facts of the case as set forth in the previous two decisions are hereby incorporated by reference.

Appellant sought reconsideration before the Office of Workers' Compensation Programs and asserted in a December 17, 1981 letter that she delayed filing her claim because she was afraid of the consequences if the claim concerned classified information at the employing establishment. She also asserted that she delayed because she was afraid that exhumation of the employee's body might be necessary to determine the cause of his cancer.

The Office denied reconsideration in a February 19, 1982 compensation order, finding the additional evidence "to be cumulative, lacking in substantial probative value, and not sufficient to require review of the prior decisions."

In a subsequent request for reconsideration, appellant asserted that part of the delay in filing the claim occurred because in early 1975, the employee's cousin agreed upon appellant's request to work on preparing the claim, so she "totally forgot this matter" after assuming he would file the claim. The employee's cousin submitted a statement relating similar facts and stating that he "gave all papers to a lawyer" who moved without leaving a change of address. The cousin's statement also related that appellant was too "upset, dazed, and saddened by the death of her husband" to file a claim. Appellant also submitted a March 10, 1982 statement of a former coworker of the employee which related that appellant hesitated to file a claim out of fear of being called to testify about her husband's work and because she could not afford a lawyer. The coworker stated he then told appellant she would not need a lawyer and would only need to go to the employing establishment and complete the necessary forms.[3] He stated he believed appellant could not remember what he had told her, as she had "grown old after the passing away of her husband . . ."

The Office reviewed the case on the merits and denied modification in a June 18, 1982 decision because appellant had not established that she pursued her claim "with the diligence an ordinarily prudent person would use . . . in the same or similar circumstances." [4]

Following appellant's resubmission of the above-mentioned statements, the Office denied reconsideration in an August 4, 1982 compensation order on the ground that the evidence was "of a cumulative nature and repetitious in nature, and irrelevant, and not sufficient to require review of the prior decision."

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[2] 5 U.S.C. section 8122(c) (1970 and Supp. III 1973), the applicable time limitation provision, provided that the one-year period for filing a claim might be waived if the claim was filed within five years and the Office finds that (A) the failure to comply was due to circumstances beyond the control of the individual claiming benefits, or (B) that such individual has shown sufficient cause or reason in explanation of, and material prejudice to the interest of the United States has not resulted from the failure.

[3] The statement does not indicate when this conversation occurred.

[4] Citing *William M. Painter*, 27 ECAB 94.

Appellant then submitted a July 17, 1982 statement of Dr. Jose P. Javier, who related that appellant was a "close family friend" and an "occasional patient" of his in the early 1970s. He stated that appellant and her husband moved in 1973 when her husband became ill and that when he next saw her in July 1976, he was "surprised to see how much she aged in three years." He noted that appellant wrote him a letter in late 1974 and told him it was "the first time after her husband's death that she could pick up a pen and paper and express her thoughts with coherency." He stated that appellant "suffered from severe depression" after the employee's death for about a year." He stated, "This could explain her failure to file claims in due time."

Dr. Ira E. Kaplan, a Board-certified internist and an Office medical consultant, reviewed the statement of Dr. Javier and stated in a September 21, 1982 report that the death of a spouse "is the most stressful occurrence one can experience and often the survivor does not ever get over it or has a difficult time doing so." Dr. Kaplan stated that Dr. Javier's statement was not sufficient to establish appellant was incompetent to manage her affairs after her husband's death. He stated appellant may have been "devastated" for up to half a year after her husband's death, but that he could not "medically support her failure to timely file her claim" after that.

The Office denied modification in a November 30, 1982 compensation order.

Appellant again requested reconsideration and submitted statements from two nieces concerning her emotional condition following the employee's death. One statement related that appellant had been "despondent from 1974 to late 1978 due to the death of her husband," and that it was "in the latter part of 1978 when she began to realize there were benefits she was entitled to." The other statement related that appellant "was in a daze and just moping around the house for a few months [after the employee's death] practically helpless."

By compensation order dated April 28, 1983, the Office denied modification of its previous decisions, finding the additional evidence "not sufficient" to warrant modification.

The Board finds that the Office properly refused to waive the one-year time limitation applicable to this case.

As the Board found in the prior appeals that appellant's claim for death benefits was not filed within the one-year time limitation period applicable to this case, the issue on this appeal is whether she has shown that the circumstances permit waiver of the one-year period.[5] In order to establish "sufficient cause or reason" to justify waiver, appellant must show she prosecuted the claim with that degree of diligence which an ordinarily prudent person would have exercised in protecting his rights under the same or similar circumstances.[6] The evidence fails to make such a showing in this case.

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[5] See note 2, *supra*.

Appellant first asserted she was afraid to file a claim because classified information could be involved and because the employee's body might have to be exhumed to establish causal relation. She later indicated the delay in filing was due to her reliance on her husband's cousin to prepare a claim. The Board finds that these circumstances do not represent the requisite degree of diligence to justify waiver.

Other evidence submitted relates to appellant's assertion that she could not file within the one-year period because of her emotional condition following her husband's death. Most of this evidence was nonmedical, consisting of statements from appellant's nieces, the employee's cousin, and a former coworker. The only statement from a physician was that of Dr. Javier, a family friend who stated appellant was an "occassional patient" of his in the early 1970s. He opined that appellant was severely depressed for about a year after the employee's death, which "could explain" her failure to file a timely claim.

Dr. Kaplan, a Board-certified internist and an Office medical consultant, stated that Dr. Javier's statement was not sufficient to establish she was incompetent to manage her affairs after the employee's death and that he could not "medically support her failure to timely file her claim" for more than half a year.

The Board finds that the evidence is insufficient to establish an emotional condition that justified appellant's failure to file a claim for more than three and one-half years after the employee's death. Although it is not necessary to show technical incompetence in order to justify waiver of the one-year period, the medical evidence must establish that appellant's emotional condition was so severely incapacitating as to prevent her from filing a claim.[7] Such evidence has not been presented in this case.

The decision of the Office of Workers' Compensation Programs dated April 28, 1983 is hereby affirmed.

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[6] See *William M. Painter*, *supra* note 4.

[7] See *Buford E. McMillan*, 17 ECAB 608; *Richard T. Southmayd*, 19 ECAB 437; *George B. Duncan, Jr.*, 32 ECAB 189.

In the Matter of Vivien L. Minor *and* U. S. Postal Service, Post Office, Washington, D.C.

Docket No. 83–1648; Hearing August 6, 1984;
Issued August 24, 1984

Appearances: *Carl W. Carter, Esq.*, for appellant; *Brenda Stovall, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant did not sustain an injury while in the performance of her federal employment on December 19, 1980, as alleged.

On December 19, 1980 appellant, then a 27-year-old mail clerk, filed a claim alleging she sustained an injury that date to her low back and stomach when "riding up escalator step drop almost to next level I fell back two or three steps but I caught myself." [1] On the claim form, her supervisor controverted the claim, noting that he investigated the escalator and observed no breakdown of the equipment.

Appellant stopped work following the alleged injury and was examined by an employing establishment nurse who obtained a history from appellant indicating she was injured on the escalator but did not fall. The nurse noted that appellant was 12 to 14 weeks pregnant. She was referred to the George Washington University Hospital where Dr. Caryl Jackson, an emergency room physician, obtained a history indicating that appellant fell at the time of injury. Dr. Jackson noted that appellant was bleeding, but was unable to tell if it was due to her pregnancy or secondary to the fall. She subsequently had a miscarriage.

In a report dated December 30, 1980 Dr. Rida N. Azer, a Board-certified orthopedic surgeon, stated he first examined appellant on December 19, 1980 and diagnosed acute strains of her lumbosacral and cervical spine. He indicated she was totally disabled for work and responded "yes" to the question, "Do you believe the condition found was caused or aggravated by the employment activity described." He noted a history that appellant had fallen backwards on an escalator.

In response to an Office of Workers' Compensation Programs request for additional information regarding the injury, appellant described her injury, as follows: "Riding up first floor escalator the [step] shifted and collapsed sending me back three or four steps, it happened so fast I grabbed my neck and then I caught the hand rail. Immediately my back started hurting [and] stomach shifted." She indicated that the injury was immediately reported to her supervisor and noted she had a prior claim for a knee injury on March 30, 1977 and a "disc problem in back."

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[1] In support of her claim appellant submitted two statements by coemployees who described incidents in July and September 1980 when the escalators at the employing establishment malfunctioned. On July 22, 1981 the employing establishment submitted an investigative memorandum which indicated that the "up" escalator in question had been serviced one-year prior to appellant's injury and that no problems in its operation had been reported. An independent escalator and elevator consulting firm examined the escalator in question and reported that it was not possible for the escalator steps to "collapse" or drop down as had been alleged by the appellant.

In attending physician reports filed between December 30, 1980 to June 9, 1981 Dr. Azer repeated his diagnosis of acute lumbosacral and cervical strains, indicated that appellant remained totally disabled and stated that her disability was due to the December 19, 1980 employment injury.

The Office accepted appellant's claim for acute strains of the lumbosacral and cervical spine and she received continuation of pay from December 19, 1980 to February 1, 1981 and compensation for temporary total disability commencing February 2, 1981.

On June 26, 1981 an Office medical adviser reviewed the record and stated that appellant's continuing disability was no longer due to the employment injury and recommended she be referred to a specialist for examination.

Appellant was referred, together with a statement of accepted facts and medical records, to Dr. Jeffrey H. Phillips, a Board-certified orthopedic surgeon, for an opinion on the extent and degree of any disability remaining as a result of the employment injury. In a report dated July 23, 1981, he noted that multiple nonanatomical findings were present during his examination of her cervical spine and lumbar region. He concluded she required no further orthopedic care with regard to her work.

In a report dated August 17, 1981 Dr. Azer noted that appellant remained totally disabled; indicated she was advised to discontinue physical therapy; and reported that a CT [computerized tomography] scan showed no evidence of a herniated disc. A lumbar myelogram of May 18, 1981 was reported evidencing a wide epidural space at the S-1 level with no other abnormality.

On September 1, 1981 the Office medical adviser reviewed the record and concurred in Dr. Phillips' conclusion that appellant's disability from the December 1980 injury had resolved.

In reports submitted between October 7, 1981 and April 19, 1982 Dr. Azer indicated appellant was totally disabled due to her lumbosacral strain which he related to the employment injury of December 19, 1980.

To resolve the conflict of medical opinion evidence existing between Dr. Azer and Dr. Phillips, the Office referred appellant for examination, together with the case record and statement of accepted facts, to Dr. Arthur B. Wein, a Board-certified oprthopedic surgeon. In a report dated August 25, 1982, he opined that appellant's disability was not related to the injury of December 19, 1980. He concluded that the residuals of the injury had resolved two to three months after the incident.

In a report dated September 14, 1982, Dr. Wein commented:

> "In reference to my statement concerning emotional and functional overlay mentioned in the conclusion of a report dated 8/25/82, I wish to state that it is my opinion that this emotional and

> functional overlay is associated with the individual rather than related to the injury of 12/19/80."

By compensation order dated October 18, 1982 the Office terminated appellant's compensation benefits effective July 28, 1982 finding that the weight of the medical evidence established that there was no residual disability as a result of the December 19, 1980 injury.

By letter dated October 29, 1982 the employing establishment injury Compensation Programs Administrator requested that the Office review its original acceptance of appellant's claim to determine whether the fact of injury had been established. On November 18, 1982 the employing establishment submitted a November 2, 1982 arbitration report which found no proof that an accident occurred as alleged by appellant on December 19, 1980.

By compensation order dated December 7, 1982 the Office rejected appellant's claim for compensation finding that her description of the injury was not consistent with the facts and that she had not demonstrated fact of injury. The Office declared as subject to an overpayment all payments of compensation previously authorized.

In an undated letter filed with the Office on December 22, 1982 appellant requested a hearing before an Office representative. She submitted the October 13, 1982 report of Dr. Azer who related appellant's continuing back disability to the December 19, 1980 employment injury.

At the hearing held on February 23, 1983 appellant's representative submitted reports which indicated that the employing establishment had contracted for premaintenance repairs made to their escalators in May of 1981.

In a decision dated May 18, 1983 and finalized May 19, 1983 the Office hearing representative affirmed the December 7, 1982 Office decision finding that the fact of injury in the performance of duty was not established and that none of the documents relating to the "up" escalator indicated a malfunction as described by appellant had ever occurred.

The Board finds that on December 19, 1980 an employment incident occurred, as originally found by the Office.

Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation. This holds true where, as here, the Office later decides that it had erroneously accepted the claim.[2]

With respect to the issue of whether appellant sustained an injury in the performance of her federal employment on December 19, 1980, the Board notes that the Office has failed to meet its burden of proof. In the present case the Office determined that appellant sustained an injury in the performance of duty on December 19, 1980 and paid her compensation and other benefits from December 19, 1980 to July 28, 1982. At the time the Office decided to review its original acceptance of her claim in October 1982, the employing establishment had already controverted the claim submitted by appellant. On her claim form, and in subsequent statements, she alleged that an incident occurred on the employing establishment up escalator; shortly thereafter she felt pain in her low back and stomach, which she reported to her supervisor; she proceeded to receive medical treatment from the employing establishment nurse and from Drs. Jackson and Azer who provided histories of injury corresponding with the history of an incident and injury on the escalator on December 19, 1980. Under these circumstances presented by this case, the Office has failed to establish that appellant did not sustain an injury in the performance of duty on December 19, 1980 as alleged.

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[2] *Benny E. Sherritze*, 33 ECAB 299; *Herman W. Stewart*, 31 ECAB 1400; *Vernon Booth*, 9 ECAB 278.

The Board notes that by decision dated October 18, 1982 the Office terminated appellant's compensation benefits effective July 28, 1982 finding that she had no disability causally related to the December 19, 1980 injury after that date. Since the Board finds that appellant sustained an injury in the performance of duty as alleged, the case will be remanded to the Office for further development of the issue of whether appellant's disability had ceased by July 28, 1982.

The May 18, 1983 and December 7, 1982 decisions of the Office Workers' Compensation Programs are reversed; the case is remanded to the Office for further development to be followed by a *de novo* decision.

In the Matter of JOSEPH A. CRUZ *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84–1432; Submitted on the Record;
Issued August 27, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant's claim for compensation is barred by the applicable time limitation provisions of the Federal Employees' Compensation Act.

Appellant, now a 68-year-old retired pipefitter, filed a claim on August 30, 1982 for pulmonary fibrosis and pleural plaques. He indicated that he first became aware of his disease in 1978 stating that in June 1978 he participated in the Bay Area Asbestos Surveillance Project. He reported that chest x-rays taken at that time showed a questionable abnormality. Appellant indicated that beginning in 1979, he experienced chest pain, shortness of breath, loss of appetite and loss of sustained energy. He stated that he had been exposed to asbestos for 12 years while working as a pipefitter without any warning of the hazards of exposure to asbestos and without any protective breathing apparatus.

The employing establishment indicated that appellant had moderate to heavy exposure to asbestos while working there. It also indicated that he was last exposed to asbestos on May 25, 1973 and retired on May 31, 1973.

Dr. Libertad A. Sevandal, in an August 25, 1982 form report, indicated that he had first examined appellant on April 27, 1970. He stated that appellant had small pleural plaques and focal pulmonary fibrosis consistent with previous asbestos exposure. He reported that pulmonary function tests showed both restrictive and obstructive lung disease. He indicated that appellant was hospitalized from September 5, 1977 to September 16, 1977 for treatment of an acute episode of complications of pneumonia. The doctor indicated that he anticipated recurrent acute infectious processes leading to increased loss of function due to the asbestos exposure.

The Office of Workers' Compensation Programs, in a May 17, 1983 letter, requested that appellant provide his medical history for treatment of any pulmonary problems, including reports from the Bay Area Asbestos Surveillance Project and a detailed smoking history. The Office also asked, "Since you learned of your possible asbestos-related condition in 1978, why did you wait until August 30, 1982 to file a claim?"

Appellant submitted a February 28, 1979 report from Dr. Phillip L. Polakoff, a Board-certified specialist in preventive medicine, who stated:

> "Last summer you participated in the Bay Area Asbestos Surveillance Project. The examination included three chest x-rays.
>
> "Although it is not thought to be an immediately serious problem, your x-rays show:
>
> 'A questionable abnormality on your chest x-ray.' "

Dr. Polakoff suggested that appellant consult his personal physician.

Appellant also submitted a May 1, 1982 report from Dr. George S. Cohlmia, a neurosurgeon, who stated that pulmonary function tests showed a mild degree of restrictive pulmonary disease and a possibility of mild obstructive pulmonary disease. He indicated that the diffusion capacity was 80 percent of the predicted value and the maximum ventilatory volume was 98 percent of the predicted value which he stated was normal. Dr. Cohlmia commented:

> "*Comment:* This patient's pulmonary function tests are abnormal and show a very mild degree of restrictive disease. This patient has smoked for 20-pack years and there may be some influence of this

upon his respiratory abnormality; however, this patient has also had heavy exposure to asbestos and the abnormalities seen, especially the restrictive ones, may have been influenced by this exposure.

"*X-RAYS*

"The patient was seen by Dr. Stanley Sizeler and X-rays were performed by him. Four views of the chest were obtained, including two oblique views. Dr. Sizeler is a Board-certified radiologist who has extensive experience with asbestos-related diseases. His impressions are as follows:

> '(1) Bilateral lateral pleural thickening, compatible with reaction to prior asbestos exposure.
>
> (2) Irregular, although well-demarcated, mass in the retrocardiac area, probably at the left lung base medially, duration and significance unknown (post-inflammatory?, neoplasm?).
>
> (3) Aortic tortuosity and elongation, small adhesion at the left lower lateral mediastinal edge.'

"*Comment:* There is evidence of pleural asbestosis, and also evidence of an irregularity shaped mass in density that could be possibly post-inflammatory or neoplastic. A letter will be sent to the patient to have this followed up.

"*DISCUSSION*

"Mr. Joseph Cruz is a 62-year-old gentleman who has had exposure to asbestos while working in the shipyards at Mare Island as a pipefitter.

"At the present time, he has only mild symptoms of respiratory insufficiencey and dyspnea on exertion. He has smoked for 20-pack years, but has quit since 1956, but still this may have some influence on his respiratory system.

"The patient's physical examination shows only mild evidence of a few wheezes and also decreased breath sounds in the left base. The laboratory exam is within normal limits. The electrocardiogram is nonspecific. The pulmonary function test is abnormal and shows mainly that of a mild restrictive disease. In light of the fact that the patient has smoked, there is a possibility that this has influenced his pulmonary function abnormality; however, he has also had heavy exposure to asbestos which may have influenced it some. This patient shows evidence of pleural asbestosis and a retrocardiac left mass shadow that is possibly post-inflammatory or neoplastic; however, this is not conclusive. A letter will be sent to the patient to have him follow-up on this. It was also extremely stressed that this patient should follow-up with his private physician for any therapy, as this office would not be carrying that out.

"Because of the patient's exposure to asbestos, he was extensively counseled on the possibility of further pulmonary dysfunction and

> carcinoma. For this reason, he was encouraged to seek frequent follow-ups with his family physician.
>
> "This patient fits into the category of Class II of the American Medical Association's classification for workers' disability and respiratory impairment."

In an accompanying June 9, 1983 letter, appellant stated that he did not file any claim for compensation prior to 1978 because he was ignorant of the harmful effects of asbestos until he participated in the Bay Area Asbestos Surveillance Program and had chest x-rays.

The Office, in a June 30, 1983 letter, informed appellant that since he was last exposed to asbestos before September 7, 1974, his claim for compensation should have been filed within one year of the time he was aware or should have been aware that his disabling condition may have been caused by factors of his employment. The Office indicated that the one-year requirement may be waived if a claim was filed within five years and the failure to file was due to circumstances beyond the claimant's control or the claimant showed sufficient cause the or reason for his delay in filing. The Office stated that Dr. Sevandal indicated that he first examined appellant for an asbestos-related disease on August 27, 1970. The Office asked appellant if Dr. Sevandal informed him on August 27, 1970 that he may have an asbestos-related condition. The Office also indicated that the evidence of record established that he was aware that his pulmonary condition may have been caused by factors of his employment no later than June 1978. It asked why he waited until August 30, 1982 to file his claim.

Appellant's attorney, in an August 4, 1983 letter, stated that appellant did not learn of his asbestos-related disease until 1981 or 1982. The attorney contended that, according to Dr. Sevandal, it was unclear that the abnormalities noted on x-ray were suggestive of asbestosis until 1982. He stated that appellant had filed his claim within three years of when he was told he had to file. The attorney argued that if appellant had only one year to file, his failure to do so should be excused because he acted diligently.

The attorney submitted a July 22, 1983 report from Dr. Sevandal who stated:

> "Mr. Cruz's initial visit to our office was on August 27, 1970 as written but this was for complaints unrelated to his asbestos exposure. On this visit he complained of abdominal pain which was interpreted as due to possible gastritis and he was treated accordingly.
>
> "His next was in 1977 (January) and this time he was complaining of discomfort in the chest, especially on deep breathing and after walking for about a block. He had had x-rays at Travis AFB and

> apparently was told that he had a 'spot' in the lung. A 12-lead resting electrocardiogram showed an abnormal superior axis and elevated ST segment in V2 and V3. Chemistry studies, particularly a CPK level, were advised, but we have no record of these so either they were not done or were done at the base, where he apparently went for more regular check-ups.
>
> "He was next seen in September 1977 when he was hospitalized at Vallejo General Hospital after a chest x-ray showed bilateral lower lobe infiltration and a left-sided pleural effusion. Follow-up films showed the infiltration to be persistent, with increase in the pleural effusion. A perfusion lung scan showed findings compatible with either pulmonary embolus or pneumonitis. EKG was normal. He was treated for pulmonary embolus and was discharged on September 16, 1977. He was to be followed up by his physician in Los Angeles.
>
> "He was seen twice in 1980, once in 1982 and was last seen on July 12, 1983 for complaints of chest tightness and occasional wheezing. A chest x-ray showed a small mass in the lower lobe seen only on the lateral film which appears to be enlarging slightly as compared with x-rays taken on August 9, 1982. The pleural change suggestive of asbestosis was unchanged."

The Office, in a November 8, 1983 decision, found that appellant had realized no later than September 1977 that he had a possible asbestos-related condition. The Office therefore rejected his claim because he had failed to file within the one-year time limitation. The Office refused to waive the one-year time limitation on the ground that he did not give any reason why a waiver should be granted.

Appellant requested reconsideration. The Office, in a February 14, 1984 letter decision, found that the request was *prima facie* insufficient to warrant review of the prior decision because appellant's attorney had not submitted any new evidence nor made any new legal arguments in support of his request for reconsideration.

The Board finds that the case is not in posture for decision.

In a case involving a claim for an occupational disease, the time limitation begins to run when the injured employee becomes aware or reasonably should have been aware of a possible relationship between his disease and his employment.[1] The Office found that since appellant was hospitalized in September 1977 for pleural effusion he reasonably should have been aware at that time that he had an asbestos-related condition. Dr. Sevandal, however, in his August 25, 1982 report, indicated that appellant was treated at that time for complications of pneumonia. There is no indication that appellant was informed that he was hospitalized or being treated for an asbestos-related condition. In June 1978, appellant was examined by the Bay Area Asbestos Surveillance Project. The only report of record from that examination was Dr. Polakoff's February 2, 1979 letter to appellant stating that there was a questionable abnormality on his chest x-ray. Dr. Polakoff made no statement describing the abnormality nor indicating that the abnormality was possibly caused by asbestos. The lack of detail was not sufficient to put appellant on notice that he had a possible asbestos-related condition. The x-rays performed by Dr. Sizeler four years later showed bilateral pleural thickening compatible with asbestos exposure and an irregular mass in the left lung which was either post-inflammatory or neoplastic. Either of these x-rays findings may have been the abnormality referred to by Dr. Polakoff.

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[1] *Green W. Bentley*, 32 ECAB 1905.

On remand, the Office should request statements from appellant and the physicians who treated him on when appellant was first informed that his pulmonary condition might be causally related to asbestos exposure. After further development as it may find necessary, the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs, dated February 14, 1984 and November 8, 1983, are hereby set aside and the case remanded for further action in accordance with this decision.

In the Matter of BRUCE E. MARTIN *and* DEPARTMENT OF THE NAVY, PEARL HARBOR, Honolulu, Hawaii

Docket No. 84–1517; Submitted on the Record;
Issued August 27, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issues are: (1) whether appellant's emotional condition was causally related to factors of his federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen the case for a merit review constituted an abuse of discretion.

On September 1, 1981, appellant, then a 32-year-old former guard, filed a claim asserting he had an emotional condition causally related to factors of employment. Appellant stopped work on December 18, 1978, used sick leave from that date through January 30, 1979 and was separated from the employing establishment due to disability on January

31, 1979. Appellant subsequently asserted that his job was stressful, that he "lost . . . [his] ability to cope with different situations" he was involved in and that his condition would not have been as "acute" if he had "had more counseling and more help from the [employing establishment] police department."

In support of his claim appellant submitted a September 22, 1978 report by Dr. Leonard S. Jacobs, a Board-certified psychiatrist, prepared in connection with a fitness-for-duty evaluation. Dr. Jacobs reviewed a "statement of observed facts" prepared by the employing establishment which described appellant's behavior at work and which set forth numerous accusations against appellant concerning alleged confrontations and threats by him against coworkers. Dr. Jacobs opined that assuming the statement of observed facts true, appellant "has some quite serious psychopathology." Dr. Jacobs concluded as follows:

> "Assuming the reality of the threats which has led to this psychiatric examination, I . . . feel that Mr. Martin should not continue his present employment because of an impulsive characterological disorder. It is difficult at this time to know how complete Mr. Martin's denial is and whether it is so pervasive that he has actually blocked out a conscious recognition of his behavior and the impact of it on other people.
>
> "*PSYCHIATRIC DIAGNOSIS IS:* Personality disorder of other specific type, borderline personality with elements of explosive personality and marked depression. It seems like the precipitating factor that has led to his depression and subsequent threatening aggressive behavior is related to the dissolution of his marriage. Mr. Martin clearly indicates that he was very concerned and upset by this and at that time did not know how to cope with it, except to desperately attempt to get his wife back. He may still be quite preoccupied with this relationship. His preoccupation did lead to a spillover of angry, aggressive behavior on the job. He did seek mental health service. *** There is every indication to believe that if the client continues mental health services that he can reconstitute his prior mode of functioning which has included a good job performance and adequate judgment. Also, there is a possibility that eventually he could get some insight into his impulse disorder which seems to be related to the loss of a significant close relationship. Because of this, I would recommend further psychiatric and psychological treatment."

In a report dated October 22, 1980, Dr. Jacobs stated he wished to supplement his September 22, 1978 report with the following comments:

> "If the allegations against Mr. Bruce Martin are false, there is *NO* basis to conclude that Mr. Martin had any significant psychiatric

> problem beyond stress due to the problems with his supervisors and the prior problems he had in adjusting to his divorce.
>
> "His mental status examination now is similar to September 1978, essentially normal though he is somewhat tense."

The employing establishment submitted appellant's dispensary records for the period January 1977 through October 1978. Treatment notes dated March 2, 1977 state that appellant "has many anxieties related to his dissolving marriage." Dr. Clark H. Martin, a clinical psychologist, and Dr. William J. T. Cody, a Board-certified psychiatrist, reported on October 27, 1981 concerning the history of appellant's treatment beginning January 1977 at a Kaiser Foundation Hospital.

By letter dated March 10, 1982, the Office of Workers' Compensation Programs informed appellant that the factual and medical evidence submitted did not establish that his disability was causally related to factors of his federal employment and that his claim would be disallowed unless he submitted evidence which supported his claim.[1]

By compensation order dated May 18, 1982, the Office rejected the claim on the ground that appellant had not met his burden of proof to establish that his disability was causally related to his employment.

At appellant's request, a hearing was held on August 17, 1983 before an Office hearing representative at which appellant testified concerning the nature of his job and asserted he wished to be compensated for a two-year period between his separation from the employing establishment and his obtaining another job. Dr. John J. Blaylock, a clinical psychologist, appeared at the hearing and testified that he had examined appellant in approximately July or August 1982 and had not found any evidence of mental disturbance at that time. Dr. Blaylock stated he believed the diagnosis made by Dr. Jacobs in 1978 was "appropriate at that time" assuming the information that had been provided Dr. Jacobs by the employing establishment was correct. Dr. Blaylock indicated that appellant's employment may have aggravated an emotional condition that "started with his personal problems."

By decision dated April 16, 1984 and finalized April 19, 1984, the Office hearing representative rejected the claim on the ground that appellant "has failed to establish that he has a disability caused by an emotional problem which is causally related to his employment."

Appellant requested reconsideration of the decision and submitted an April 30, 1984 report by Dr. Blaylock in which the psychologist stated "I firmly believe that while Mr. Martin did indeed have personal problems at the time in question, the reaction of management was not satisfactory and served to further aggravate the problems."

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[1] The case file contains voluminous records submitted by appellant concerning his appeals of his disability separation from the employing establishment and concerning a lawsuit be filed against a supervisor and Kaiser Hospitals Foundation. Included are depositions, interrogatories, testimony and other evidence in his cases before the Federal Employees' Appeal Authority, Merit Systems Protection Board and the U.S. District Court for the District of Hawaii.

By compensation order dated May 15, 1984, the Office denied the reconsideration request on the grounds that the evidence submitted in support of the request was "repetitious" and not sufficient to require a review of the prior decision.

The Board finds that the medical evidence of record fails to establish that appellant's emotional condition is causally related to factors of his federal employment.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment. As part of this burden he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[2]

The case record contains no substantive well-rationalized medical evidence in support of appellant's claim that his emotional condition was causally related to factors of his federal employment. Dr. Jacobs, a Board-certified psychiatrist, opined in the detailed September 22, 1978 report that appellant had an "impulse disorder" which appeared to be related to the dissolution of his marriage He opined two years later that if the allegations of threats made by appellant against others had been untrue, then appellant had no significant psychiatric problem "beyond stress due to the problems with his supervisors and the prior problems he had in adjusting to his divorce." This statement, however, is not sufficient to establish that any emotional condition was causally related to appellant's federal employment. Dr. Blaylock, a clinical psychologist, lent some support to the claim. His opinion, however, that factors of employment aggravated an emotional condition has little probative value because that opinion fails to include any medical rationale in support of causal relationship.

The Board further finds that the refusal of the Office to reopen the case for a merit review did not constitute an abuse of discretion.

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously or record or advance legal contentions not previously considered. Where such evidence or contentions are not present, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. section 8128.[3] Material which is repetitious or duplicative of that already in the case record is of no evidentiary value and does not constitute a basis for reopening a case.[4]

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[2] *Froilan Negron Marrero*, 33 ECAB 796.

[3] *Jerome Ginsberg*, 32 ECAB 31.

The only evidence submitted in support of the reconsideration request, the April 30, 1984 report by Dr. Blaylock, was repetitive of Dr. Blaylock's testimony at the Office hearing which had already been considered by the Office and therefore did not constitute a basis for reopening the case.

The decisions of the Office of Workers' Compensation Programs, dated April 16, 1984 and finalized April 19, 1984 and dated May 15, 1984, are hereby affirmed.

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[4] *Jerome Ginsberg*, *supra*.

In the Matter of MICHAEL R. HRYNCHUK *and* U.S. POSTAL SERVICE, POST OFFICE, Hartford, Conn.

Docket No. 84-1449; Submitted on the Record;
Issued August 27, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether appellant is barred from receiving continuation of pay by the time limitation provision of the Federal Employees' Compensation Act.

On September 22, 1981 appellant, a 58-year-old pastal mailhandler, experienced "a sharp momentary pain in the stomach immediately followed by a mild burning and discomfort sensation," when lifting a sack of mail. Although appellant continued to work that day, he stopped work the following day and was treated by Dr. Franklin B. Watters, a Board-certified internist of professorial rank, for a recurrent ventral incisional hernia.[1]

Appellant filed a form CA-1, notice of traumatic injury and claim for continuation of pay/compensation, dated May 25, 1982, which was not received by the employing establishment until June 18, 1982.[2] In response to the question as to why he did not file his claim within two working days following the injury, appellant stated the following:

> "I was not aware it was necessary to report such injuries to the post office at the time of the injury. I started working at the post office on June 15 and the injury occurred about 3 mos. later, during

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[1] It is unclear from the record how long appellant was absent from work as a result of this injury.

[2] The employing establishment's injury compensation specialist informed the Office that although the form was dated May 25, 1982, it was only partially completed at that time, and that appellant did not fully complete it until June 18, 1982.

> which time no one told me every little injury should be reported. On the day following the injury I reported to my family doctor, Dr. Watters, who told me there was no immediate danger and I could conceivably go through the rest of my life with the hernia unless it got too big or there [was] blood or food blockage resulting from the hernia. During our safety talks since the injury I have learned how important it is to report such injuries."

In response to an Office of Workers' Compensation Programs request for information regarding the facts and circumstances surrounding the September 22, 1981 employment incident and the reasons for his delay in filing written notice of injury, appellant submitted a statement expanding the information contained on the form CA-1. In addition, he stated that after lifting the mail on September 22, 1981 he experienced pain for a brief period of time; that he often experienced "small pains that soon disappear" due to his age; that he completed his work shift without any incidence of pain; and that he did not experience any discomfort until he returned to his home, which he stated, prompted his visit to Dr. Watters on September 23, 1981. Appellant further stated that because the hernia increased in size, Dr. Watters referred him to Dr. Phillip E. Trowbridge, a Board-certified surgeon, for hernia repair, which was performed on June 21, 1982. Appellant also noted that he had undergone hernia repair in May 1981 in the same area.

Appellant submitted several medical reports by Dr. Trowbridge, including the discharge summary from the June 21, 1982 hernia repair, describing the treatment administered to him as a result of his recurrent ventral hernia. Also submitted was the discharge summary from his hernia repair performed on February 2, 1981.

By letter decision dated January 25, 1984, the Office determined that appellant was not entitled to continuation of pay for his absence from work beginning September 23, 1981 on the following ground:

> "You did not file CA-1 within 30 days of your injury date of 9/22/81."

Appellant requested reconsideration and reiterated the fact that he failed to file form CA-1 within 30 days because he "was not aware of this requirement at the time" since his employment with the employing establishment had just begun. He also stated that he was unaware of the severity of his injury, since Dr. Watters had informed him that "there was no reason to become alarmed"; moreover, he stated that Dr. Watters also informed him that surgery was not indicated at the time of his September 23, 1981 examination, and therefore, he believed he had no basis to file a claim at that time.

Appellant submitted a medical note by Dr. Watters, dated September 29, 1982, who stated that, as of his examination of appellant on September 23, 1981, appellant had an abdominal incisional hernia; however, he advised appellant "that surgery was not indicated at that time but might be necessary at a future date." He also submitted an attending physician's report by Dr. Trowbridge, dated January 25, 1984, indicating that appellant was totally disabled from June 20, 1982 to September 20, 1982 as a result of his employment-related recurrent ventral incisional hernia."

After reviewing appellant's case on the merits, the Office, by compensation order dated June 1, 1984, denied modification of its January 25, 1984 decision on the ground that the "evidence submitted in support of the application is not sufficient." In a letter accompanying the compensation order, the Office stated:

> "There is no provision in the Federal Employees' Compensation Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury (William E. Ostertag, ECAB Docket No. 82-832)." [3]

Appellant's attorney contends on appeal that appellant delayed filing his claim for continuation of pay until May 25, 1982 because he was unaware of the severity of his condition until he was advised of the necessity for corrective surgery. The attorney further contended "that the chief of claims has erroneously relied upon sec. 8119 [of the Federal Employees' Compensation Act] [4] in her decision" of January 25, 1984. In that regard, he stated that the basis for appellant's claim for continuation of pay was under section 8118 of the Act[5] which "specifies that his original claim must be filed within the time frame established under section 8122, stated as within 3 years after the compensable injury." He concluded, therefore, that appellant had until September 22, 1984 to file a timely claim for continuation of pay. Additionally, he contended that appellant's time to file a claim was extended because of 5 U.S.C. section 8122(b), which states that the time for filing a claim in the case of a "latent disability does not occur until the claimant is aware of a causal relationship between the disability and the employment." In this respect, the attorney pointed out that since appellant was not disabled until June 1982, he had "until at least June of 1985 to file a timely claim."

The Board finds that appellant's claim for continuation of pay is barred by the 30-day time limitation provision for filing under the Act.

With respect to the applicable time limitation provision for filing in the present case, the Board notes that section 8118 of the Federal Employees' Compensation Act [6] provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title." [7] The latter section provides that written notice of injury shall be given "within 30 days." The context of section 8122 makes clear that this means within 30 days of the injury.[8]

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[3] By letter dated March 19, 1984, the Office informed appellant that he was entitled "to all compensation and medical benefits" (as distinguished from continuation of pay) provided under the Act, for his absence from work from June 21 to August 16, 1982, as a result of his September 22, 1981 employment injury.

[4] 5 U.S.C section 8119.

[5] 5 U.S.C section 8118.

[6] *Id.*

Appellant filed form CA-1, notice of traumatic injury and claim for continuation of pay/compensation, on June 18, 1982. As this was more than 30 days after the September 22, 1981 injury, the claim for continuation of pay is barred by the applicable time limitation provision.

With respect to the contention that appellant delayed in filing his claim because of his unawareness of the severity of his condition at the time and therefore he had no basis to file a claim, the Board has held that unawareness of the seriousness of an injury is no excuse for waiving applicable time limitation provisions.[9] Further, the Board has held that section 8122(d)(3) of the Act, which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a)[10] which sets forth the filing requirements for continuation of pay.[11] There is, therefore, no provision in the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the employment injury. The rationale for this finding is set forth fully in the Board's decision in *William E. Ostertag.*[12] Thus, since appellant filed form CA-1, notice of traumatic injury and claim for continuation of pay/compensation more than 30 days after the September 22, 1981 injury, his claim for continuation of pay is barred by the applicable time limitation provision.

The decisions of the Office of Workers' Compensation Programs, dated January 25 and June 1, 1984, are hereby affirmed.

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[7] 5 U.S.C. section 8122(a)(2).

[8] See *George A. Harrell*, 29 ECAB 338.

[9] *Eloise Wilson Cade*, 31 ECAB 338; *Louise A. Rizzo*, 31 ECAB 510.

[10] 5 U.S.C. section 8118(a).

[11] 5 U.S.C. section 8122(d)(3).

[12] 33 ECAB 1925. See also *Patricia J. Kelsesky*, 35 ECAB 549.

In the Matter of FRED STINGL *and* DEPARTMENT OF THE ARMY, ADMINISTRATIVE SURVEY DETACHMENT, FORT HOLABIRD, Md.

Docket No. 84–1226; Submitted on the Record;
Issued August 28, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's compensation rate.

This case has been before the Board on two previous occasions. The facts of the case as set forth in the Board's two previous decisions are hereby incorporated by reference. In the first appeal,[1] the Board affirmed the April 22, 1982 decision of the Office of Workers' Compensation Programs which denied appellant's request for reconsideration of the Office's October 1, 1969 decision awarding compensation for a 58 percent employment-related loss of wage-earning capacity. In the second appeal,[2] the Board found that the Office's July 8, 1983 letter decision properly determined appellant's loss of wage-earning capacity and used the proper weekly pay rate in determining the amount of his compensation. The Board set aside the decision and remanded the case for a *de novo* decision on the amount of appellant's four-week compensation rate, which appeared to have been miscalculated in the July 8, 1983 letter decision.

Following remand, the Office determined that it had neglected to include a 3.9 percent cost-of-living increase in appellant's compensation effective March 1, 1983.[3] It notified him by letter dated March 23, 1984 that it would correct the error commencing with his check for the March 22, 1984 to April 18, 1984 period, and that he would receive a supplemental payment for additional compensation due him from March 1, 1983 to March 22, 1984 because of the omission of the cost-of-living increase. By letter of March 28, 1984, the Office notified him he would receive a check for $576.96 representing the back compensation due him.[4]

By letter decision dated April 12, 1984, the Office determined that appellant's weekly compensation rate, increased by cost-of-living adjustments through March 1, 1984 (thus including the March 1, 1984 cost-of-living adjustment), was $311.50 and that his four-week compensation rate was $1,206.00. The decision stated that the net compensation each four weeks, after deduction of a health benefits subscription of $71.46, was $1,174.54.

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[1] Docket No. 82-1433 (decision and order issued July 27, 1982).

[2] Docket No 83-1731 (decision and order issued January 13, 1984).

[3] The Board notes that the case record as developed on remand shows that the error in the four-week compensation rate in the July 8, 1983 letter decision amounted to an omission of the March 1, 1983 cost-of-living increase. The decision gave a current weekly compensation rate of $301.50, but a four-week compensation rate of only $1,161.00, which is four times the pre-March 1, 1983 weekly compensation rate of $290.25. The four-week compensation rate should have been four times $301.50, or $1,206.00.

[4] The Board notes that the computation worksheet in the case record on which the $576.96 figure was calculated indicates that this amount includes back compensation for the period March 1, 1983 to February 22, 1984. It thus appears that back compensation for the period February 22, 1984 to March 22, 1984 was not included. However, as the matter of back compensation is not on appeal, the Board does not have jurisdiction over that issue.

The Board finds that the Office's April 12, 1984 decision correctly determined appellant's net four-week compensation, but it incorrectly states the gross four-week compensation rate.

The Office determined that appellant's adjusted weekly compensation rate was $311.50. The proper four-week compensation rate is therefore $1,246.00, which, reduced by the health benefits subscription of $71.46, results in the net four-week compensation rate of $1,174.54.

The Board notes that the Office's decision lists the four-week compensation rate as $1,206.00, which is the amount applicable to the period March 1, 1983 to March 1, 1984, when the weekly compensation rate was $301.50. Although this may be a harmless error since the correct net four-week compensation rate was found, the Office should ensure on remand that the correct amount is being paid.

The decision of the Office of Workers' Compensation Programs dated April 12, 1984 is hereby set aside and the case remanded for a *de novo* decision correcting the amount of appellant's four-week compensation rate.[5]

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[5] The Board notes that appellant asserts on appeal that the Office's April 12, 1984 decision used the incorrect rate of pay. As that issue was raised by appellant and disposed of by the Board in the last appeal, it was not involved in the Office's April 12, 1984 decision and is not a proper issue in this appeal. See 20 CFR section 501.6(c) (stating that the Board's decisions are "final as to the subject matter appealed and . . . shall not be subject to review, except by the Board.").

In the Matter of EDWARD E. OLSON *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84–1321; Submitted on the Record;
Issued August 28, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant has established that he sustained an asbestos-related pulmonary condition causally related to factors of his federal employment.

Appellant, a 40-year-old rigger, began working with the employing establishment on June 27, 1960, and currently remains in its employ. On August 11, 1983 he filed a claim alleging that he sustained an asbestos-related pulmonary condition as a result of factors of his federal employment.

In response to an Office of Workers' Compensation Programs questionnaire concerning his alleged asbestos exposure, appellant stated that he was exposed to a heavy amount of asbestos (i.e., visible airborne asbestos particles were evident) for eight hours per day from 1960 to 1977. He also stated that from 1977 to date, he was exposed to a medium amount of asbestos (i.e., asbestos dust was visible on floors and work surface) for eight hours per day. Appellant further stated that he experienced an "irregular heart beat" in 1964; that he had difficulty with his back in 1970; and that he contracted asbestosis in 1982. He added that he smoked a pack of cigarettes per day from 1959 to 1964, and that he occasionally smoked a pipe and cigars during the same period.

The employing establishment submitted the following documents: appellant's application for federal employment; the functional requirements and environmental factors of his position; his position description and supplemental information sheet; his employment record; a copy of the developmental history of its asbestos control program; an estimation of the quantity, degree and frequency of appellant's exposure to asbestos during his employment; and an employment history summary. The employing establishment also submitted radiographic reports of chest x-rays taken by its medical unit for intermittent periods between March 19, 1964 and April 20, 1981, which were interpreted as normal, and copies of pulmonary function studies, also conducted in the medical unit, which were within normal limits.

In support of his claim appellant submitted a copy of a medical report by Dr. George S. Cohlmia, a general surgeon, dated September 1, 1982, together with the radiographic report of a June 15, 1982 chest x-ray taken by Dr. Stanley Sizeler, a Board-certified radiologist, and the results of pulmonary function studies and laboratory tests performed on Dr. Cohlmia's behalf. Dr. Cohlmia stated that he examined and evaluated appellant on June 9, 1982, and set forth appellant's employment, exposure and medical history, and discussed his findings on physical examination of appellant. The doctor reported the following:

> "PULMONARY FUNCTION STUDIES: "
>
> * * *
>
> "(1) *Spirometry:* The FVC, [forced vital capacity] the FEV-1 [forced expiratory volume in one second], the FEF 25-75%, [forced expiratory flow] the rest of the flow rates, and the FEV-1: FVC ratio are all within normal limits and indicate no restrictive or obstructive disease.
>
> "(2) *Lung Volumes:* The SVC [slow vital capacity] is 4.18 liters or 84% of predicted. The RV [residual volume] is 1.43 liters or 71% of predicted. The TLC [total lung capacity] is 5.61 liters or 81% of predicted. The FRC is 2.16 liters or 59% of predicted. The lung volumes are decreased, indicating a mild to moderate restrictive disease.

"(3) *Diffusion Capacity:* The DLCO is within normal limits, as noted.

"(4) *Maximum Ventilatory Volume:* The MVV is within normal limits, as noted.

"*Impression:*

"(1) Mild restrictive pulmonary disease.

"(2) No evidence of obstructive pulmonary disease.

"(3) Normal diffusion capacity.

"(4) Normal maximum ventilatory volume.

"*Comment:* This patient's pulmonary function tests are abnormal and indicate a mild to moderate restrictive disease. It is most likely influenced by his asbestos exposure, as his smoking history has been very minimal.

"*X-RAYS:*

"The patient was seen by Dr. Stanely Sizeler and x-rays were performed by him. Four views of the chest were obtained, including two oblique views. Dr. Sizeler is a Board-certified radiologist who has extensive experience with asbestos-related diseases. His impressions are as follows:

'(1) No significant cardiopulmonary abnormality.'

"*Comment:* There is no evidence of pleural or parenchymal asbestosis.

"*DISCUSSION:*

"Mr. Edward E. Olson is a 39-year-old gentleman who has had exposure to asbestos while working in the shipyards at Mare Island as a rigger.

"At the present time, he has no significant symptoms of respiratory insufficiency. He has no history of lung disease. He has only smoked for 5 pack years, which is a mild degree and may not affect his respiratory system.

"The patient's physical examination shows no evidence of respiratory disease. His laboratory and electrocardiogram are normal. His pulmonary function tests are abnormal and indicate a mild restrictive disease most likely influenced by his asbestos exposure. The patient's x-rays show no evidence of pleural or parenchymal asbestosis.

"Because of the patient's exposure to asbestos, he was extensively counseled on the possibility of further pulmonary dysfunction and carcinoma. For this reason, he was encouraged to seek frequent follow-ups with his family physician.

"This patient fits into the category of Class II of the American Medical Association's classification for workers' disability and respiratory impairment."

The Office prepared a statement of accepted facts and referred it, together with appellant and the case record, to Dr. Michael L. Cohen, a Board-certified internist specializing in pulmonary diseases, for a pulmonary evaluation.

Dr. Cohen examined and evaluated appellant and submitted a copy of pulmonary function studies performed on appellant at his request on February 8, 1984. In a report of the same date Dr. Cohen discussed appellant's medical history and employment history, and his findings on physical examination. The doctor went on to report the following:

> "*LABORATORY:*
>
> "Pulmonary function tests are normal. There is no obstruction or restriction. The FEV-1 is 88% of a FVC that is 77%. TLC is 82%. Diffusion is 101%. PO2 is 90%. SUMMARY: Normal resting study.
>
> "Electrocardiogram is normal.
>
> "CHEST X-RAYS: The patient refused to have chest x-rays. He states that he has had x-rays in the past and he has had radiation in the shipyard and he wants no further damage to his lungs. If I want to see his x-rays, I'll have to get them from the office in Walnut Creek where he had them several years ago. [i.e., by Dr. Sizeler].
>
> "I explained to him that it would be impossible to truly assess his problem without current x-rays but he again refused.
>
> "*DIAGNOSIS:*
>
> "History of asbestos dust exposure—no symptoms. Normal pulmonary function tests, normal EKG. No x-ray available as the patient refused x-ray.
>
> "*DISCUSSION:*
>
> "Certainly this gentleman has had an asbestos exposure and may very well have pleural changes, but refuses x-ray. It would be appropriate to pursue his old films from Dr. Sizeler's office in Walnut Creek and then I can review these and amend the report, at least insofar as his status in 1982 is concerned.
>
> "He does not have any physiologic or significant impairment, either by history or by exam at this time."

On March 23, 1984 Dr. Judd Sheliito, a Board-certified internist specializing in pulmonary diseases acting as an Office consultant, reviewed the evidence of record and after briefly discussing appellant's history of asbestos exposure stated:

> "Included in the medical records is an evaluation of the claimant by a nonpulmonary specialist, Dr. G. Cohlmia, dated September 1, 1982. A chest x-ray at that time was described as showing no pleural or parenchymal abormality. Pulmonary function testing showed normal spirometry and well-preserved diffusing capacity. Doctor Cohlmia brings a great deal of attention to a decreased residual volume in the claimant. This is of little consequence, in my opinion.

> "The claimant has since received a more current and comprehensive evaluation by a pulmonary specialist, Dr. M. Cohen, dated February 8, 1984. There are no complaints of abnormal dyspnea on exertion. Physical examination revealed no evidence of clubbing or abnormal pulmonary sounds. Pulmonary function testing was within normal limits. This included spirometry, static lung volumes, and a diffusing capacity determination. In addition, arterial blood gases obtained at rest on room air were normal. The claimant refused an x-ray.
>
> "1. According to the medical evidence available at this time, no condition or disability was caused by the accepted conditions of employment.
>
> "2. The diagnosis is established as asbestos exposure without current evidence of asbestos-related pulmonary disease. No pleural abnormalities have been demonstrated on chest x-ray. There is insufficient evidence to support a diagnosis of parenchymal asbestosis in the face of a normal physical exam, normal lung markings on chest x-ray, normal spirometry, a normal total lung capacity, and a well-preserved diffusing capacity.
>
> "3. The claimant is not disabled from his position due to disease resulting from exposure to asbestos while in federal employment.
>
> "4. The percentage of respiratory impairment due to asbestos related pulmonary disease is 0%."

By compensation order dated April 9, 1984, the Office denied appellant's claim on the ground that appellant had "not sustained a pulmonary disease or condition resulting from exposure to asbestos in the performance of duty."

The Board finds that the weight of the medical evidence fails to establish that appellant sustained an asbestos-related pulmonary condition causally related to factors of his federal employment.

An indivdual seeking compensation benefits has the burden of establishing the essential elements of his claim.[1] Thus, appellant had the burden of establishing by the weight of the reliable, probative and substantial evidence that he sustained an injury in the performance of his duties, which disabled him for employment. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of an employee that the disease was caused or aggravated by employment conditions is sufficient to establish causal relation.[2]

Dr. Cohen, a Board-certified internist specializing in pulmonary diseases, reported that appellant had a history of exposure to asbestos dust; however, he stated that appellant had no symptoms. The doctor explained that the results of appellant's pulmonary function studies were normal; that his electrocardiogram was normal; and that he had a "normal resting study." Dr. Cohen pointed out that appellant "refused x-ray," and stated that although he explained to appellant that current x-rays were necessary to assess his current status, he continued to refuse. The doctor concluded that appellant had no "physiologic or significant impairment, either by history or by exam at this time."

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[1] *Margaret A. Donnelly*, 15 ECAB 40.

[2] *Birger Areskog*, 30 ECAB 571.

Dr. Cohlmia, a general surgeon, reported that the spirometry portion of the pulmonary function tests was within normal limits and demonstrated no evidence of obstructive pulmonary disease, and that the diffusion capacity or DLCO and MVV were also within normal limits. The doctor concluded, however, that since appellant's lung volumes had decreased, i.e., were below the predicted values, this indicated "a mild to moderate restrictive disease most likely influenced by his asbestos exposure" since his smoking history was minimal. The Board notes that Dr. Cohlmia did not provide any rationalized medical opinion explaining why the decreased lung volumes alone caused appellant's pulmonary function tests to be abnormal especially since the rest of the tests were within normal limits. Moreover, Dr. Cohlmia reported that the chest x-rays performed by Dr. Sizeler, a Board-certified radiologist, demonstrated "no significant cardiopulmonary abnormality," and concluded himself that "there is no evidence of pleural or parenchymal asbestosis." Thus, the Board finds that Dr. Cohlmia's lack of detailed medical rationale explaining why the decrease in appellant's lung volume alone demonstrated restrictive lung disease, coupled with the fact that chest x-rays did not reveal any pleural or parenchymal asbestosis, does not support his conclusion that appellant should be classified as Class 2 or 10-20 percent impairment according to the American Medical Association's *Guide to the Evaluation of Permanent Impairment*,[3] which would normally entitle appellant to a schedule award. The doctor's report is therefore of diminished probative value and insufficient to support appellant's claim for an employment-related pulmonary condition resulting from his exposure to asbestos.

Dr. Shellito, the Board-certified internist specializing in pulmonary diseases who acted as the Office's consultant, reviewed the evidence of record and concurred with Dr. Cohen's assessment. He stated that appellant's diagnosis consisted of asbestos exposure without current evidence of asbestos-related pulmonary disease. In that regard he noted that there were no pleural abnormalities demonstrated by x-ray, and that there was insufficient evidence to support a diagnosis of parenchymal asbestosis especially since the physical examination, lung markings on chest x-ray, spirometry, and total lung capacity were normal, and the diffusing capacity was well preserved. Dr. Shellito noted that, although Dr. Cohlmia focused on appellant's decreased residual volume as demonstrative of restrictive lung disease, he believed this was "of little consequence" as explained above. Dr. Shellito concluded that appellant had no disability arising from his exposure to asbestos in federal employment and that he had a zero percent lung impairment or class I rating after applying the table in the AMA *Guides*.

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[3] These *Guides* have been adopted by the Office and approved by the Board as a standard for evaluating scheduled losses. See *Samuel McGee*, 33 ECAB 1422.

There is no rationalized medical evidence of record supporting appellant's claim for an asbestos-related pulmonary condition resulting from his exposure to asbestos in federal employment. He has failed to meet his burden of proof.

The decision of the Office of Workers' Compensation Programs, dated April 9, 1984, is hereby affirmed.

In the Matter of RICHARD UUEREB *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84-1295; Submitted on the Record;
Issued August 29, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant has any disability or impairment causally related to asbestos exposure in his federal employment.

On July 25, 1983 appellant, then a 50-year-old marine machinist, filed a claim asserting he had sustained "pulmonary asbestosis" as a result of exposure to asbestos in his federal employment. He commenced work at the employing establishment in 1965 and, as far as the record indicates, continues to date.

Appellant indicated that his asbestos exposure was heavy, i.e. visible airborne asbestos particles were evident, on a daily basis.

Appellant smoked one-half pack or less cigarettes a day for approximately three months in 1962. He indicated that he had lung problems since 1970 and had asthma since 1974.

The case record contains appellant's employment records including his job description, health records, and reports of normal chest x-rays for the years 1970, 1971, and 1973. Chest x-rays for the years 1978 and 1979 were interpreted as revealing bilateral pleural thickening on the lateral sides of the lungs, although there was no active disease seen in the chest.

Appellant submitted an April 1, 1982 report from Dr. George S. Cohlmia, a general surgeon, which gave a history of appellant's asbestos exposure. Dr. Cohlmia reported in pertinent part:

> "(1) *Spirometry:* The FVC, or forced vital capacity, is 3.60 liters or 83% of predicted, which is at the lower limits of normal and may not indicate any restrictive disease. The FEV-1 is 2.09 liters or 60% of predicted, which is significantly decreased and shows a moderate degree of obsructive disease. There is mild increase with bronchodilators. The FEF 25-75 is .89 liters per second or 20% of predicted, which is severely decreased and shows a mild to moderate obstructive disease. The FEV-1:FVC ratio is 58% which is markedly decreased and shows moderate obstructive disease.
>
> "(2) *Lung Volumes:* The SVC is 4.05 liters or 93% of predicted. The RV is 2.82 liters or 137% of predicted, which shows over-inflation. The TLC is 6.86 liters or 108% of predicted, also increased. The FRC is 3.10 liters or 96% of predicted. All the lung volumes are slightly increased and may show pulmonary over-inflation. The RV:TLC ratio is 41% and is increased, showing mild air trapping.
>
> "(3) *Diffusion Capacity:* The DLCO is 30.97 milliliters per minute per millimeter of mercury, or 118% of predicted, which is normal.
>
> (4) *Maximum Ventilatory Volume:* The MVV is 84 liters per minute or 67% of predicted, which is moderately decreased.
>
> "*Impression:*
>
> (1) No significant evidence of restrictive pulmonary disease.
>
> (2) Mild to moderate degree of obstructive pulmonary disease, also of the emphysematous type.
>
> (3) Normal diffusion capacity.
>
> (4) Moderately reduced maximum ventilatory volume.
>
> "*Comment:* This patient's pulmonary function tests are abnormal and show mainly that of a moderate obstructive disease. This is evident in the patient's flow volume loops which do show evidence of a moderate obstructive disease of the small airways type also. There is a degree of overinflation and emphysematous type of obstructive disease is questioned. In light of the fact that the patient has smoked very little, this obstructive disease is difficult to explain as having come from this. He has had very heavy exposure to asbestos for 27 years and this may have some influence upon his respiratory abnormalities, although they are obstructive and show no significant sign of restriction, although with pulmonary overinflation secondary to obstructive change restrictive disease may be obscured.
>
> "*X-RAYS*"
>
> * * *
>
> "(3) Slight bilateral localized pleural thickening, left greater than

> right, nonspecific. The local thickening is compatible with local pleural thickening as a reaction to prior asbestos exposure, and/or localized extrapleural adipose tissue. The contour of the thickening is smooth on the left, but there is a slight straightening of the superior margin of the thickening on the right, and the additional possibility of local prominence of the serratous anterior musculature is also raised.
>
> "*Comment:* There is evidence of pleural thickening that may be related to asbestos exposure although nonconclusive.
>
> "*DISCUSSION*"
>
> * * *
>
> "The patient's physical examination shows very mild degree of wheezes on forced expiration that would go along with a bronchospastic component. His laboratory is within normal limits. His electrocardiogram is nonspecific. His pulmonary function tests are abnormal and show a definite moderate degree of obstructive disease of an emphysematous type. This abnormality is difficult to explain in light of the fact that the patient has had a very minimal amount of smoking history, although it could have influenced this. He has had very heavy exposure to asbestos and this may have influenced his pulmonary function abnormality, although it is an obstructive one and not a restrictive disease. It should be noted that in significant obstructive disease, the restrictive component may be obscured. This patient's x-rays do show evidence of chronic obstructive pulmonary disease, as well as some local pleural thickening which may be due to asbestos exopsure, although this is not conclusive."
>
> * * *
>
> "This patient fits into the category between Class II and III of the American Medical Association's classification for workers' disability and respiratory impairment."

The Office of Workers' Compensation Programs referred appellant with a statement of accepted facts to Dr. Oscar R. Scherer, Board-certified in internal medicine and pulmonary disease. Dr. Scherer examined appellant on December 14, 1983, reviewed the results of a November 2, 1983 x-ray and pulmonary function tests and a December 15, 1983 computerized axial tomography (CAT) scan of the chest and a January 10, 1984 pulmonary exercise stress test, and reported as follows on January 16, 1984:

> "*Chest x-rays*
>
> PA, lateral and oblique views of the chest were obtained and interpreted by a government-certified "B" reader . . . It was felt that these films were within normal limits. Apparent extrapleural densities were seen on the PA view that probably represent extrathoracic musculature or extrapleural fat, rather than pleural plaques.

However, there was one area on the right side that may have been a plaque. For this reason a CT scan of the chest was performed.

"Pulmonary Function Studies

These studies demonstrate changes compatible with obesity; that is, marked reduction in the expiratory reserve volume with a normal total lung capacity. There is mild airway obstruction that did not respond to inhaled bronchodilator. The diffusing capacity was normal. There was mild hypoxemia.

"CT Scan of the Chest

Because the plain films could not settle the question of the presence of pleural plaques, a CT Scan was performed. There were bilateral focal areas of fairly flat top pleural thickening consistent with pleural plaque. No definite calcifications were identified. There did not appear to be paraspinous pleural thickening. Much of the densities that were seen on the plain chest x-rays were not in the same areas as the pleural plaques and were probably muscle.

"Noninvasive Pulmonary Function Study

The patient was exercised to 6.1 METs at which point he achieved 83% of his predicted maximum heart rate. He was also approaching a pulmonary limitation with normal tidal volumes and respiratory rate. This was a relatively normal pulmonary response to exercise without evidence of significant restrictive lung disease.

"Impression

(1) Bilateral pleural plaque secondary to asbestos exposure.

(2) Mild chronic obstructive pulmonary disease, probably asthmatic bronchitis although a contribution from allergic asthma is not completely excluded.

(3) Moderate exogenous obesity.

"Discussion

The patient has significant pleural-associated densities on his plain film and has on CT scan, areas which are consistent with pleural plaque. There is no calcification present and the extent of plaque development is not in the same areas as the plain x-ray abnormalities. There is no evidence for interstitial lung disease on the chest x-rays and his resting pulmonary function studies show mild airway obstruction, which is probably a result of asthmatic bronchitis or allergic asthma. These changes are not related to an asbestos exposure. He is moderately overweight and in poor condition. He was able, however, to exercise to 6 METs and did not exhibit any pulmonary limitation or changes suggestive of a restrictive lung disease. There is therefore, no asbestos-related pulmonary limitation present. The pleural plaques do not cause a limitation. He should be able to continue his work with adequate protective measure from further asbestos exposure. He should not resume cigarette smoking and he should have adequate protection from smoke and fumes as

> he does have airway obstruction present which can be exacerbated by fumes. He should be reevaluated every two to three years to check on the progression of his pleural abnormalities."

An Office medical consultant, Dr. Charles C. McDonald, a Board-certified internist and pulmonary specialist, reviewed the medical evidence and diagnosed "pleural thickening secondary to asbestos exposure." Dr. McDonald noted, however, that there was insufficient evidence to support the diagnosis of parenchymal disease secondary to asbestos exposure because there were no crackles on physical examination, normal parenchyma by chest x-ray, no restriction on pulmonary function tests, a normal exercise test, and a normal parenchyma by CT scan. The doctor opined that appellant was not disabled due to asbestos exposure and rated him as having zero percent impairment secondary to asbestos-related disease, using the AMA *Guides*.

By letter decision dated April 17, 1984 the Office found that appellant had sustained pulmonary injury consistent with exposure to asbestos during his federal employment; however, it determined that he had no disability or impairment arising from such condition. The Office further found that appellant was entitled to periodic medical examinations.

The Board finds that appellant has failed to establish that he has any disability or impairment causally related to his exposure to asbestos in his federal employment.

An award of compensation may not be based on surmise, conjecture or speculation or on an employee's unsupported belief of causal relation.[1] Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that his disability was causally related to his federal employment.[2] This burden includes the necessity of furnishing medical opinion evidence of a cause and effect relationship based upon a proper factual and medical background.[3]

Dr. Cohlmia, a general surgeon, examined appellant and reported that his pulmonary function tests were abnormal; however, he stated that the tests showed a moderate degree of obstructive disease of an emphysematous type. The doctor noted appellant's exposure to asbestos and opined that "this may have some influence upon his respiratory abnormalities," however, this opinion is speculative, and therefore, of little probative value. Dr Cohlmia stated that appellant had "no significant evidence of restrictive pulmonary disease," and although he classified appellant into the category between class 2 and 3 of the AMA *Guides* for disability and respiratory impairment he did not relate this impairment to asbestos exposure, but rather to obstructive pulmonary disease. Dr. Scherer, a Board-certified pulmonary specialist, evaluated appellant and found no evidence for interstitial lung disease, nor any pulmonary limitation or changes suggestive of a restrictive lung disease. Dr. McDonald, a Board-certified pulmonary specialist, reviewed the medical evidence and concluded that appellant had pleural thickening but zero percent impairment secondary to asbestos exposure. There is no convincing medical evidence of record showing that appellant has any disability or impairment as a result of his exposure to asbestos in federal employment.

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[1] See *Mrs. Alonzo D. King, Sr.*, 19 ECAB 402; *Wilbur D. Earl*, 24 ECAB 42.

[2] *John Cogswell*, 25 ECAB 88.

[3] *Thomas J. Spelson*, 22 ECAB 274, *John Cogswell*, *supra*.

The April 17, 1984 decision of the Office of Workers' Compensation Programs is hereby affirmed.

In the Matter of PASQUAL TORNA *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Newcastle, Pa.

Docket No. 83-2059; Hearing held June 28, 1984;
Issued August 29, 1984

Appearances: *James Zaccaria, Esq.*, for appellant; *Paul J. Klingenberg, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant's pay rate for compensation purposes is limited to the amount he received for his regular full-time employment as an electronics technician at time of injury or whether nonfederal part-time employment as a real estate salesman should be considered in computing his pay rate for purposes of compensation.

Appellant, then a 40-year-old electronics technician, filed a claim on May 7, 1979 alleging that on April 30, 1979 he injured his back while pulling on a lift chain. Appellant returned to light duty and on September 5, 1979 filed for a July 25, 1979 recurrence of disability. He returned to a new position on September 13, 1979. On April 24, 1980 he filed for another recurrence of disability for April 10, 1980. On May 6, 1980 appellant underwent a laminectomy-discectomy. The Office of Workers' Compensation Programs paid appellant compensation for temporary total disability for the recurrences and authorized regular payment of temporary total disability commencing August 14, 1980. His compensation rate was based on his earnings as a full-time electronics technician in the federal government.

In a June 30, 1981 letter, appellant stated that prior to March 31, 1980, he supplemented his salary with part-time employment as a real estate broker; he stated that he had been advised by the personnel officer at the employing establishment that part-time earnings outside the government were included in compensation payments.

In a November 5, 1981 letter, appellant stated that he wished to make claim for his loss of earnings as a real estate salesman retroactive to April 1, 1980.

In a November 9, 1981 letter, appellant's outside employer stated that appellant became associated with their office as a real estate broker and salesman from June 1975 until March 30, 1980. The letter also included appellant's annual earnings as a real estate salesman from 1977 to March 31, 1980.

In a December 28, 1981 letter, the Office stated:

> "This will confirm our conversation of this afternoon.
>
> "If we are to establish your entitlement to an amended pay rate based in part on your real estate earnings and your lost wage-earning capacity in your nongovernment work as a result of your work-related disability, we must have the following:
>
> '(1) The exact amount of your earnings from Carl H. Schmidt Realtors for the one-year period 4/10/79 through 4/9/80;
>
> '(2) A statement . . . certifying that your loss of income from this source was solely the result of your work-related injury and the disability which you incurred as a result thereof rather than as a result of the depressed realty market (or any other reason not directly attributable to the work injury);
>
> '(3) Certification from your attending physician(s) that you were disabled by the work injury from the duties of the realty position as well as from your regular work; the statement should spell out those features of the job you were/are incapable of performing;
>
> '(4) A statement from your [federal] employing agency to the effect that your outside employment was known to them (or that had it been known it would have been permitted.)"

There was also a December 28, 1982 (sic) "memo to file" in the case record pointing out that the claims examiner spoke with an assistant deputy commissioner of the Office who had advised the claims examiner that "we may adjust claimant's pay rate to reflect the nonfederal income."

The Office also requested the federal employing establishment to provide a statement concerning whether the outside employment was known to the agency and, if so, condoned. On December 31, 1981, the federal employing establishment replied that appellant's outside employment was known to the agency and did not constitute a conflict of interest.

On January 7, 1982 appellant's outside employer supplied a statement of appellant's earnings for the one-year period April 10, 1979 through

April 9, 1980, further stating that appellant's income record substantiated that appellant maintained a consistent level of earnings.

By compensation order dated May 13, 1982, the Office affirmed the prior pay rate computation. In an April 26, 1982 memorandum to the Director which was incorporated by reference into the compensation order, a claims examiner stated that wages earned in dissimilar outside employment cannot be used in computation of the employee's pay rate. He concluded that due to the dissimilarity between the duties of an electronics technician and those of a real estate salesman, appellant's pay rate based solely on his federal employment was properly computed.

Appellant's representative requested a hearing before an Office hearing representative. The hearing was held on December 13, 1982. By decision dated August 4, 1983, the hearing representative affirmed the Office's decision, finding that appellant's outside earnings as a real estate broker could not be considered in computing the compensation rate. The hearing represenative stated that "it is clear that the similarity/dissimilarity question involves not only the physical activities involved in the performance of the two concurrently held jobs but rather the type of work and nature of duties performed in the two jobs."

The Board finds that appellant's rate of compensation was properly computed by the Office.

The applicable section, section 8114, of the Federal Employees' Compensation Act states:

> "(d) Average annual earnings are determined as follows:
>
> (1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay—
>
> (A) was fixed, the average annual earnings are the annual rate of pay; or
>
> (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a $5^1/_2$-day week, and 260 if employed on the basis of a 5-day week.
>
> (2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment of substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or

> similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.
>
> (3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in Federal employment, and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury."[1]

The Board notes that Congress, in enacting the 1949 amendments to the Federal Employees' Compensation Act, stated that the Act was similar to the New York workmen's compensation law,[2] which has been interpreted as allowing earnings from concurrent employments to be combined in determining the pay rate for compensation purposes only if the concurrent employments were related.[3] Following the precedents of the New York courts and of this Board, and the majority rule in the other jurisdictions, earnings from dissimilar private employment cannot be considered in computing appellant's pay rate for purposes of compensation.[4]

In the instant case, appellant's duties as an electronics technician in his federal employment and as a real estate salesman in his nonfederal employment involved dissimilar duties; thus, the earnings from the positions could not be combined.[5] The test of similarity of employment involves not only the physical activities required by the two positions but the type of work performed.[6]

The Board notes that appellant's attorney argued that the Office had contractually committed itself to pay appellant compensation based on his nongovernmental employment. Appellant's attorney provided no rationale for this assertion and cited no legal precedent in support of his argument. The Board finds this argument to be without merit.

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[1] 5 U.S.C. 8114(d).

[2] S. Rept. 836, 81st Cong., 1st sess. p. 24

[3] *McDowell v. Flatbush Congregational Church*, 277 NY 536, 13 N.E. 2d 462; *Birch v. Bund* 8 N.Y.S. 2d 781.

[4] *Irwin E. Goldman*, 23 ECAB 6; *Leo Clouser*, 5 ECAB 366. See *Larson's Workmen's Compensation Law*, 860.31(a) *et seq.* See also *Cecile Barrett*, 26 ECAB 112.

[5] See also *Federal (FECA) Procedure Manual*, Chapter 2-900, Computation of Compensation which states:

"(4) Consideration may be given only to earnings in employment which is the same as, or similar to, the work the employee was doing when was doing when injured. No consideration may be given to earnings in dissimilar employment. For this reason the CE [claims examiner] be sure to ascertain the nature of the employment in respect to the employee's earnings and take into account only those earned in work which is the same or similar to the work performed on the date of the injury."

[6] See *Johnson v. Phaeffin*, 136 Conn. 107, 68 A. 2d 687 (1949). [Duties of power company lineman and tree-trimmer held too dissimilar to permit combining of earnings although both are climbing jobs.].

The decisions of the Office of Workers' Compensation Programs dated May 13, 1982 and August 4, 1983 are hereby affirmed.

In the Matter of A. Z. EDWARDS *and* DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alameda, Calif.

Docket No. 84–1263; Submitted on the Record;
Issued August 30, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant has a permanent impairment of his lungs causally related to his exposure to asbestos at work.

On April 27, 1983 appellant, then a 66-year-old retired former wood worker, filed a claim for a schedule award for pulmonary asbestosis which he attributed to his exposure to asbestos while crating and packing at several federal facilities from 1948 to June 1, 1976.

Appellant submitted an October 1, 1981 report from Dr. George S. Cohlmia, a general surgeon and neurosurgeon, which included results of pulmonary function studies. Dr. Cohlmia interpreted the results of these studies showing mild restrictive pulmonary disease and no evidence of obstructive pulmonary disease. The doctor stated that appellant's restrictive pulmonary disease was most likely influenced by his exposure to asbestos, and noted that x-rays showed no evidence of pleural or parenchyma asbestosis. Dr. Cohlmia concluded that appellant fit into Class 2 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, but that he may lean to Class 3 because of the severe reduction in his diffusing capacity.

By an October 4, 1983 letter the Office of Workers' Compensation Programs requested that appellant submit further information, including a medical report from the doctor who advised him he may have an asbestos-related disease. No further medical evidence was submitted.

By a compensation order dated March 21, 1984 the Office rejected appellant's claim on the ground that the medical evidence did not establish that he had any condition causally related to his employment-related exposure. This compensation order contained a finding that the medical evidence appellant submitted indicated he has no evidence of pleural or parenchymal asbestosis.

The Board finds that the case is not in posture for decision.

In rejecting appellant's claim, the Office did not follow the procedures it has established for evaluating claims for abestosis. The Federal (FECA) Procedure Manual states: "If the claimant submits a report of recent medical evaluation from a personal physician at the time of filing (or prior to our referral), the report should be carefully evaluated to determine its completeness according to the requirements of OWCP medical guidelines. If the report indicates asbestos-related disease but is deficient according to OWCP requirements, the claimant should be referred, as described above, at OWCP expense."[1]

It is apparent that the Office did not carefully evaluate Dr. Cohlmia's October 1, 1981 report to determine its completeness according to the requirements of the Office's medical guidelines. No Office medical adviser or consultant reviewed this report, and the Office's March 21, 1984 compensation order contains an erroneous finding that Dr. Cohlmia's report indicated appellant has no evidence of pleural or parenchymal asbestosis. Dr. Cohlmia's report, in fact, stated that x-rays showed no evidence of pleural or parenchymal asbestosis, but that appellant had at least a Class 2 pulmonary impairment which was causally related to his exposure to asbestos.

The decision of the Office of Workers' Compensation Programs dated March 21, 1984 is hereby set aside and the case remanded to the Office for further development in accordance with its established procedures, to be followed by a *de novo* decision.

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[1] Chapter 2-806, FECA Tr. No. 81-44, issued August 1981, section 18(f), p. 51.

In the Matter of DUANE G. SAUNDERS *and* DEPARTMENT OF THE NAVY, NAVAL STATION FIRE DEPARTMENT, San Diego, Calif.

Docket No. 84-1457; Submitted on the Record;
Issued August 31, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether appellant's claim for compensation is barred by the applicable time limitation provision of the Federal Employees' Compensation Act.

On March 14, 1983 appellant, then a 51-year-old ex-firefighter, filed a claim alleging that his lower back and pulmonary conditions were caused by his federal employment. Appellant indicated he first became aware in October 1971 of his back injury and smoke inhalation in 1976. The date of the back injury was listed as December 2, 1970 and of smoke inhalation as July 19, 1976. In response to the question when he first realized the disease or illness was caused or aggravated by his employment, appellant stated: "1971 severe back pain in lower area, extreme pain while walking or sitting. Difficulty and shortness of breath." Appellant indicated that he had not filed notice and claim with the employing agency within 30 days because he "was not on the job long enough to file for fear of getting laid off or losing job." His employment records indicate that he resigned from his firefighter position for reasons unrelated to this claim, effective June 15, 1979.

The employing establishment submitted employment, retirement and dispensary medical notes. Among the dispensary notes are several dated from December 2, 1970 through September 11, 1974 which describe back injuries. In answer to the question whether the back problem for which appellant was referred to the dispensary was work related, several notes were marked "Yes," others have "questionable" checked off. Among the dispensary notes there were four dated January 8, 9, 10 and July 19, 1976 respectively, which indicated appellant was treated for occupational smoke inhalation.

The case file also contains a memorandum to the file dated December 13, 1983 which states the following:

> "Duane Saunders filed a CA-1 based on an incident of smoke inhalation. (DOI: 1/8/76, Case #A13-468431). There was no time lost and case was . . . closed 4/6/76."

An addendum paragraph stated the following: "Case file A13-468431 has since been destroyed, all that remains is copy of summary with some inquiries from it."

By a February 9, 1984 letter, the Office of Workers' Compensation Programs requested that appellant furnish information with respect to his October 1971 back injury, his pulmonary disease, and whether his pulmonary disease was related to his April 6, 1976 smoke inhalation injury. In a February 17, 1984 response, appellant stated that he did not report his back injury earlier because he was able to "work with it." In 1979, however, he attempted but was unable to obtain employment at Fort McCoy, Wisc. due to his back condition. Appellant further reported that his pulmonary disease "was determined at the V.A. hospital in Saint Paul, Minn., most likely as a result on the Air Craft Carrier LPH-10 Okinawa, at which time I was employed at NAVSTA and we were called to assist [with] the fire [which] was out of control." Appellant did not indicate the date of this incident nor did he state whether it was this incident that necessitated filing a CA-1 on April 6, 1976.

By letter decision dated April 13, 1984 the Office of Workers' Compensation Programs rejected appellant's claim for benefits on the basis that he failed to timely file a claim for compensation. Appellant's claim for compensation contains two separate parts—the first is for a traumatic back injury occurring in October 1971; the second is for an occupational pulmonary condition allegedly sustained as a result of smoke inhalation in 1976.

The Board finds that appellant did not file his claim for an alleged 1970 or 1971 back injury within the applicable time limitation provision of the Act.

In the case of traumatic injury, the time for filing a claim begins to run on the date of injury.[1]

Appellant alleges that his disability which resulted from a back injury occurred in December 1970 or October 1971. Therefore, the time for filing with respect to the alleged back injury began to run at the time of the injury.

The five-year time limitation applicable to this case is a maximum, mandatory limit which may not be waived regardless of the reasons for or circumstances surrounding the failure to file within the prescribed time.[2] There is no indication that appellant filed a claim at any time prior to March 14, 1983. Since the time limitation began to run on appellant's claim for a back injury in October 1971 at the latest, he failed to file within the applicable time limitation provision of the Act.

However, an employee's failure to file a timely claim for compensation does not foreclose his right to receive medical benefits for a condition causally related to his employment provided timely notice of injury was given or if the employee's immediate supervisor had actual timely knowledge of the employment-related condition.[3]

Employing establishment dispensary unit notes indicate that appellant had reported back injuries from 1970 through 1974. The Board finds that the dispensary notes which were in the possession of the employing establishment establish that there was timely notice of a possible relationship between appellant's back condition and his employment.[4] Therefore, appellant would be entitled to receive medical benefits if the medical evidence establishes that his back condition is causally related to the reported injuries.

The Board further finds that appellant timely filed his claim with respect to the smoke inhalation incident in January 1976.

The record indicates appellant had filed a CA-1 form (notice of traumatic injury and claim for compensation) "based on an incident of smoke inhalation" on January 8, 1976. Although the original claim form was apparently destroyed, the memorandum to the file concerning the incident indicates that it was timely filed.

Thus, the issue becomes whether the pulmonary condition claimed is causally related to the January 1976 inhalation incident or incidents.

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[1] *William Nuess*, 25 ECAB 55.

[2] *John A. Camisa*, 27 ECAB 453.

[3] *John M. Ragsdale, Jr.*, 19 ECAB 535, *Nathan J. Bryand*, 20 ECAB 192.

[4] 5 U.S.C. section 8122.

Appellant has the burden of establishing by the weight of the reliable and substantial evidence that his condition was caused or adversely affected by his employment. As part of his burden he must present rationalized medical opinion evidence, based on a complete factual and medical background showing causal relation.[5] Therefore, the case is remanded so that appellant may be given an opportunity to submit such evidence in support of his claim.

The April 13, 1984 decision of the Office of Workers' Compensation Programs is affirmed with respect to the determination that the claim for appellant's back injury was not timely filed. The decision is reversed with respect to the determination that the claim regarding smoke inhalation was not timely filed. The case is remanded to permit further development in accordance with the Board's decision.

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[5] *Robert N. Pollard*, 32 ECAB 489.

In the Matter of STEPHEN SPIRO and NEW YORK CITY POLICE DEPARTMENT, New York, N.Y.

Docket No. 83-2108; Hearing August 8, 1984;
Issued August 31, 1984

Appearances: *John J. Maguire, Esq.*, for appellant; *Daniel T. Franklin, Esq.*, for the Director, Office of Workers' Compensation Programs.

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, DAVID S. GERSON

The issue is whether the injury sustained on October 19, 1981 by appellant, a local police officer, in a national bank while responding to an alarm that proved to be false, came within the provisions of the Federal Employees' Compensation Act authorizing the payments of benefits, under certain conditions, to local law enforcement officers.

On October 19, 1981 appellant, a 34-year-old police officer, sustained an injury to his right knee when he slipped and fell on a staircase inside a savings bank "while inside attempting to apprehend perpetrators" in response "to a radio run." He filed a claim alleging that his injury came under the provisions of section 8191 of the Federal Employees' Compensation Act,[1] which provides benefits for local law enforcement officers under certain specified circumstances.

In an October 19, 1981 internal police department report, appellant's superior described the incident as follows:

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[1] 5 U.S.C. section 8191.

> "[Appellant] was performing tour 4X12 and was assigned to 20 Pct. [precinct] sector C. At 1927 hours [7:27 p.m.] [appellant] responded to a . . . radio run . . . at 1895 Broadway, the Franklin Savings Bank on a signal 10-11, [to] investigate a bank alarm. Upon arriving at the location, the officers,[2] were admitted to the closed premises by . . . a maintenance man who was working inside the bank. After searching the premises and determining that the alarm was activated in a teller's cage on the basement level and that the alarm was apparently faulty, the officers were walking up the rear stairwell between the basement and the first floors, when [appellant] slipped on a step, fell forward spraining his back and striking his right knee on a step, causing an injury to same. Witness observe that the step was missing a piece of tile and was defective."

By compensation order dated June 27, 1983, which incorporated a memorandum summarizing the evidence, the Office of Workers' Compensation Programs denied appellant's claim on the ground that the evidence of record did not establish that his injuries occurred "under circumstances to bring it within the purview of 5 U.S.C. section 8191 as enumerated." The memorandum, noting that appellant had responded to a false alarm, stated that he was not covered because "there has been no crime committed."

Appellant contends on appeal that he was injured "while preventing a robbery at a Unites States saving bank."

The Board finds that the evidence does not establish that appellant's October 19, 1981 injury occurred under the circumstances enumerated in section 8191 of the Federal Employees' Compensation Act,[3] the section authorizing the payment of benefits to local law enforcement officers under certain conditions.

The provision in question is section 8191(3) of the Act,[4] which provides in pertinent part:

> "[A]n eligible officer is any person who is determined by the Secretary of Labor in his discretion to have been on any given occasion— *** (3) a law enforcement officer and to have been engaged on that occasion in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States; and to have been on that occasion not an employee as defined in section 8101(1), and to have sustained on that occasion a personal injury for which the United States would be required under subchapter I of this chapter to pay compensation if he had been on that occasion such an employee engaged in the performance of his duty. *** "

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[2] One other officer accompanied appellant on this call.

[3] 5 U.S.C. section 8191, *et seq.*

[4] 5 U.S.C. section 8191(3).

The legislative intent for this provision was expressed by Senator Yarbrough, one of the sponsors of this portion of the legislation enacted as section 8191, who stated in part:

> "A clear-cut case deserving benefits is presented when an officer is attempting to prevent a crime but may not be in the process of actually apprehending a person for the commission of a crime against the United States.
>
> "He moves in to stop a crime before it is committed. For instance, a city policeman may be standing outside a national bank and may attempt to prevent the entrance of a man holding a revolver. If the policeman is then injured, does his case fall within the scope of the bill? I believe it should be clearly stated."
>
> * * *
>
> "It applies to the policeman shot down when he tries to halt a man starting into a bank with a pistol and tries to prevent what looks like a crime, rather than waiting and trying to apprehend the criminal after a crime. ***"
>
> "It seems to me, . . . that the prevention of Federal crimes should be recognized as being of as great benefit to society as the apprehension of the criminal after the crime." [5]

In the present case, appellant was injured after inspecting a bank's premises in response to a faulty bank alarm. There was no evidence in the record that a crime had actually been committed, or that someone was preparing to commit a crime, or that a crime was in progress at the time of injury. There is no evidence that anyone, other than appellant, his coworker/partner and the maintenance engineer, were on the premises at the time of appellant's injury. Therefore, in keeping with the context of section 8191(3) and the legislative intent behind the enactment of this section, appellant did not sustain injury while engaging in the act of lawful prevention of or the lawful attempted prevention of a crime against the United States, and therefore he is not an "eligible officer" under 5 U.S.C. section 8191(3). Thus, section 8191 does not apply to this injury.[6]

The decision of the Office of Workers' Compensation Programs dated June 27, 1984, is hereby affirmed.

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[5] Cong. Rec., September 14, 1967, p. 25567.

[6] Although appellant also contended that he entered the bank in an attempt "to apprehend perpetrators," there is no evidence of record which establishes that appellant at the time of his injury was engaged in the act of apprehending or attempting to apprehend a person who had committed a crime against the United States, (5 U.S.C section 8191(1)(A)) or a person who was sought by a law enforcement authority for the commission of a crime against the United States, (5 U.S.C. section 8191(1)(B)). See also *Michael B. McKeon*, 28 ECAB 8; *Angel F. Poggi*, 28 ECAB 199; and *Lewis J. Angelone*, 35 ECAB 747. The Board notes that appellant does not contend that he was in the act of protecting or guarding a person held for a crime against the United States, or as a material witness in connection with such a crime (5 U.S.C. section 8191(2)); nor does he contend that was apprehending or attempting to apprehend an individual being sought as a material witness in a criminal proceeding instituted by the United States (5 U.S.C. section 8191(1)(C)).

In the Matter of SANTOS BONILLA ORSINI, claiming as dependent parent of SAMUEL BONILLA CRESPO, deceased employee, *and* U. S. DEPARTMENT OF AGRICULTURE, JOB CORPS PROGRAM, Ramey, P. R.

Docket No. 84–1362; Submitted on the Record;
Issued September 13, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant was a partial dependent of the employee at the time of his death within the meaning of 5 U.S.C. section 8133.

On February 28, 1983 appellant, father of the deceased employee, filed a claim in which he alleged that he was entitled to survivor's benefits as a dependent parent. The employee, a 19-year-old corps member, was struck and killed by an automobile while in the performance of duty on December 14, 1982. Appellant noted that he was an unemployed mason and was totally dependent on his son's contributions for his support. He also listed $1,786.00 per month from "unemployment benefits and coupons" as other income.

In an August 16, 1983 response to an Office of Workers' Compensation Programs request for proof that the employee contributed to his income, appellant submitted copies of three undated notes written by the employee, in which he noted contributions of $50.00, $5.00 and $5.00.

On October 18, 1983 the Office determined that appellant was entitled to a burial allowance and should submit an itemized copy of the funeral bill. The Office also notified appellant that the evidence submitted as proof of dependency was insufficient for purposes of determining his entitlement to survivor's benefits. The Office informed appellant that he must establish that regular or periodic contributions were made, and that the money was being used to maintain him in his customary standard of living.

Thereafter, on November 16, 1983 appellant submitted an Office form OWCP-20 questionnaire in which he listed a total income of $290.00 per month in the form of food stamps. Appellant also listed monthly expenses in the amount of $551.00, itemized as $265.00 for food, $200.00 for clothing, and $36.00 for utilities, with $50.00 per month being paid on an $800.00 loan. Five family members were listed in addition to appellant. Appellant stated that the employee made bi-monthly contributions to his support in the amount of $40.00.

On January 23, 1984 the Office issued a compensation order in which it rejected appellant's claim, on the ground that "it has not been demonstrated that the claimant made regular contributions for the maintenance of the household and that these contributions were necessary to maintain a customary standard of living." The Office also determined that appellant was entitled to reimbursement of burial expenses of up to $800.00 plus an administrative allowance of $200.00 upon submission of a paid funeral bill.

In *Agnes M. Chekel*,[1] the Board stated that "In order to meet the test of dependency, it is necessary to show that the parent claiming as a dependent looked to and relied upon the contributions of the employee as a means of maintaining or helping to maintain a customary standard of living. It is not necessary to show dependency to a substantial extent."

The Board finds that appellant has failed to submit evidence supporting his claim that he as a parent of the deceased employee was partially dependent upon him within the meaning of the Federal Employees' Compensation Act.

Appellant submitted copies of three undated notes written by the employee in which he noted contributions of $50.00, $5.00 and $5.00. Also submitted were Office forms in which he claimed that the employee made bi-monthly contributions of $40.00, that his other monthly income consisted of $290.00 in food stamps, and that his total monthly expenses amounted to $551.00. However, he did not submit any documentation to support his contention of bi-monthly payments or that any such payments helped to maintain his customary standard of living. There has not been "demonstrated a pattern of regular contributions toward the support" of appellant or his family in their customary standard of living.[2]

The test for dependency is whether the employee provided the "means of maintaining or helping to maintain a customary standard of living." The evidence submitted by appellant does not meet this test of dependency. Although his statements tend to show that the decedent financially assisted his parent in certain respects, his statements do not show that the decedent's support helped appellant maintain his "customary standard of living."

The decision of the Office of Worker's Compensation Programs dated January 23, 1984 is hereby affirmed.

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[1] 13 ECAB 289.

[2] *Robert C. Boyd*, 18 ECAB 639 at 641.

In the Matter of JOHN J. WYSZYNSKI *and* U. S. POSTAL SERVICE, POST OFFICE, Berkeley, Calif.

Docket No. 84-1300; Submitted on the Record;

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether the Office of Workers' Compensation Programs acted properly in suspending appellant's possible entitlement to compensation benefits on the ground that he obstructed a medical examination he was directed to undergo by the Office.

On January 31, 1983 appellant, a 64-year-old postal letter carrier, sustained an injury to his lower back when he slipped and fell on a moss-covered driveway while in the performance of duty. He was treated the following day at the Kaiser-Permanente Medical Center Program for a low back sprain, and was advised against returning to work until February 8, 1983.

Appellant returned to work on February 8, 1983, and on March 15, 1983 was treated by Dr. Bannanje R. Nayak, Board-certified in preventive medicine, and Dr. Norman Pearl of the employing establishment's industrial medicine unit. The doctors reported that an electromyographic examination of both lower extremities and the lumbosacral paraspinals and a right peroneal nerve conduction study were normal. The doctors further reported that there was no evidence of lumbar root, lumbosacral plexus or peripheral nerve injury; they noted that appellant lost no time from work.

By letter decision dated May 13, 1983 the Office denied appellant's claim for compensation on the ground that he did not meet his burden of proof in establishing that he sustained an injury in the performance of duty on January 31, 1983.

Appellant requested a hearing before an Office hearing representative, and submitted a medical certificate from the Kaiser-Permanente Medical Care Program indicating that he should be assigned limited duty, including one hour of assistance per day when making deliveries, for the period May 1 to June 8, 1983.[1]

Appellant also submitted a report by Dr. Cecil L. Jun, a Board-certified neurosurgeon of Kaiser-Permanente, dated May 24, 1983, who described a history of the January 31, 1983 employment incident and his findings on physical examination of appellant. Dr. Jun reported that appellant's symptoms had improved; that a computerized tomography scan revealed bulging of the L3–4 and L4–5 discs; that x-rays of the lumbosacral spine revealed facet changes at L3–4 and also degenerative disc disease at this level, which he noted was "not at all unexpected at his age"; and that surgery was not indicated. The doctor concluded that although appellant would periodically experience an exacerbation of his degenerative disc disease, he would fully recover "with time." [2]

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[1] The employing establishment complied with these restrictions.

In a report dated May 31, 1983, Dr. Edward B. Keller, a neurosurgeon and an associate of Dr. Jun, stated that he essentially agreed with Dr. Jun's report. Dr. Keller concluded that appellant had chronic degenerative arthritis and disc changes "with no evidence of disc herniation" and stated that contrast injections and surgical intervention were not indicated.

The Office scheduled a hearing before an Office hearing representative but prior to the hearing the hearing representative reviewed the evidence of record and cancelled the hearing. In a memorandum dated August 9, 1983, he stated that there was sufficient evidence to determine that appellent's low back sprain resulted from the January 31, 1983 employment injury, that appellant was disabled from February 1 through 7, 1983, as a result, and that although the record did not establish that appellant's bulging discs and degenerative arthritis resulted from the Janurary 31, 1983 employment injury, "the record does suggest there may be some relationship, at least enough to warrant further development." The hearing representative recommended that the May 13, 1983 decision be set aside, that appellant's claim for a low back sprain for the period February 1 to 7, 1983 be accepted as employment related, that the Office issue a decision as to whether appellant had any continuing disability or impairment resulting from the January 31, 1983 employment injury, and that appellant's physicians should clarify their reports as to the relationship, if any, between appellant's current condition and the January 31, 1983 employment injury.[3]

Accordingly, by order dated August 9, 1983, the Office vacated its May 13, 1983 decision for the reasons cited.

By letter dated October 4, 1983, the Office informed appellant that in order to determine the extent of any residual problems that he may have as a result of the January 31, 1983 employment injury, a referral to an independent physician for an examination was necessary. However, the Office further informed appellant that prior to the scheduling of the examination it was necessary for him to submit all reports of treatment received as a result of the employment injury.

In response, appellant submitted a series of clinical notes from the physicians of Kaiser-Permanente, including duplicates of the reports of Drs. Jun and Keller. These reports included the same diagnoses as those included in the reports of Drs. Jun and Keller; however, the reports did not include a statement as to whether or not appellant's chronic degenerative arthritis and disc changes resulted from the January 31, 1983 employment injury. Other reports, consisting of form reports and clinical notes, were submitted indicating that appellant received periodic treatment at Kaiser-Permanente for his lumbosacral sprain with possible radicular symptoms from February 1 through October 3, 1983. They further indicated that appellant was placed on "temporary disability" periodically during that time period.[4]

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[2] In an addendum to his May 23, 1983 report, dated February 3, 1984, Dr. Jun stated that appellant informed him that he had not experienced any back problems over the past ten years, and that since this fact was "contrary" to his previous impression, "this should be corrected."

[3] On remand appellant received continuation of pay for the period February 1 through 7, 1983.

Appellant also submitted a medical report by Dr. Elizabeth F. Nelson, a Board-certified internist and an associate with Kaiser-Permanente, dated December 5, 1983, who stated:

> "IMPRESSION: Degenerative osteoarthritis and disc changes, with symptoms suggestive of spinal stenosis. He had degenerative changes at L4–L5 with diffusely bulging disc at L3–L4. At the L4–L5 level he has a combination of degenerative disc, foraminal and lateral recess stenosis, all probably contributing to his symptoms. The fact that his symptoms started approximately 2-3 days after his fall is suggestive that in the fall there was some mild change in the relationship of the nearly compromised degenerative structures bringing on the onset of symptoms suggestive of spinal stenosis, most likely in the left L5 distribution."

By letter dated January 19, 1984 the Office informed appellant that it had scheduled an examination for him with Dr. Enos Trent Andrews, a Board-certified orthopedic surgeon, for an opinion as to the relationship between his current condition and the January 31, 1983 employment injury, and to determine the extent and degree of any disability remaining as a result of the employment injury. The appointment was scheduled for Monday, February 13, 1984.

Appellant was unable to keep that appointment and rescheduled it for March 7, 1984.

The record reveals that on March 7, 1984, appellant reported for his examination with his brother, who was his authorized representative, and a friend; that appellant insisted that the two individuals accompany him in the examination room; that when Dr. Andrews attempted to secure a medical history from appellant, his representative interrupted and attempted to relate the medical history; and that Dr. Andrews refused to continue with the interview. The record further reveals that the Office asked Dr. Andrews if he would examine appellant at a later date if it were to warn appellant of the consequences of his failure to follow his instructions; the doctor was reported as replying in the negative.

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[4] The record reveals that appellant had previously sustained an injury to his back at work on September 12, 1967, for which he alleged a recurrence of disability on November 8, 1973. The record further reveals that appellant injured his back in November 1982. It is unclear whether or not this occurred at work.

In a letter dated March 13, 1984, appellant's representative requested that the Office schedule an appointment for appellant with another physician because of Dr. Andrew's refusal to "allow a third person in his office when he conducted an examination." The representative explained that the presence of a third person in the doctor's examining room "was to insure that the patient conveyed to the doctor a complete, accurate medical history, necessary for the doctor to prepare an accurate medical report," and noted that appellant had experienced a situation where his medical reports, prepared by physicians at Kaiser-Permanente, were inaccurate. The representive also noted that the Federal Employees' Compensation Act [5] provides that a physician, paid by appellant, may be present at the examination; [6] however, he pointed out that appellant was unable to afford this expense. He further requested that the Office permit the use of a tape recorder during the course of the examination to determine whether appellant received "an adequate examination." The representative then requested that the Office arrange another medical examination by a physician of appellant's choice, "where a third party would be allowed as an observer and to tape record the examination for the claimant's physician's information."

By letter dated March 20, 1984 the Office informed appellant that it was aware of the events that took place in Dr. Andrews' office on March 7, 1984, and apprised appellant of the following:

> "You are hereby notified of the provisions of section 8123(a) of the Federal Employees' Compensation Act, which states '(a) An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.'
>
> "In other words, you may have a physician of your choice, paid by you, present at an examination requested by this Office.
>
> "You *may not* have any laymen present while you undergo examination.
>
> "Please carefully read the attached notice which informs you of the provisions of section 8123(d) of the Federal Employees' Compensation Act.
>
> "Please advise this Office in writing within 2 weeks as to whether you intend to fully cooperate with a medical evaluation arranged by

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[5] 5 U.S.C. section 8101, *et seq.*

[6] 5 U.S.C. section 8123(a.

> this Office and if you agree to abide by the regulations of this Office concerning such an evaluation. If you respond in the positive, we will reschedule this necessary medical examination."

Appellant did not respond.

In a subsequent letter dated April 11, 1984 addressed to appellant's representative with a copy forwarded to appellant, the Office stated:

> "To reiterate: No person other than Mr. Wyszynski may be present during a medical examination requested by the Office, except a qualified medical doctor paid by Mr. Wyszynski to attend the examination.
>
> "Ordinarily, examinations are not tape recorded. If Mr. Wyszynski agrees to cooperate with our procedures, we will schedule an appointment with an impartial medical specialist. He may request permission from that doctor to tape record the exam. Only if that doctor gives his consent will tape recording be allowed.
>
> "Failure to heed the physician's instructions during the examination will be construed as obstruction.
>
> "Again, Mr. Wyszynski should advise us within ten days of receipt of this letter if he intends to cooperate with the exam according to the regulations outlined by this Office."

By letter dated April 23, 1984 appellant's representative stated that Dr. Andrews "was untruthfully stating that the claimant 'declined to respond to Dr. Andrews' questions when he attempted to take a history from him.' " He explained that appellant "asked Dr. Andrews to examine him after the doctor declined to examine [him] while accompanied by an assistant," and that upon refusing to examine appellant Dr. Andrews replied that he "would not bill Office of Workers' Compensation Programs for the examination." The representative requested that Dr. Andrews be disqualified from examining appellant in the future because of the doctor's misrepresentation of the events that took place in his office on March 7, 1984 and that Dr. Andrews' "injurious remarks to clear the claimant's reputation" be investigated.

By letter decision dated May 7, 1984 the Office suspended appellant's entitlement to compensation on the following grounds:

> "You are acting in breach of section 8123(d) of the Federal Employees' Compensation Act and you are preventing obtainment of medical evidence necessary to establish your claim. Your entitlement to benefits will remain suspended until you have fully cooperated and made possible the obtainment of medical evidence in your case."

The Board finds that the Office acted properly in suspending appellant's possible entitlement to compensation because of his refusal to submit to an examination.

Section 8123 of the Federal Employees' Compensation Act [7] states in pertinent part:

> "(a) An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required."
>
> * * *
>
> "(d)If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

Regulations enacted pursuant to the above section state that "the injured employee may have a qualified physician, paid by him or her, present at the time of such examination," and that "if the employee refuses to submit himself . . . for or in any way obstructs any examination, the employee's right to claim compensation under the Act shall be suspended until such refusal or obstruction ceases." [8]

Section 8123 of the Act authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary. The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[9]

The Board finds that the Office's referral to Dr. Andrews, a Board-certified orthopedic surgeon, was reasonable under the circumstances and did not constitute an abuse of discretion.

At the time the Office referred appellant to Dr. Andrews, there was no rationalized medical report contained in the case record establishing causal relationship between appellant's current condition and the January 31, 1983 employment injury. This was the principle reason the Office hearing representative remanded the case. Therefore, it was not unreasonable for the Office to request that appellant undergo an examination to assist it in securing a rationalized medical opinion as to the relationship, if any, between appellant's current condition and the January 31, 1983 employment injury.

Appellant reported for his examination accompanied by two lay persons, insisted that they be allowed to enter and remain in the examination room and declined to answer Dr. Andrews' questions when the doctor attempted to elicit responses with respect to the history of the January 31, 1983 employment injury. Under these circumstances Dr. Andrews was unable to conduct his examination.

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[7] 5 U.S.C. section 8123.

[8] 20 CFR 10.407.

[9] *Lucy L. Allen*, 33 ECAB 1175, and cases cited therein.

By letter dated March 13, 1984 appellant's representative, one of the two lay persons present at the examination, requested the scheduling of an examination by a physician of appellant's choice and asked that a third person be present in the examination room to insure the accuracy of appellant's medical history. On March 20, 1984, the Office properly informed appellant that pursuant to 5 U.S.C. section 8123(a) and the relevant regulations the only other person permitted to accompany appellant in the examination room was "a physician designated and paid by him." [10] The Office further informed appellant of the provisions of 5 U.S.C. section 8123(d) relative to the penalty for either refusing to undergo or obstructing a medical examination, and allotted him two weeks within which to advise the Office as to whether or not he intended to cooperate with a physician selected by the Office.[11] It also stated that it would reschedule the examimation if he responded positively; however, appellant did not respond. Subsequently, in a letter dated April 11, 1984, the Office allotted appellant an additional ten days to advise it of his decision to either undergo or not to undergo a medical examination scheduled by the Office "according to the relationship outlined by this Office." Appellant's representative's letter of April 23, 1984 did not address the Office's inquiry; instead he requested that Dr. Andrews' allegations that appellant was uncooperative during the medical interview on March 7, 1984, be investigated.

The Board finds that since appellant's reasons for refusing to submit to an examination were insufficient to justify his refusal,[12] and since appellant did not inform the Office of his willingness to cooperate with an examination scheduled by the Office according to its applicable regulations, the Office's action in suspending appellant's possible entitlement to compensation was proper.

The decision of the Office of Workers' Compensation Programs dated May 7, 1984, is hereby affirmed.

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[10] See also 20 CFR 10.407(a).

[11] The Board notes that in the instant case, the Office properly followed its established procedures for suspending appellant's possible entitlement to compensation. Federal (FECA) Procedure Manual, Chapter 3-400, Examinations, Treatment and Related Services, paragraph 1.

[12] See generally, *Lucy L. Allen*, *supra*.

In the Matter of JOHN J. GALLAGHER *and* U.S. DEPARTMENT OF AGRICULTURE, OFFICE OF INSPECTOR GENERAL, Gainesville, Fla.

Docket No. 84–1113; Submitted on the Record;
Issued September 18, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH,
MICHELE VON KELSCH

The issues are whether appellant's April 18, 1981 myocardial infarction and heart condition are causally related to factors of his federal employment.

On November 12, 1981 appellant, now a 59-year-old retired criminal investigator, filed a claim for compensation alleging that he sustained a disabling "coronary heart condition" as a result of his employment duties. He stopped work on August 18, 1981 and was hospitalized from August 18 through 31, 1981 for an acute anterior wall myocardial infarction. Appellant did not return to work retiring on disability in 1982.

Appellant submitted a December 8, 1981 attending physician's form report in which Dr. Michael A. Nocero, Jr., a Board-certified internist with a sub-specialty in cardiovascular disease, diagnosed "arteriosclerotic heart disease, recent anterior wall myocardial infarction, treated by intracoronary streptokinase." The doctor indicated appellant was "permanently and totally disabled."

The employing establishment submitted appellant's job description and medical records. In two separate certificates of medical examination, one undated and one dated June 10, 1981, employing establishment physicians reported that appellant's duties were as follows:

> ". . . may require irregular unscheduled hours, special personal risks, exposure to all kinds of weather, considerable travel, and arduous exertion under adverse emotional conditions. Duties may require the use of firearms . . ."

On December 22, 1981 the Office of Workers' Compensation Programs received appellant's statement concerning his activities from August 10 through 18, 1981, the date he sustained a myocardial infarction. He stated, in part, the following:

> "Started working investigations with Metro Dade Police Department, Dade County, Florida on or about May 27, 1981 in the highly volatile area of Liberty City/Brownsville. These investigations included thefts of food coupons from food stamp insurance offices; fraudulent businesses authorized by USDA; fraud rings operating in multi-county areas; stores, and individuals involved in food stamp trafficking. These investigations were being conducted concurrently with other investigative assignments including sales of food coupons to members of organized crime in the Broward County, Florida area.
>
> "The area worked in Miami is the highest crime area of the country

> and was, and still is, worked by criminal investigators with no police powers."
>
> * * *
>
> "*Tuesday, August 18, 1981:* Departed motel approximately 6:30 a.m. to meet with Metro-Dade detectives to run stores on a buy back operation. En route suffered severe chest pains. I do not recall returning to motel, but did, and I was subsequently taken to Cedars of Lebanon Hospital."

In response to the Office's request for further information regarding specific incidents and factors of his employment appellant believed were stressful and resulted in his claimed condition, appellant submitted an undated detailed description of the period May 27 through August 18, 1981. In the report, appellant described his duties working with the Metro-Dade police officers in food-coupon fraud investigations as well as with other law enforcement agencies in Florida. Appellant reported that he participated in these "dangerous" operations unarmed and in an area which he described as "extremely stressful due to high drug activity, low employment, armed robberies, stabbings and shootings." Appellant described the extent of traveling he did during this period and the preparations for a "buy/bust operation" on August 17 and 18, 1981 as follows:

> "*August 17, 1981:* I departed from my Altamonte Springs home at 3:30 A.M. and drove to the Metro-Dade Police Department Central Station 2, Dade County, arriving at approximately 8:15 A.M. The weather was very bad, fog and drizzle turning into a hurricane.
>
> "Between 8:15 A.M. and 4:30 P.M., I spent the day with Metro detectives recording and marking food coupons to be used; reviewing statistical information relating to the subject stores; briefing female detectives to be used; and reviewing all statements taken to date for information regarding suspected activities such as: drugs and guns, that might be encountered in the buy/bust dealings that were to begin on August 18, 1981. I then returned to my motel, completed and mailed outstanding reports on my own time to keep the case time at a minimum.
>
> "*August 18, 1981:* I arose at 5:00 A.M., took a shower, reviewed some case material, double-checked food coupons and departed motel about 6:30 A.M. en route to Metro Station 2. En route, I suffered severe chest pains, nausea and faintness. I do not recall returning to the motel but I did, and the next thing I remembered was being taken to the hospital.
>
> "As a point, the buy/bust operation went down and several arrests were made by Metro police, all of which was recorded by the various TV stations in the Miami area, showing the raids taking place by armed officers with weapons at the ready."

In a March 8, 1982 note, Dr. Nocero opined that appellant is "permanently and 100 percent disabled because of his previous heart attack and his present coronary artery disease."

By compensation order dated June 22, 1982 the Office of Workers' Compensation Programs rejected appellant's claim on the basis that he did not discharge his burden of proof in establishing that his disease condition was causally related to factors of employment.

Appellant submitted hospital medical records and a September 1, 1982 sworn statement from Dr. Nocero. In his statement, the doctor opined the following:

> "The diagnosis of his condition is arteriosclerotic heart disease with a previous massive heart attack involving the anterior portion, or front portion, of the main pumping chamber of the heart, the left ventricle."

* * *

> "The arteriosclerotic heart disease, the coronary obstructive disease, leads to a decrease in caliber of the blood vessel supplying the heart muscle, and when this gets to a crucial obstructive size, an acute clot can form on that obstruction and then completely cut off blood flow. And this is exactly what happened to [appellant]. So the antecedent problem is the arteriosclerotic heart disease, namely, the coronary obstructive disease due to fatty tissue being deposited in the wall of the artery and closing off the opening of the artery, and that takes many years to develop. And as far as the causes of that development, it is now thought that that is multifactorial. Cigarette smoking has something to do with it, high blood pressure, stress, being overweight, being diabetic, eating diet high in cholestrol, these are the leading factors that probably lead to coronary artery obstuctive disease."

* * *

> "Let me emphasize that this takes many years to develp and it's an ongoing, progressive disease. Let me also mention that there are many people just like [appellant] who present with obstructions but not massive heart attacks. They can present with chest pain, they can present with sudden death and we don't see them as patients—the coroner sees them—or they can present with heart attacks like [appellant]. Now, why some people present differently is unknown. The cause of an acute myocardial infarction with damage to the heart is, at this state of the investigative game, probably due to an acute clot that forms on a significant obstruction inside a coronary artery. Now, what causes that clot to form is still controversial, but some things that we now think play a role are factors that may change the coagulability of the blood, situations that occur

inside the obstruction that may lead to rupture inside that plaque that's obstructing the coronary artery, and with actual breaking of that plaque there is a roughened surface through which blood is flowing and then an acute clot can form on top of the so-called plaque rupture.

"I think the big question that has to be answered is can stress by itself lead to a clot forming on an obstructing plaque."

* * *

"The kind of work [appellant] was doing just prior to his heart attack could be summed up in one word: stress. Stress with an underlining. I think that the kind of work he was involved in, the hours he was keeping, the environment he was part of, put an inordinate amount of stress on this man's physical state.

". . . one thing we do know that stress can do to people is that it can increase heart rate and it can increase blood pressure, and both of these factors can put a lot of pressure on the heart. When heart rate and blood pressure increase, the heart needs more oxygen to deal with that, and the way the heart delivers oxygen to itself is through the coronary arteries. Now, if the coronary arteries are obstructed and the heart rate and blood pressure go up and if the heart cannot deliver more blood through the obstructed coronary artery, then it will be deprived of blood flow. And blood has nutrients and it has oxygen and all of these things the heart muscle needs. And if it is deprived of these things, it will start to die. And basically, that is what a heart attack is, death of heart-muscle tissue.

"Absolutely [that is what stress could cause].

". . . In fact, this is probably why it is frequently commented upon that people who drop dead suddenly have either been in an altercation or an emotional situation and they get so worked up with an increase in their heart rate and an increase in their blood pressure that they can have an acute dropoff of blood flow to their heart and have the heart attack and die suddenly."

* * *

"I don't think that the stress that he had been going through immediately prior to the heart attack led to the blockages in the coronary arteries. As I said before, that takes many years to slowly develop. But I do think the final event, the acute clot in the coronary artery leading into the heart, was precipitated by stress for the reasons I just gave. The increase in heart rate, the persistent increase in blood pressure, the stress and strain on the individual's nervous system. I think all of these things play a role, and I think definitely in his case, [appellant's] case, stress did lead to the acute myocardial infarction."

* * *

> "I think with the job assignment and identity that I'm familar with, he was always in an environment where there was the nature of a physical threat, namely, the possibility of being shot or stabbed or physically assaulted in some way. So I think that an individual who always fears for his life will be under persistent stress, and I think that if he has underlying coronary artery obstructive disease to the extent that [appellant] had, I think it's almost a matter of time before he will go ahead and clot off one of the arteries and have a massive heart attack."

* * *

> ". . . I think that since he was working in the highest crime area in the country and he was unarmed and constantly under the pressure of realizing that he could have threats made to his life with all of the arrests and busts that were going on at that time, I think this was—this threat of living under the constant fear of being either physically assaulted or actually murdered was an inordinate amount of stress, and in a man such as this with coronary artery disease it probably did have a very major role in precipitating his heart attack."

In response to the question whether Dr. Nocero felt that, based upon a reasonable degree of medical probability, appellant's job stress caused his myocardial infarction, the doctor answered "I think so." Dr. Nocero further stated:

> "He really didn't go into that much detail, but after reading his job description it certainly sounds like he was under a lot of mental as well as physical stress."

* * *

> ". . . all you have to do is look at his activities and it doesn't take much of an imagination to realize that not only the environment that he was working in but also the people that he was working with, namely, the illegalities that he was part of and the individuals that he was trying to apprehend, that this was the type of activity that was keeping him constantly under a lot of stress."

* * *

> "Now, his future prognosis is not that of a normal person. We now know that patients with this type of picture who have already suffered major heart damage—and remember, once the heart has been damaged there is no turning scar tissue into normal tissue. There's no drug, no surgery that can do that. People with [appellant's] clinical situation have got to look forward statistically to an

> 18, 20% annual mortality. Now, that doesn't mean that he as an individual absolutely must face this number, but if we take a broad range of patients with his ailment we have to accept the statistics, and the statistics are not good for very long-term longevity."

Dr. Nocero indicated that appellant was totally disabled as a result of his myocardial infarction. When asked for an opinion with respect to the causal relationship between appellant's myocardial infarction and his job stress, the doctor concluded as follows:

> ". . . I see many patients each month who look just like [appellant] who don't have massive heart attacks, who have similar obstructions in their coronary arteries who either undergo surgery or other techniques to improve blood flow to their heart and who are put in a much better clinical position. In my own mind to try to understand and decide why [appellant] was different than those individuals, those individuals who did not have acute heart attacks, it seems to me that the major differentiating factor was the inordinate amount of physical and mental stress that this man was under prior to his heart attack . . .
>
> ". . . I'm talking predominantly about the stresses that he was faced with on a daily basis through his job."

By compensation order dated February 24, 1983 the Office vacated their June 22, 1982 decision rejecting appellant's claim for compensation. In a letter on the same date, the Office informed appellant that Dr. Nocero's statement and medical records were sufficient to satisfy appellant's burden of proof and that after submission of the case file and statement of accepted facts to an Office medical adviser for an opinion, a new merit decision would be issued.

An Office medical adviser reviewed the record. In an April 4, 1983 report he concurred that appellant had sustained an acute anterior septal myocardial infarction, but "[did] not agree that the arteriosclerotic heart disease with subsequent myocardial infarction is not [sic] job related and the stress was due to his personality (Type A)." The medical adviser opined as follows:

> "The difficulty and defining and measuring emotional stress and the failure to exclude numerous other possible causative from reported studies minimize the significance of their conclusions that emotional stress is causally related to coronary heart disease."

As support for his conclusion, the medical adviser indicated that if appellant's myocardial infarction was due to job-related stress then the incidence of this condition would be greater among police officers, which was not the case. The medical adviser also stated that cigarette smoking provides the "strongest and most consistent correlation with increased incidence of arteriosclerotic disease . . ." He related appellant's heart condition to personality characteristics which predispose an individual to develop arteriosclerosis. The medical adviser recommended referral of the case to an impartial specialist.

On referral by the Office, appellant, the case record and a statement of accepted facts were examined by Dr. Robert A. Turkel, a Board-certified internist specializing in cardiovascular disease of professorial rank. In a July 14, 1983 report, Dr. Turkel reviewed the statement of accepted facts and findings from physical examination. In reviewing the statement of accepted facts, which outlined appellant's activities prior to his myocardial infarction, the doctor stated the following:

> ". . . it is apparent that [appellant] had been doing quite a bit of traveling (i.e., from Altamonte Springs to Homestead back to Miami to various police stations in the Miami area) . . . [On August 17,] . . . he helped prepare markers on food stamps and recorded numbers of the food stamps, for the contemplated activities in the next day or so. Although some of his work involved going into the Liberty City Area of Miami, he was never physically threatened or abused by any of the inhabitants of that area and had no altercations requiring any physical force.
>
> "According to [appellant], the days leading up to his infarction were not unusually stressful and he seemed to feel that as a trained police officer that none of the events were unusual and maybe even less stressful than some days he'd had well into the past. He was concerned because the Liberty City Area of Miami had a riot approximately a year before and some of the places he was dealing with were known to have had violence in the recent past. Another concern was that he was unarmed and had no power to arrest people, but he was always accompanied by armed police officers, who could arrest people, when he went into these areas for criminal investigation, as far as I can tell."

Dr. Turkel diagnosed "coronary artery disease with old healed myocardial infarction [and] . . . significant anterior apical damage to his left ventricle with some compromise of his cardiac function and occasional recurrence of anginoid like symptoms." In response to the Office's question concerning causal relation, the doctor opined as follows:

> "The most difficult question to answer is whether his work was causally related to the infarction, occurring August 18, 1981. In all honesty, I can find nothing unusual enough, or no indications of any unusual stress on the day of his infarction, to conclude that stress of his job aggravated or precipitated the infarction. I think it can be fairly well-concluded that he had some level of chronic stress related to his apprehension about being unarmed and unable to use

> police powers in his forays into the Liberty City Area, of Miami, but in talking to the patient it doesn't seem like this was a significant amount of stress in the days leading up to his infarct. Patient enjoyed his work and actually looked forward to it, and even now states that he misses his job. He had been trained as a police officer and in police work for many years prior to the infarction, and actually was under no threat of physical harm the day the infarction occurred, or for several days before.
>
> "Since my opinion is that his job didn't immediately aggravate or precipitate his infarction, I would conclude that if there was an element of chronic stress present, it was temporary, since he is no longer working as an investigative officer.
>
> "The work tolerance limitation information was not filled out because I don't think there is a remaining disability related to job factors.
>
> "This gentleman has had adequately demonstrated coronary artery disease which is a preexisting condition, in his case, leading up to his myocardial infarction, on August 18. I would find it much easier to conclude that stress and strain, as described in his records but not documented, could have led to an acute myocardial infarction, as a temporary aggravating condition, if he had been subjected to any threats or dangers the day of his infarction or in the days immediately preceding it. This was not the case as far as his history and records reveal."

In an October 5, 1983 note, the Office medical adviser concurred with Dr. Turkel.

Dr. Nocero submitted a November 9, 1983 letter in which he stated appellant had "severe ventricular dysfunction" and reiterated his poor prognosis. The doctor did not address causal relation.

In a November 28, 1983 note to the medical adviser, the Office requested him to comment on Dr. Turkel's July 14, 1983 statement that: "If there was an element of chronic stress present, it was temporary . . . and his closing remarks in which he opined there was no causal relationship between appellant's myocardial infarction and factors of his employment."

In a November 29, 1983 response, the Office medical adviser again stated that he agreed with Dr. Turkel that appellant's coronary arteriosclerosis and myocardial infarction were not due to job-related stress. In support of his opinion, the medical adviser quoted the following:

> "a prospective study of men has found no link between type A behavior and either heart attacks or with death from coronary artery disease . . . [Dr. Victor B. Maxwell *et al* reported] in Clinical Medicine of Aerospace Medical Assn (March 1983) the factors measured do not support the view that air control produces an increased risk

> of coronary heart disease, despite the alleged connection between stress and coronary heart disease.
>
> [Dr. M. E. DeBakey reported] . . . 'that there is increase evidence . . . cytomegalovirus are found in a proportion of arterial muscle cells which probably play a significant factor in the development of arteriosclerosis.'"

The Office medical adviser concluded that job-related stress and exertion could have caused "repeated attacks of angina," but that this would be a temporary condition which "would cease with the activity." He related coronary artery disease to factors such as age, heredity, blood lipids, diabetes, smoking and obesity.

By compensation order dated December 6, 1983 the Office rejected appellant's claim for compensation on the basis that the condition for which compensation is claimed is not causally related to employment.

By letter dated December 13, 1983 appellant's attorney requested a hearing before an Office hearing representative which was held on January 25, 1984. In response to questions concerning activities prior to his August 18, 1981 myocardial infarction, appellant stated as follows:

> ". . . we were advised by our main office . . . that they wanted these cases closed as quickly as possible. In either August or September they wanted all GS-12's taken off of [food] stamps completely. We were also told to keep down the amount of travel and per diem, in order to cut the costs. And yet, I was in constant argument with my own supervisor because the more we investigated, the more we uncovered . . ."

* * *

> ". . . Dade County, at that time was the highest crime area within the United States. We worked in Liberty City, the Brownsville area, both areas of which I was very familiar with. I worked in those areas when I was with U. S. Customs. During the Republican Convention I was present when they had the riots. I showed up on these investigations—it was less than a year prior that they had the riots in the Liberty City, Brownsville area. And the police officers that I was working with could not understand why any agency would send our people down, because we did not have the powers of arrest nor had the authority to be armed. And the officers that I was working with, both of them—they each carried two guns—they had a riot gun and their Sergeant, the Lieutenant, and the Captain of the investigative unit told me that I was to go absolutely nowhere in the confines of Liberty City or Brownsville area without one of his men being with me."

* * *

> ". . . we had been told during the course of the investigation of

this one market to be extremely cautious, because [there had been a shooting there in July 1981]. One person was killed and three were injured . . . That's the same market we were investigating."

* * *

"We were not authorized to carry firearms. We had not the powers of arrest. The powers of arrest and the authority to carry firearms was not granted until October of 1981 . . .

"*** Some [of my work] was undercover. Some was an investigative officer."

* * *

"I would say probably about sixty percent of [the suspects] were known to be armed and/or dealing in drugs."

Appellant indicated that on August 18, 1981, the date he sustained a myocardial infarction, he was to have been involved in "busts" of seven stores. Appellant also indicated that on that date at approximately 6:30 a.m. he began to have chest pain en route to his meeting with other investigators between 7:30 and 8:00 o'clock. They were to "go up between 9:00 and 10:00 o'clock . . ." In response to the question whether he felt the physical danger level was any higher during this investigation than previously in his career, appellant stated:

"I would have to answer that yes . . . In one respect. That everytime an arrest was made the potential of starting another riot was present."

* * *

"I think the thing utmost in everybody's mind, including my own, was the possibility of setting off a riot while we were going through this. And if a riot broke out—I mean I can't say whether I would be hurt or I wouldn't be, but I don't think I'd be human if I wasn't worried about it. I worried about it plenty."

"The entire Liberty City, Brownsville area was totally unstable at the time. Even the police had extra security . . ."

Appellant further stated that he had "instructions on the weekends to go home in order to cut down on travel; on the per diem costs . . ." He indicated that he was required to drive because it was "the least expensive way." Appellant noted that he would leave his home at 3:00 o'clock on Monday mornings in order to be at work by 8:00 a.m. During the five-month period in the Miami area as an investigator, appellant estimated he worked approximately sixty hours each week .

In a decision dated March 12, 1984 and finalized on March 13, 1984, the hearing representative affirmed the Office's December 6, 1983 decision on the basis that the opinion of an impartial specialist, Dr. Turkel, who negated causal relationship, must be accorded special weight and, therefore, constitutes the weight of medical opinion.

On March 19, 1984, the Office received a February 14, 1984 report by Dr. Nocero, in which the doctor stated the following:

> "It is very obvious to me and to any cardiologist who understands cardiac physiology and pathophysiology that when a gentleman such as [appellant] is under an extreme amount of physical and mental stress, that the blood pressure and heart rate can rise to significant levels. We know that there is an anginal threshold for each patient with coronary artery disease which is the threshold that, if superseded, will cause severe pain due to myocardial ischemia due to decreased coronary blood flow that cannot meet the oxygen needs of the cardiac muscle. It is also obvious that in [appellant's] case he had a severe obstruction in the proximal left anterior descending coronary artery that was present during his duties as an investigator for the Department of Agriculture. It is also obvious to me that this man realized that he could be shot in the line of duty, or that he could provoke a riot in the area within which he was working, and that this could have led to physical harm done to himself, and that he also was unarmed and could not protect himself if any of the above occurred. It is during situations such as this that his anginal threshold was unquestionably reached and exceeded, and I am sure it had a lot to do with precipitating his acute myocardial infarction. Heart muscle cannot tolerate long periods of deprivation of blood flow and I am sure this is exactly what happened to him, and I am sure this is what provoked his myocardial infarction. I am not saying that stress in this gentleman caused the basic problem, which was the deposition of cholesterol and fatty tissue in the proximal portion of the left anterior descending coronary artery. What I am saying is that the acute event, namely, the acute myocardial infarction, was precipitated by an excessive amount of stress experienced by this man during his work."

In an April 4, 1984 decision, finalized on April 9, 1984, the Office hearing representative affirmed the Office's December 6, 1983 compensation order on the following bases: (1) as an impartial specialist, Dr. Turkel's opinion negating causal relationship is given special weight, and (2) Dr. Nocero's report dated February 14, 1984 was insufficient to compromise Dr. Turkel's opinion.

The Board finds that the case is not in posture for decision.

Dr. Nocero submitted extensive reports which discussed appellant's heart condition and the employment duties the doctor believed aggravated appellant's heart condition. The doctor provided detailed medical rationale supporting causal relation. The Office medical adviser, however, negated causal relationship and the Office referred appellant to

Dr. Turkel to resolve the conflict in medical evidence. Dr. Turkel reported he could "find nothing unusual enough or no indications of any unusual stress on the day of his infarction, to conclude that stress of his job aggravated or precipitated the infarction."

The Federal Employees' Compensation Act does not require the showing of the occurrence of unusual exertion or stress in the employment as a prerequisite for compensability. The claim is compensable if it is established that the performance of regular duties did in fact precipitate or cause the myocardial infarction.[1] In light of this, Dr. Turkel should be requested to clarify his opinion by answering the following questions: (1) whether appellant's August 18, 1981 myocardial infarction was causally related to the stress of his job duties; (2) if so, whether the residuals of that myocardial infarction have any adverse effect on appellant's ability to work; and (3) whether appellant's underlying cardiac condition was related by causation or aggravation, to his federal employment.

The Board also notes that in light of the significance placed on appellant's activities prior to his myocardial infarction on August 18, 1981, the statement of accepted facts should contain a more detailed description.

The case must therefore be remanded to the Office for referral of the entire case record and an augmented statement of accepted facts to Dr. Turkel for clarification of his opinion in accordance with the aforementioned questions. After such further development of the evidence as it deems necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated April 4, 1981 and made final on April 9, 1981 is set aside and the case remanded to the Office for further action in accordance with this decision of the Board.

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[1] *Mary A. Barnett*, 17 ECAB 187; *Williard Purdy*, 32 ECAB 293.

In the Matter of JOHN C. MATTERN *and* U.S. POSTAL SERVICE, POST OFFICE, Cleveland, Ohio.

Docket No. 84–1456; Submitted on the Record;
Issued September 18, 1984

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, WILLIE T. C. THOMAS

The issue is whether appellant's myocardial infarction and subsequent disability were causally related to factors of his federal employment.

This is the second appeal in this case. In the previous appeal,[1] the Board set aside the decision of the Office of Workers' Compensation Programs that rescinded its prior acceptance of appellant's March 3, 1973 myocardial infarction and his subsequent disability as employment related. The Board noted that the July 7, 1981 report of Dr. Martin I. Broder, a Board-certified cardiologist, upon which the Office's rescission was based, did not discuss the role, if any, physical exertion played in appellant's myocardial infarction, nor did it provide rationale for the doctor's opinion that employment-related aggravation of appellant's arteriosclerotic heart disease ended the day appellant stopped work. The Board remanded the case for referral of appellant to a second medical specialist.

Following remand, the Office referred appellant, along with the case record and a statement of accepted facts, to Dr. Robert C. Bahler, a Board-certified cardiologist of professorial rank. The Office's referral letter requested that the doctor's report address the following:

> "(1) Please discuss what role, if any, did claimant's physical activity during his work shift on 3/2/73 played in the development and onset of the myocardial infarction on 3/3/73.
>
> "(2) In your opinion, did claimant's factors of employment cause a temporary or permanent aggravation of the underlying arteriosclerotic heart disease? ***
>
> "(3) In your opinion, does claimant have a continuing employment-related heart condition and disability? Please provide medical rationale to support your opinion."

In a December 23, 1983 report prepared in cooperation with Dr. Neelesh Desai, a cardiologist, Dr. Bahler reviewed appellant's medical history, discussed his x-ray, laboratory test, and physical examination findings, and stated:

> "*EXERCISE STRESS TEST REPORT:* The exercise stress test was abnormal. The patient's blood pressure fell during stage 1 of the Bruce protocol which is 4.8 METS [Metabolic Units]. He had down-sloping ST depression of approximately 1.5 mm at the point of test termination which was after 1 minute and 30 seconds of stage 2. The calculated function aerobic impairment is moderate. By stress testing at this time, he should not perform work above a 3.4 MET level.
>
> "*VOCATIONAL SERVICES REPORT:* The patient states that the job of letter carrier has changed in many ways since he stopped working: Between 1971 and 1973, there were no parcel post trucks, and letter carriers delivered packages, boxes and crates weighing

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[1] 34 ECAB 903. The facts and history of the case as set forth in the previous decision are hereby incorporated by reference.

up to 40 pounds. At times he made deliveries of automobile tires. Patient's route was residential/business mix, included some apartment houses as well as single and multi-family dwellings. Most were older houses with front porches requiring frequent climbing of four to eight steps while carrying his mailbag and packages.

"Work loads varied considerably from day to day according to how many heavy articles there were (magazines, catalogs, parcels). Weather would also affect job performance requirements. Energy requirements of performing the work would be higher if he had to walk against wind, in heavy rain, or through snow.

"Energy requirements of work performed by Mr. Mattern can be defined in Metabolic Units (METS) or the ratio of the amount of oxygen used per minute at absolute rest versus the amount used during an activity. Absolute rest is represented by 1.0 METS.

'Casing mail: 3.0 METS.

'Standing/walking while carry 20 to 44 pounds: 4.5 METS.

'Climbing stairs while carrying 24 to 35 pounds: 10 to 14 METS.'

"It can, therefore, be assumed that the energy requirements of Mr. Mattern's job were generally ranged between 3.0 and 4.5 METS but that several times a day for very brief periods (less than one minute), the requirements might go to 10 METS or more.

"The U. S. Department of Labor classifies the physical demands of a Mail Carrier . . . as medium work. This assumes lifting 50 pounds maximum with frequent lifting or carrying of up to 25 pounds.

"The METS requirement of medium work for 150 to 165 pounds body weight is 3.7 METS.

"The METS requirement of the work may be compared to the patient's performance on a stress test.

"In answer to the three specific questions in your letter of September 7, 1983 I would offer the following: (1) It is possible that the claimant's continued physical activity during the work shift of 3/2/73 temporarily aggravated the underlying condition of coronary artery disease and myocardial ischemia. It is unlikely that the job caused the onset of symptoms and/or the actual infarction. In relationship to item 2, it is reasonably well established that myocardial infarction is generally caused by the development of a thrombus or blood clot in a coronary vessel that is already very diseased. It is unlikely that employment caused either the blood clot or the underlying disease. Once the occlusion of the coronary vessel evolved, his continuing to work might have affected the actual amount of muscle damage that ensued. It should be noted that most individuals who experience cardiac ischemic chest pain often deny importance of this pain syndrome and continue their usual activities until either the pain is incapacitating or they feel the consequences of poor cardiac function caused by the infarction. Therefore it is unclear

> whether the claimant's behavior was substantially different from that of the majority of individuals who experience a myocardial infarction. In relationship to question 3, the patient is presently seriously limited by his heart disease. He would be unable to carry out the demands of his job on the basis of our current information from the stress test. It is probable that his continued symptoms are related to significant disease of his coronary arteries. A fall in blood pressure during stress testing is most commonly seen in the presence of multiple severe coronary artery obstruction. It can also occur with severe damage or scarring to the myocardium but his electrocardiogram does not indicate that the latter possibility is very likely. With his current limitation being on the basis of probable extensive cornary artery disease, it is therefore unlikely that this disease process was related to his employment. Coronary artery disease is the most common cause of death and disability in the United States and to date, has not been proven to be causally associated with any type of employment.
>
> "In summary, the patient is now totally disabled but it is difficult to attribute his disability to the prior employment."

Dr. Arthur K. Cieslak, a Board-certified surgeon and an Office medical consultant, reviewed Dr. Bahler's report, which he stated in a February 1, 1984 report to be "very clear and complete." He further stated: "Dr. Bahler's impression is that [appellant's] employment was not related to the M.I. [myocardial infarction] but may have intensified the symptomatology to make [appellant] more aware of his problems."

By letter decision dated April 27, 1984, the Office again rescinded its prior acceptance of appellant's claim, finding that the medical evidence "established that your myocardial infarction and coronary artery disease as well as your disability March 3, 1973 and continuing are unrelated to your employment."

The Board finds that the case is not in posture for decision.

Once the Office has accepted a claim and found that an employee's disability or death was related to his employment, it has the burden of justifying subsequent termination of compensation benefits.[2] This holds true where, as here, the Office later decides that it had erroneously accepted the claim.[3] The Board finds that the Office has not met its burden in this case.

On the previous appeal, the Board set aside the Office's initial rescinding of its acceptance of the claim, noting that the report of Dr. Broder, a Board-certified cardiologist, did not discuss the role, if any, physical exertion played in appellant's myocardial infarction, nor did it provide rationale for the doctor's opinion that employment-related aggravation of appellant's arteriosclerotic heart disease ended the day appellant stopped work.

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[2] *Robert D. Poorman*, 31 ECAB 523.

[3] *James Cash, Jr.*, 31 ECAB 1110.

Following remand, the Office referred appellant, along with the case record and a statement of accepted facts, to Dr. Bahler, a Board-certified cardiologist of professorial rank, to address these matters not discussed in Dr. Broder's report. In a report prepared with Dr. Desai, a cardiologist, Dr. Bahler reviewed appellant's medical history and discussed his findings on x-rays, laboratory testing, and physical examination. The report concluded, based on exercise stress testing, that appellant "should not perform work above a 3.4 MET [metabolic unit] level," while the energy requirements of appellant's job "generally ranged between 3.0 and 4.5 METS" and for brief periods of less than a minute were 10 METS or more.

The report stated that it was "possible" that appellant's continuing to work on March 2, 1973 while experiencing chest pain "temporarily aggravated the underlying condition of coronary artery disease and myocardial ischemia," but that it was "unlikely" appellant's work caused "the onset of symptoms and/or the actual infarction." The report stated that myocardial infarctions are "generally caused" by the development of blood clots in already diseased blood vessels, and opined that it was "unlikely" that employment caused the blood clot or the underlying disease in appellant's case. The report further stated: "Once the occlusion of the coronary vessel evolved, [appellant's] continuing to work might have affected the actual amount of muscle damage that ensued."

The Board finds that further development is required because the report of Drs. Bahler and Desai did not adequately address the issue of what role if any, appellant's physical exertion on March 2, 1973 played in the myocardial infarction and in his subsquent disability. Further, their conclusions regarding the effect of his exertion on that date in causing a temporary or permanent aggravation of his condition appear to be inconsistent. The Board also notes that the report does not support their conclusions with adequate rationale or explanation.

Following remand, the Office should refer the case record and a statement of accepted facts to another Board-certified specialist for a report addressing the above mentioned deficiencies. The specialist should be authorized to examine appellant if desired. After such further development as is necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated April 27, 1984 is hereby set aside.and the case remanded for futher proceedings consistent with this decision.

In the Matter of DAVID MARTIN *and* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, New Cumberland, Pa.

Docket No. 84–540; Submitted on the Record;
Issued September 24, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH,
MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant forfeited his right to compensation for the period of January 1, 1976 to April 11, 1981 under section 8106(b) of the Federal Employees' Compensation Act because he had earnings during that period which he did not report.

On April 4, 1974 appellant, then a 32-year-old air traffic controller, filed a claim alleging extreme gastric pain caused by the stress of his federal employment. In an attached statement he indicated that he first began to experience recurring periods of gastric pain in January 1971. He stopped work for the period of May 1 to 16, 1973 during which time he was hospitalized by Dr. Dale C. Stahle, a Board-certified internist, for examination. In a discharge summary dated June 2, 1973 Dr. Stahle noted that appellant was admitted with a tentative diagnosis of a perforated ulcer; however, he stated that diagnostic testing was not able to establish the diagnosis. He indicated that appellant was advised to undergo a neurological-psychological consultation which he refused and he was discharged on May 9, 1973 against Dr. Stahle's advice. Appellant was subsequenlty found medically unqualified to continue in his federal employment based on a severe nervous (chronic anxiety) condition and hypertension. He retired on disability effective August 2, 1974.

By letter dated June 3, 1975 the Office of Workers' Compensation Programs informed appellant that it accepted his claim for a chronic anxiety reaction. He began receiving compensation for temporary total disability on July 7, 1974.

In a CA-4 claim form dated June 9, 1975 appellant notified the Office that he claimed his son as dependent and that he had received no pay since July 6, 1974.

By letter to appellant dated December 6, 1975 the Office stated, in part:

> "Do not file claims unless requested to do so. If you return to your former job or obtain other employment submit the following information to the OFEC [Office of Federal Employees' Compensation] at once (1) name and address of employer; (2) date you returned to work; (3) type of work you are performing; (4) your weekly pay rate; and (5) number of hours worked per week. Your rate of pay should include not only cash wages but 'wages in kind' such as board

> and lodging. If you are self-employed (as a farmer, operating a store, etc.) you must report as pay, what it would have cost you to hire someone else to do the same work."

In a letter to appellant dated March 3, 1976 the Office stated, in part:

> "1. You must report all employment during the past 12 months (or since your last employment and pay was reported to the OWCP if submitted less than 12 months).
>
> "2. You must account for the entire time including periods of self-employment or unemployment.
>
> "3. You must report as your 'Rate of pay (per week)' your pay before deductions including the value of housing, board, laundry, or any other advantages received. If you did not work for others but were self-employed (such as farming, operating a store, etc.), you must report as pay what it would have cost you to have hired someone to do the same work."

In a letter dated April 4, 1979 appellant instructed the Office, as follows: "Please correct my dependents as follows: Yvonne C. Reeser Martin, wife born February 27, 1927, Michael Giovanni Martin, son born January 24, 1972."

On April 11, 1980 appellant submitted form letter CA-1032 indicating that he had not been employed or performed work since the last report to the Offfice. He claimed his wife and unmarried child as dependents. Appellant filed a similar subsequent form letter CA-1032 with the Office on February 23, 1981.

By letter dated June 3, 1981 an Office claims examiner notified appellant that she had attempted to contact him by telephone with regard to updating the medical evidence in his case. She stated: "the telephone message which I received indicates that you are frequently 'on the road, out of the office.'" Appellant was advised to report all information with regard to his employment and income to the Office. In a response dated June 9, 1981 appellant stated:

> "I have not been employed whatsoever since July 6, 1974."

On June 14, 1981 appellant notified the Office to delete Yvonne C. Martin and add Irene F. Martin as his spouse on Office dependent forms.

In a letter dated November 3, 1981 Yvonne C. Reeser informed the Office that she had lived with appellant for a period of 7 years but was not married to him. During that period appellant had claimed her as a dependent. She also stated that since November of 1974 appellant had worked as a saxophone player in a band he owned. She indicated that during this period appellant had lifted and carried heavy music equipment and had mowed lawns during the summer months.

In a January 29, 1982 investigative report by the Office of the Inspector General of the Department of Labor it was confirmed that appellant had worked from approximately January 1, 1976 until April 11, 1981 as a band leader/member and as a bricklayer and steward. The report confirmed earnings during this period of at least $7,298.00 and noted that the band appointment book showed numerous other jobs the band played but did not include the amount of income received by appellant.

In a February 24, 1982 letter decision the Office determined that an overpayment of compensation in the amount of $7,298.00 occurred because appellant had earned income during the period he had received compensation benefits for total disability. The Office made a preliminary finding that he was at fault in the creation of the overpayment on the ground that "you have submitted fraudulent statements to this Office indicating that you have had no income since July 1974."

On March 2, 1982 the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. John M. Hume, a Board-certified psychiatrist, for an opinion on the cause and extent of impairment residuals related to the employment injury.

On March 5, 1982 appellant submitted form CA-1032 in which he declared an unmarried child as his dependent. He indicated that he had not received any income from employment since the last report.

By letter dated March 16, 1982 appellant, through his representative, alleged there was no overpayment because his expenses in operating the band had exceeded his earned income and "consequently, while the band offered him something to do, it did not produce an income and we submit that the failure to report receipts and expenditures does not constitute fault."

By letter dated March 12, 1982 the appellant requested a hearing before an Office representative.

In a report dated April 2, 1982 Dr. Hume diagnosed alcohol addiction and a passive-aggressive personality disorder. He did not find a chronic anxiety reaction as had been accepted by the Office and concluded that appellant's preexisting personality disorders were not the result or consequence of his federal employment.

On April 26, 1982 an Office medical adviser reviewed Dr. Hume's report and concurred in his conclusions.

By compensation order dated April 28, 1982 the Office rejected appellant's claim for compensation after March 26, 1982 finding that his continuing disability was not related to the factors of his federal employment.

In a May 6, 1982 letter decision the Office determined that an additional overpayment of compensation in the amount of $1,582.39 occurred because appellant was paid compensation benefits through April 21, 1982. The Office made a preliminary finding that he was without fault in the creation of the overpayment and was advised to submit further evidence or argument, with regard to the fact of the overpayment and whether the criteria for waiver of this overpayment applied in his case. He was also advised of his right to a hearing before an Office representative on the issue of whether the recovery of the overpayment should be waived.

By letter dated July 23, 1982 the Associate Director for Federal Employees' Compensation Act notified appellant that the case was not in posture for decision as the February 24, 1982 decision had not addressed the proper issue which was whether appellant had forfeited his right to compensation under 5 U.S.C. 8106(b); that there had been no conflict in the medical opinion evidence prior to the receipt of Dr. Hume's report; that Dr. Hume's report now created a conflict; and that a new decision as to whether appellant's disability had ceased was required. The Office vacated the Feburary 27, 1982, April 28, 1982 and May 6, 1982 decisions and remanded the case for a *de novo* decision on disability as well as any overpayment issue.

By letter dated August 10, 1982 the Office informed appellant that an overpayment in the amount of $80,487.89 occurred because he reported no income since July 6, 1974 when, in fact, he had earned income from January 1, 1976 to April 11, 1981 "thus forfeiting your right to all compensation for that period." The Office made a preliminary finding that he was at fault in the creation of the overpayment because he had submitted fraudulent statements indicating that he had no income since July, 1974. Appellant was informed of the right to submit further evidence with regard to the amount of overpayment or the preliminary finding of fault and that he could request a hearing on the issues of the preliminary finding of fault or determination of whether the overpayment should be waived.

On August 18, 1982 appellant was referred, together with a statement of accepted facts and the case record, to Dr. Lawrence L. Altaker, a Board-certified psychiatrist, for an opinion on appellant's current conditions and whether the effects of his employment on his personality disorder had ceased by the date of Dr. Hume's report.

By letter dated August 19, 1982 appellant requested a hearing before an Office representative. He submitted the July 20, 1982 report of Dr. George H. Porr, and June 21, 1981 report of Dr. N. Eugene Shoemaker, his attending physicians, who supported his claim that his chronic anxiety disorder was causally related to his federal employment.

In a report dated October 1, 1982 Dr. Altaker provided a diagnosis of anxiety, depression and psychophysiologic disorders which he stated were contributed to by the factors of "his life, his employment, and possibly the accident as well."

In a letter dated November 1, 1982 the Office requested that Dr. Altaker clarify his report on the issue of causal relationship. In a response dated November 22, 1982 he stated:

> "In my judgment, when I saw Mr. Martin, he continued to suffer from the same disorder that had been present when he was retired from federal employment as an Air Traffic Controller. Therefore, it is my opinion that he is continuing to suffer from the illness, which had developed during his employment. With regard to your second question, that is, whether or not he is capable of any employment, he certainly should be capable of working in a nonstressful situation, but my feeling is that owing to a combination of poor motivation, qualities of an inadequate personality, chances are that he would be able to perform only ineffectively and the question that I have would be how long he would be able retain a job. With regard to your question about treatment, the only effective treatment for Mr. Martin would be psychotherapy on a weekly or twice weekly basis. I am in agreement, however, with Dr. Hume that the prognosis is quite guarded.
>
> "As I tried to indicate to you in my letter of October 1, 1982, Mr. Martin's Dysthmyic Disorder is something that was superimposed upon what I believe to have been a Personality Disorder of moderate severity. I feel that the condition is chronic and not likely to change regardless of any therapy. He appears to be unchanged from the time of his employment."

A hearing was held May 24, 1983 at which appellant was not represented by counsel. The hearing representative stated the issue to be "whether or not you were with fault in the creation of the overpayment." Appellant testified that he was without fault in creating an overpayment as his band was merely a hobby and his expenses had exceeded the amount of any income he had derived therefrom. Appellant asserted that he therefore had no income and therefore had nothing report to the Office. Appellant submitted an overpayment recovery questionnaire listing itemized monthly income of $172.00 against monthly expenses of $1274.00. He also listed a total of $17,119.27 in debts past due.

By decision dated September 26, 1983 and finalized September 29, 1983 the hearing representative determined that appellant was at fault in creating the $80,487.89 overpayment since he did not report any of the pay he received and, therefore, he was not subject to the waiver provisions under the Federal Employees' Compensation Act. The case record was returned to the district office for collection of the overpayment.

Section 8106(b) of the Act,[1] in pertinent part, states as follows:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment by af-

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[1] 5 U.S.C. section 8106(b).

READEX FICHE

fidavit or otherwise, in the manner and at the times the Secretary specifies. * * * An employee who—

> "(1) fails to make an affidavit or report when required; or
>
> (2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."

Section 8129 of the Act, in pertinent part, provides as follows:

> "(a) When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor decreasing later payments to which the individual is entitled. ***
>
> "(b) Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." [2]

In determining whether an individual is "without fault," what constitues "fault" depends on whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect." [3]

In the present case, it is apparent that the Office applied the first two standards to appellant in finding him to be at fault in creating the overpayment.

First, concerning the operation of section 8106(b) appellant was advised by the Office of the requirment that he report any earnings from employment or self-employment. If self-employed, such earnings would not be based on profit or loss but on what it would cost to have someone else do the same work. According to the investigative memorandum, appellant organized and played in a band beginning in November 1974 and had earnings until the band dissolved in October 1981. During this period he did not file a report with Office regarding those earnings; on the contrary, he filed reports representing that he had no employment and no earnings. His argument that he had no earnings and therefore nothing to report to the Office because his expenses exceeded the amount of his income has not been accepted by the Board as a reasonable justification for the failure to report employment or earnings to the Office as required.[4]

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[2] 5 U.S.C. section 8129.

[3] Pursuant to *Califano v. Yamasaki*, 422 U. S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. The procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2-claims.

The Board finds that the Office properly determined that appellant knowingly failed to report earnings from self-employment during the period January 1, 1976 to April 11, 1981 and that pursuant to the provisions of 8106(b), he is subject to the forfeiture provisions.

The Board further finds, however, that the case is not in posture for decision on the amount of the forfeiture and the collection of such amount. The Board notes that the case was remanded by the Office to its district office for further development. However, the August 10, 1982 letter informing appellant of a $80,487.89 forfeiture did not explain how the Office determined its latest computation and therefore did not afford appellant an opportunity to comment on whether it was accurate. In view of the fact that the amount of the forfeiture has been revised and recomputed on several occasions appellant should be afforded a detailed decision on how the amount was computed and be apprised of the overpayment procedures of Bulletin 80-35 prior to any recoupment action.[5]

The September 26, 1983 decision of the Office of Workers' Compensation Programs is affirmed insofar as it finds that appellant is subject to the forfeiture provisions for the period January 1, 1976 to April 11, 1981; however, the Office's decision with respect to all other findings is set aside and the case remanded for further proceedings in accordance with this decision.

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[4] See *William H. Higgins*, 34 ECAB 833.

[5] See *Dale I. Williams*, 35 ECAB 964.

In the Matter of GEORGIA F. KENNEDY *and* DEPARTMENT OF THE AIR FORCE, MCCLELLAN AIR FORCE BASE, Calif.

Docket No. 84–1313;Submitted on the Record;
Issued September 26, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, WILLIE T. C. THOMAS

The issue is whether appellant's emotional condition was causally related to or aggravated by factors of her federal employment.

Appellant, a 47-year-old inventory management specialist, filed a claim on March 10, 1981 alleging that she experienced stress, strain, headaches, hypertension, and difficulty breathing as a result of her supervisor's imposition of unreasonable deadlines, public scoldings, and harassment. After a confrontation between appellant and her supervisor on February 10, 1981, she left work and did not return.

Appellant came under the care of Dr. Morris K. Pleasant, a psychiatrist, who initially requested that she be excused from work until April 13, 1981. In a report dated March 23, 1981 Dr. Pleasant stated that appellant had been hospitalized in late February 1981 for elevated blood pressure, agitation and depression and that she attributed her emotional condition to job stress. According to Dr. Pleasant, appellant contended that her supervisors had "plott[ed] against her" and that at the time of the February 10, 1981 altercation "she saw one of her employers change into a 'mad dog' . . . [and] felt an impulse to physically harm her." He concluded that appellant had an "underlying emotional problem which was exacerbated by the work situation."

In a second report dated May 1, 1981 Dr. Pleasant added, "I am unable to state whether or not there were objective pressures on [appellant] at McClellan. Information from McClellan is necessary to elucidate whether or not there were objective pressures." He added that if these pressures did exist, then her work situation "could certainly produce enough emotional strain over the years to culminate in the symptoms which she now presents." In subsequent attending physician's reports dated June 5, July 11, and July 29, 1981 Dr. Pleasant noted that appellant was totally disabled and checked the box marked "yes" in answer to the question whether her condition was due to the injury for which compensation was claimed.

In response to an Office of Workers' Compensation Programs request for information appellant attributed her emotional condition to a job transfer in August 1974, her failure to be promoted in September 1977, the refusal by her supervisor to allow her to attend an out-of-state conference in September 1977, her supervisor's practice of making daily notes about her for his personnel file, her failure to be selected for a "position on the rotatable program" in June 1980, a heavy workload, and verbal harassment by her supervisor.

The Office referred appellant, together with the medical evidence of record and a statement of accepted facts, to Dr. Maurice H. Bisharat, a Board-certified psychiatrist, who examined her on November 18, 1982. In a report dated January 5, 1983 Dr. Bisharat diagnosed a dysthymic disorder and a chronic paranoid personality disorder. In answer to the question whether appellant's emotional condition was due to, precipitated, accelerated, aggravated or proximately caused by her federal employment, Dr. Bisharat reported the following:

> "The answer to this question is difficult. Dr. Pleasant has entertained reasonable doubts in his own mind as to whether or not [appellant's] allegations were unchallenged and he left room for the input he needed from the accused parties before he could make a judgment on the patient's allegations. He offered the alternative explanation of a slowly developing delusional system centering on her role as a civil rights activist. In essence I agree with this interpretation. He would very likely come to this alternative conclusion had he had the chance to see her case file.
>
> "I wish to explain . . . that it is meaningless to think of [appellant's] paranoid consciousness as operating independently of a context. She has to have a context from which she must pick out those events which accord with her paranoia. Given her paranoid development from birth forward, her illness had to unfold and become manifest, not abstractly, but in real interpersonal relationships in real life situations, which, in her case, and as far as she alleged and admitted, were only related to her employment. I am theoretically certain that she was not surrounded by saints, and that at times her supervisors must have contributed to her difficulties, but this probably happens in conditions of all kinds of employment and indeed would have happened to her no matter where else she might have been employed or even if she had never been employed. My conviction is that her illness took its course despite the conditions of her employment, not because of them. The final firmness exhibited by her superiors was a limit which she created and had to reach sooner or later because of progression of her illness.
>
> "Accordingly, I am of the opinion that the relationship between her illness and her employment is not in any material way causal, but simply contextual, which would then preclude precipitation, acceleration, aggravation or causation."

Appellant was referred by Dr. Bisharat to Dr.Damien G. McCann, a psychologist. Dr. McCann examined appellant in November 1982 and in an undated report stated:

> "[Appellant] appears to be depressed and befuddled in her current emotional life. But she also tends to overdramatize both the extent of her symptomatic experiences as well as the external 'sources' of her condition; this characteristic seems to serve an egosyntonic purpose, giving her (at some level) a rationale for her sense of deeply feared inadequacy. Her emphasis on her having been "stuck" at her job level for a long period of time, her attempt to improve herself by educational advancements, her having been nonetheless passed over for promotion (and her lack of recognition of the apparent lack of relevance between her chosen educational focus and her job du-

> ties), and the shortly subsequent deterioration in her psychological condition all tend to support the framework of a such a dynamic."

The Office referred the medical evidence of record and the statement of accepted facts to Dr. David R. Kessler, a Board-certified psychiatrist of professorial rank and an Office medical consultant. In a report dated February 8, 1983 Dr. Kessler diagnosed a dysthymic disorder and a paranoid personality disorder and stated:

> "The available data appear effectively to support the conclusion that the claimant suffered from a lifelong paranoid personality disorder. This character pattern includes traits which may tend to provoke an antagonistic response from others, but it is these personality characteristics themselves which are the key and necessary factors in the symptoms and distress which are currently claimed. To the degree that any current psychiatric impairment exists, it was brought about by the claimant's own chronic personality structure, and bears no specific relationship to the conditions of her federal employment.
>
> The available data also suggest that any current depressive or anxiety symptoms are probably secondary to the failure of the paranoid mechanisms to achieve their desired effect, and may represent a partial and presumably temporary breakdown of the claimant's usual coping style. They may also signify a partial recognition of the inadequacy and dysfunctional nature of her lifelong coping style. In addition, the results of psychological testing seemed to indicate that the symptomatology may also, at least in part, be a dramatization for manipulative and self serving purposes.
>
> "The bulk of the evidence, therefore, is that the claimant's psychiatric condition is not due to, precipitated, accelerated, aggravated, or proximately caused by conditions of her federal employment."

By compensation order dated May 6, 1983 the Office denied appellant's claim on the ground that "causal relationship is not established, and that her disability is due to a self-generated preexisting personality disorder."

At the request of appellant's attorney a hearing was held before an Office hearing representative on September 19, 1983. Appellant and several co-workers testified that appellant was harassed at work as a result of her participation in union and civil rights activities and therefore not promoted. Appellant submitted a January 12, 1982 report by Dr. Stephen Ericksen, a Board-certified psychiatrist, who diagnosed chronic depression, a report dated August 5, 1982 by Dr. Robert S. Treat, a Board-certified psychiatrist, who diagnosed major depression and noted appellant's inability to return to her previous job, and a September 11, 1983 report issued by Dr. Pleasant in which he diagnosed depression and paranoia. Dr. Pleasant further stated that his understanding of the question involved was not "whether or not [appellant] has an emotional problem" since "that problem was present prior to her going on disability from McClellan Air Force Base," but rather "whether or not [appellant's] emotional problems were in any significant way precipitated by, exaggerated by, or in any way increased by her work environment." Dr. Pleasant concluded that appellant's failure to be promoted, her participation in union activities, and her relationship with her supervisors aggravated her underlying emotional condition and eventually caused her to leave her job setting.

By decision dated April 16, 1984 and made final on April 19, 1984 the Office hearing representative denied appellant's claim on the ground that "the evidence fails to establish that the claimant's emotional disability or that her physical disability were causally related to the conditions of her employment."

The Board finds that the case is not in posture for decision.

As the Board pointed out in the case of *Lillian Cutler*,[1] "workers compensation law does not apply to each and every injury or illness that is somehow related to an employees' employment." There the Board discussed at length the principles applicable to various circumstances involving disabling emotional reactions by employees to factors in the employment. While in many such situations, the disability is regarded as due to an injury arising out of and in the course of the employment, others are not so regarded. An example of an employment-related injury is "[W]here an employee experiences emotional stress in carrying out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment." [2] On the other hand, the disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion.[3]

In the instant case, situations enumerated by appellant which would be deemed conditions of employment as enunciated in *Cutler* are alleged verbal harassment and altercations with her supervisors, the imposition of unreasonable deadlines, an unusually heavy workload, and public scoldings.

The factors alleged by appellant which would not be compensable under the principles enumerated in *Cutler* would be distress over not being promoted, transferred, or allowed to enter certain programs.

Appellant submitted several medical reports of Dr. Pleasant, a psychiatrist, who stated that appellant's emotional condition was aggravated by her relationship with her supervisors. However, his reports do not specify whether this aggravation was permanent or temporary and, if temporary, the duration of the period of aggravation.[4] On the other hand, medical reports of Dr. Bisharat, a Board-certified psychiatrist and Dr. Kessler, a Board-certified psychiatrist of professorial rank and an Office consultant, seemed to negate any causal relationship between appellant's employment and her emotional condition.

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[1] *Lillian Cutler*, 28 ECAB 125.

[2] *Id.* at 129-131

[3] *Lillian Cutler*, note 5 *supra*, at 131.

The Office should send the case record, along with a statement of accepted facts, which would indicate those accepted factors which would be deemed employment factors as outlined in *Cutler* and those which would not be, to an impartial medical specialist with a request to evaluate the evidence and provide a rationalized opinion on the issue of whether appellant's disability commencing February 10, 1981 was causally related to factors of her employment. If causally related, the specialist should determine whether the causal relationship was temporary or permanent and, if temporary, the date it ceased. If the specialist feels that further examination of appellant would be useful in such a determination, he should be authorized to perform such examination. The Office should then make a *de novo* decision based on the augmented record.

The decision of the Office of Workers' Compensation Programs dated April 16, 1984 and made final on April 19, 1984 is hereby set aside; the case is remanded for further development consistent with this decision of the Board.

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[4] *James L. Hearn*, 29 ECAB 278.

In the Matter of ZOHRA BEN ALI *and* AGENCY FOR INTERNATIONAL DEVELOPMENT, MISSION TO TUNISIA, Tunis, Tunisia

Docket No. 83-1221; Submitted on the Record;
Issued September 27, 1984

Before E. GERALD LAMBOLEY MARGARET PALLANSCH,
DAVID S. GERSON

The issue is whether the Office of Worker's Compensation Programs properly determined that appellant was not entitled to continuation of pay from June 3 to August 6, 1982.

Appellant, a 42-year-old administrative assistant, sustained a fractured articulation of her left elbow on June 3, 1982 when she fell down several stairs. The employing establishment did not controvert continuation of pay and appellant received such pay from June 3 to August 6, 1982.[1]

By letter dated June 17, 1982 the employing establishment informed the Office of Workers' Compensation Programs that appellant was a "foreign National employee of the AID mission to Tunis."

In a December 7, 1982 memorandum an Office claims examiner stated that appellant was entitled to compensation for time she lost from work due to the fracture of her left elbow. The claims examiner concluded however, that appellant was not entitled to continuation of pay since "section 10.202(a)(3) of the Federal Register requires controversion by the employing agency if the employee is neither a citizen nor resident of the United States. (i.e., a foreign national employee outside of the United States)."

By letter decision dated January 24, 1983 the Office determined that appellant was not entitled to continuation of pay from June 3 to August 6, 1982 on the ground that "Foreign National employees have the protection under 5 U.S.C. 8101 of the Federal Employees' Compensation Act, but are not entitled to continuation of pay under 10.202 of the Federal Regulations."

The Board finds that the Office properly determined that appellant was not entitled to continuation of pay from June 3 to August 6, 1982.

Section 8118(b)(3) of the Federal Employees' Compensation Act provides for continuation of pay "under accounting procedures and such other regulations as the Secretary may require." [2]

Section 10.202(a) of the Office's regulations sets forth nine specific instances of when "the employing agency may, on the basis of the information submitted by the employee, or secured on investigation, controvert a claim and terminate an employee's [continuation of] pay." One of those instances is set out in section 10.202(a)(3) as being when "the employee is neither a citizen nor resident of the United States or Canada (i.e., a foreign national employed outside of the United States or Canada)." [3]

While section 10.202(a) states only that the employing establishment "may" controvert continuation of pay, section 10.202(b) of the regulations indicates that controversion in the nine enumerated instances is not optional, but mandatory. Section 10.202(b) states that "In all other cases, the employing agency may controvert an employee's right to continuation of pay, however, such employee's regular pay shall not be interrupted during the 45-day period unless the controversion is sustained by the Office and until the employing agency is so notified." [4]

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[1] Appellant apparently returned to light-duty work on August 9, 1982 and to full-duty work on August 16, 1982.

[2] 5 U.S.C. section 8118(b)(3)

[3] 20 CFR section 10.202(a)(3).

[4] 20 CFR section 10.202(b).

That language, permitting controversion "in all other cases," implies that in those situation specified in section 10.202(a), there is no such choice for the employing establishment but to controvert continuation of pay. The Federal Procedure Manual, Chapter 2-500, which addresses continuation of pay supports this conclusion by stating that "The employing agency will . . . controvert a claim and terminate an employee's pay only if . . . the employee is neither a citizen nor a resident of the United States, Canada, or the Canal Zone (i.e., a foreign national employed outside the United States, Canada, or the Canal Zone.)" [5]

Section 8137 of the Act addresses the payment of compensation to noncitizens or nonresidents of either the United States or Canada. Section 8137(b) states that "Compensation paid under this subsection is instead of all other compensation from the United States for the same injury or death, and a payment made under this subsection is deemed compensation under this subchapter and is satisfaction of all liability of the United States in respect to the particular injury or death." [6] The Federal Procedure Manual states that "persons who are noncitizens and nonresidents of the United States or Canada, and who are injured while working outside the continental United States or Canada, come under the provisions of 5 U.S.C. 8137. They are excluded from COP [continuation of pay]." [7]

The January 24, 1983 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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[5] See FECA Procedure Manual, Chapter 2-500, FECA Tr. No. 82-4, issued March 1982, P. 6.

[6] 5 U.S.C. section 8137(b).

[7] FECA Procedure Manual, Chapter 2-500, FECA Tr. No. 82-4, issued March 1982, P. 6.

In the Matter of EDWARD LOUIS HOFFMAN *and* U. S. POSTAL SERVICE, POST OFFICE, Westwood, N.J.

Docket No. 84-1644; Submitted on the Record;
Issued September 28, 1984

Before E. GERALD LAMBOLEY, MICHELE VON KELSCH, WILLIE T. C. THOMAS

The issue is whether appellant's heart condition is causally related to factors of his federal employment.

Appellant, a 51-year-old letter carrier, filed a claim alleging that on September 11, 1983 he had a myocardial infarction as a result of employment-related stress. He stopped work on September 12, 1983 and did not return.

In a statement attached to his claim appellant noted that he was on sick and annual leave from August 6 through September 5, 1983 due to an unrelated bladder infection. He returned to work on September 6, 1983, and at his supervisor's request went to the employing establishment's health unit. He stated that a nurse at the health unit found that appellant's blood pressure was higher than employing establishment regulations permitted and recommended that appellant be examined by his treating physican. That same day appellant was examined by Dr. Lois J. Copeland, an internist, who increased the medication he had been taking for high blood pressure. He returned to Dr. Copeland's office on September 9, 1983, and the doctor reported that appellant's blood pressure was at that point low enough for him to return to work. Appellant stated that he returned to the health unit that same day, and the nurse informed him that his blood pressure still exceeded the employing establishment's regulations. She also performed an eye examination and informed appellant that his vision was below standards and that corrective measures were required. The following day, September 10 1983, appellant was examined by an optometrist and corrective lenses were prescribed. Appellant attributed the myocardial infarction he had the next day to "aggravation" caused by the health unit's nurse.

Appellant submitted an October 19, 1983 attending physician's report and duty status report from Dr. Copeland. She stated:

> "Patient developed extreme chest pain and diaphoresis following extreme tension and agitation induced by nurse, Mrs. Behrens, who was obstructing [appellant's] return to work despite my, (his physician's), ok."

Dr. Copeland diagnosed "extensive acute anterior myocardial infarction with apical aneurysm formation and myocardial dyskinesia," and stated that his condition was "stress induced, as patient had recently undergone thallium stress testing with negative results."

Appellant submitted a third report from Dr. Copeland dated December 26, 1983, who noted that appellant had "been a patient in my care since 1974, followed regularly for hypertension" which "has by and large been acceptably controlled." She stated that in April 1982 appellant "had undergone combined Stress Test and Thallium scanning in evaluation of an episode of non-exertional left sided chest pain which was negative, resulting in prediction of significant coronary artery disease as less than 5%." Dr. Copeland further reported:

> "On June 2nd 1983 his routine BP [blood pressure] evaluation in the Office revealed a pressure of 140/95. On September 6, 1983 he reported to my office stating that his BP was found quite increased on routine evaluation at work. He was notably anxious, and his pressure was found to be 150/114 on the right, 150/110 on the left.

> His antihypertensive medication was increased and he was seen again on September 9. His systolic pressure was 150 on both sides; the right diastolic was difficult to hear at approximate 110; the left was 100. Patient was extremely anxious because he was told his diastolic pressure would have to be below 90 before he would be allowed to return to work. Additional antihypertensive medication was prescribed and patient returned two hours later to my office at which time his blood pressure measured 130/90 in both arms. I reassured him that this was a perfectly safe and adequate response, and wrote a note concerning my measurement and its adequacy for him to take to the Postal Service physician and nurse immediately following his visit to my office. He called later to report that they refused to believe my finding, and had further aggravated his situation by insisting upon an eye examination. Needless to say Mr. Hoffman was in an agitated state as he was being threatened with the loss of his job despite his own physician's assurance as to the adequacy of his antihypertensive medication and control. Approximately 36 hours later he was admitted to the Pascack Valley Hospital with an extensive anterior myocardial infarction. This infarction was complicated by recurrent ventricular tachycardia, apical aneurysm formation and diminution of the left ventricular ejection fraction to 30% as determined by MUGA scan. Although his blood pressure is now normal at 120/80, he cannot return to work because of severe left ventricular dysfunction.
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> "It is the considered opinion of both myself and one of the consulting cardiologists that this infarction was in all likelihood induced by spasm of coronary arteries, rather than by a preexisting atherosclerotic plaque, in view of the recently completely negative stress-Thallium test. It is my considered opinion that the stress was directly due to the unconscionable behavior of the nurse and physician in charge at the post office, who harassed this patient in his desperate quest to preserve his job, continuing to do so despite the written note from myself, the patient's physician, stating the achievement of adequate blood pressure control and his qualification in my opinion to return to work."

Appellant submitted a January 4, 1983 report from Dr. Sheldon B. Eisenberg, a Board-certified internist specializing in cardiovascular diseases. Dr. Eisenberg stated:

> "[Appellant] had a nuclear stress thallium test done by me at Pascack Valley Hospital in April 1982. The results were negative. To my knowledge [appellant] did not have heart disease and did not have a heart attack prior to September 1983."

An Office of Workers' Compensation Programs medical adviser reviewed the medical evidence and a statement of accepted facts and in a March 2, 1984, report diagnosed coronary heart disease, an acute myocardial infarction, and hypertension. He further reported:

> "Nothing in the SOAF [statement of accepted facts] would be expected to cause myocardial infarction. Infarction was related to factors other than employment such as hypertension and family history and preexisting coronary disease."

By compensation order dated May 31, 1984 the Office denied appellant's claim on the ground that "the agency's prevention of the claimant's working was in accordance with the established safety regulations and procedures" and that "the myocardial infarction did not arise out of factors of his employment."

The Board finds that the case is not in posture for decision.

The Board has held that when an employee consents to a physical examination and an injury results, the examination is a factor of the employment. If this factor aggravated the employee's emotional condition so as to cause his disability, the disability is compensable.[1]

The Office did not make a finding based on the *Schulz* [2] decision as to whether the physical examination caused appellant's disability. The case is therefore remanded for the purpose of having a finding made on this question.

The decision of the Office of Workers' Compensation Programs dated May 31, 1984 is set aside and the case is remanded for further proceedings pursuant to his decision.

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[1] *Raymond H. Schulz, Jr.*, 23 ECAB 25.

[2] *Supra.*

In the Matter of JOHN S. BALDWIN *and* U.S. POSTAL SERVICE, POST OFFICE, St. Louis, Mo.

Docket No. 84-1592; Submitted on the Record;
Issued September 28, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a second hearing.

Appellant, then a 51-year-old truck driver, filed a claim for compensation on March 8, 1973 alleging that he sustained an injury to his low back on February 26, 1973 when he slipped from a fender and fell to the ground. His claim was accepted by the Office of Workers' Compensation Programs for a lumbosacral strain superimposed on spondylolisthesis[1] and he received compensation for intermittent periods of temporary total disability commencing March 22, 1973.

On January 14, 1975 appellant was referred by the Office for examination by Dr. Vilray P. Blair, a Board-certified orthopedic surgeon, for a description of his condition and evaluation of any impairment related to the 1973 injury. In a report dated February 26, 1975 Dr. Blair stated that appellant had reached maximum improvement and recommended that he return to work with limitations on bending and lifting.

Appellant was also referred by the Office to his treating physician, Dr. Robert E. Kuhlman, a Board-certified orthopedic surgeon, who stated in a report dated June 25, 1976 that appellant had reached maximum improvement with narrowing of the lumbosacral disc space and some forward displacement of L5 on S1. He advised that appellant was able to work without heavy lifting over 20 pounds and designated restrictions of walking, standing, sitting and bending.

The Office proceeded to develop the case in an effort to determine appellant's loss of wage-earning capacity. In a September 8, 1976 memorandum, an Office claims examiner selected the position of telephone solicitor[2] as suitable for appellant's reemployment with physical demands of lifting up to 20 pounds with walking or standing and the ability to push, pull, talk and hear. He indicated that the wage rate was $2.30 per hour.

By letter decision dated October 15, 1976 the Office determined that appellant had a 71 percent loss of wage-earning capacity effective November 11, 1976.

By letter dated October 22, 1976 appellant requested reconsideration of the Office's decision.

By compensation order dated December 17, 1976 the Office rejected appellant's application for review on the ground it was *prima facie* insufficient to warrant review under 5 U.S.C. 8128.

Appellant thereafter filed an application for review with the Board.[3] In a motion filed on March 2, 1977 the Director of the Office requested that the Board set aside the October 15, 1976 decision and remand the case for further action and a *de novo* decision. In an order issued March 24, 1977 the Board granted the Director's motion.

On remand, the Office referred appellant to Dr. Kuhlman for examination. In a report dated August 7, 1978 Dr. Kuhlman stated that appellant could be employed in a manner "avoiding bending, lifting, stooping, and prolonged sitting.

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[1] On July 11, 1973 appellant underwent a spinal fusion of the posterior aspect of the vertebra at L4-5.

[2] Department of Labor, *Dictionary of Occupational Titles*, Code No. 293.358.

[3] The appeal was docketed as no. 77-51.

On September 7, 1978 an Office medical adviser reviewed the record and opined that appellant could lift a maximum of 20 pounds and perform work walking, standing, or sitting; partial restriction on stooping, kneeling and climbing; and no bending.

On September 12, 1978 an Office loss of wage-earning capacity specialist selected the position of hotel clerk[4] as representing his wage-earning capacity. The physical requirements of the job were listed as light lifting to a maximum of twenty pounds, the ability to hear and talk. The working conditions were listed as being inside 75 percent or more of the time with vocational preparation required of three to six months. The specialist confirmed by telephone conversation with a state employment service represenative that the position of hotel clerk was reasonably available in appellant's commuting area and the Office medical adviser stated that appellant could perform the requirements of the position.

Applying the principles of the *Shadrick* case,[5] the Office by decision dated October 11, 1978 determined that appellant had a 68 percent loss of wage-earning capacity effective November 11, 1976 based on his ability to perform the duties of a hotel clerk.

On November 9, 1978 appellant requested a hearing before an Office representative. In suport of his request he submitted the February 13, 1979 report of Dr. Edward H. Bowdern, a general surgeon, who stated that appellant was totally disabled for any work due to his spinal fusion for spondylolisthesis.

On July 16, 1979 a second Office medical adviser reviewed the record and stated that appellant should be referred for an impartial orthopedic examination as a conflict in medical opinion existed between Dr. Bowdern and Dr. Kuhlman.

This matter came for a hearing on February 11, 1980. At the hearing appellant submitted the February 7, 1980 report of Dr. Bowdern who stated he found no improvement in his condition and repeated his conclusion that appellant was permanently disabled and unemployable.

By decision dated and finalized April 7, 1980 the Office hearing representative affirmed the October 11, 1978 Office wage-earning capacity determination finding that the weight of the medical opinion evidence was represented by the reports of Dr. Kuhlman who indicated appellant could perform the duties of a hotel clerk. The hearing representative stated that appellant had failed to establish a basis for modifying his wage-earning capacity rating.

Appellant thereafter filed an application for review with the Board.[6] By order dated November 12, 1980 the Board dismissed the appeal noting that appellant had new medical evidence which he wished to have considered by the Office.

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[4] Department of Labor, *Dictionary of Occupational Titles*, Code No. 242.368.

[5] *Albert C. Shadrick*, 5 ECAB 376.

[6] Docket No. 80-1130.

Appellant submitted to the Office the May 29, 1980 report of Dr. William F. Luebbert, an osteopath, in support of his request for reconsideration by the Office. Dr. Luebbert diagnosed Grade II spondylolisthesis of L-5, treated by posterior elementectomy of L-5 and spinal fusion. He expressed the opinion that appellant was totally disabled and unable to return to work.

The Office determined that a conflict existed in the medical opinion evidence of record and referred appellant, together with a statement of accepted facts and the case record, to Dr. David L. Stronsky, a Board-certified orthopedic surgeon, for an opinion on whether he was totally disabled or partially disabled for gainful employment. In a report dated April 8, 1981 Dr. Stronsky reviewed the statement of accepted facts, reported his findings on examination and concluded that appellant was totally disabled for gainful employment as a result of the injury he sustained on February 26, 1973. He reviewed the physical requirements of a hotel clerk listed in the statement of accepted facts and stated: "[it] would certainly be impossible for this man to engage" in the position.

On April 27, 1981 the first Office medical adviser reviewed Dr. Stronsky's report and disagreed with his findings and conclusions.

By letter dated May 26, 1981 the Office requested that Dr. Stronsky clarify his report by specifying an approximate date the appellant's total disability began, noting that Dr. Kuhlman's August 7, 1978 report indicated that he could perform gainful employment.[7] In a response dated September 21, 1981 Dr. Stronsky stated that appellant was totally disabled from May 22, 1974 "due to the fact he has continued difficulties since his injury."

By compensation order dated December 1, 1981 the Office modified the October 15, 1976 decision and reinstated compensation for temporary total disability retroactive to April 8, 1981, the date of Dr. Stronsky's first report.

Appellent thereafter filed an application for review with the Board contending that the Office's decision should have been made retroactive to November 11, 1976, the date his compensation was reduced to reflect his wage-earning capacity.[8] In a motion filed on April 23, 1982, the Director of the Office requested that the Board set aside the Office's December 1, 1981 decision and remand the case noting that appellant would be referred to another impartial specialist because Dr. Stronsky did not provide medical rationale in support of his conclusion that appellant was totally disabled beginning on May 22, 1974. By order dated August 16, 1982 the Board granted the motion of the Director.

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[7] In its letter to Dr. Stronsky, the Office also noted that appellant had been able to work on a part-time basis as a hotel manager since 1976,

[8] The appeal was docketed as No. 82-935.

On remand, the Office referred appellant, together with a statement of accepted facts and the case file, to Dr. Frank Luechtefeld, a Board-certified orthopedic surgeon, for an opinion on whether appellant was totally disabled as of May 22, 1974 through April 8, 1981. In a report dated February 1, 1983 Dr. Luechtefeld diagnosed fusion from L4-S1 and degenerative changes of L3-4, T11, and T12 with recurrent strain pattern. He stated "that [appellant] should continue to be totally disabled" and "could not return to any type of work that he had previously been employed." He noted that any attempt to return appellant to work would lead to recurrent problems.

On February 22, 1983 the first Office medical adviser reviewed Dr. Luechtefeld's report and noted that he did not specifically address the causal relationship of appellant's continued back disability. The medical adviser opined that appellant's continuing back disability was not due to employment factors but rather to degenerative changes.

By letter dated March 24, 1983 the Office requested that Dr. Luechtefeld clarify his report by determining whether appellant was temporarily totally disabled from May 22, 1974 to April 7, 1981. In a response dated March 29, 1983 Dr. Luechtefeld stated:

> "With regard to John Baldwin, the question is whether this patient has been totally disabled from May 22, 1974 until the present time. As I can determine from your letter, I do not have the entire history. I think we should refer to Dr. Kuhlman who initially took care of the patient and see if he feels this patient was temporarily totally disabled.
>
> "From my impression the patient has not been able to work and from my history, the patient has not been able to work from the initial injury from May 22, 1974. It was never my impression that he had ever improved enough that he has been able to return to the type of work he had done before.
>
> "The records from Dr. Kuhlman and the other physicians that he had seen prior to us would be more beneficial than my opinion based on a person's history.
>
> "With regard to your note that if we needed any more records from your file. All I could say is that I would have to go over them again and indeed there would be a fee for spending time in reviewing these records. I would wonder if this is not already enclosed in the records which you have and that you possibly could determine that from the previous records."

By letter dated May 5, 1983 the Office forwarded the case record to Dr. Luechtefeld, together with a statement of accepted facts and a request that he clarify hs earlier reports. In a report dated May 25, 1983 he responded:

> "We will render the following opinions on Mr. Baldwin. The first question was whether this man was totally disabled from all gainful employment from 5/22/74 through 4/7/81. It is obvious from reviewing the records that he worked from late 1974 until November 1980 as a rooming house manager part time. There was no lifting, bending and only had to work part time, a few hours a day. Therefore, he was able to to this particular type of work. Even though he could not do his previous employment and he was totally disabled from that he was not totally disabled from all types of work.
>
> "Also, was made mention in my previous report that there was no relation between the surgery and degeneration of L5-S1. I just wish to make it clear that Dr. Kuhlman initially saw the patient because of back problems and also had at that time deterioration of L5-S1 with spondylolisthesis. This was March 26, 1973. In his report he notes that this man's subjective complaints are justified on the basis of this finding at L5-S1."
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> * * *
>
> "As far as physical limitations for any type of work being considered this gentleman cannot do anything which will require prolonged standing, sitting, bending, climbing, absolutely no lifting.
>
> "It should be noted that Dr. Kuhlman felt in August of 1978 that the patient could hold down some type of job especially as a hotel clerk, as did Dr. Lubbert. However, he does not have that job at the present time. I do not know the situation of the discharge from that particular employment but if Mr. Bocox does not feel this patient can undergo Vocational Rehabilitation, I really do not understand what type of employment you could possibly seek for this gentleman in the future. As I have already noted he has been off work for such a long period of time the chance of getting back to any gainful employment is next to zero.
>
> "I feel at this time with the fact as has been noted in the charts he is not a candidate for Vocational Rehabilitation. I feel that the patient is totally disabled at this time. Possibly psychiatric evaluation would help guide your decision in the future as to possibility of sending this patient through another training program."

By memorandum dated July 19, 1983 the first Office medical adviser reviewed Dr. Luechtefeld's report and stated his opinion that appellant's continuing back disability was due to degenerative disc disease and spondylolisthesis and not to the employment injury.

By compensation order dated September 28, 1983 the Office rejected appellant's claim for temporary total disability compensation from May 22, 1974 through April 7, 1981 finding that the weight of the medical opinion evidence failed to support total disability for employment during that period.

By letter dated October 25, 1983 appellant requested a hearing before an Office representative. The Office, in a February 29, 1984 letter, informed appellant's representative that a hearing would be scheduled for March 14, 1984. However, in a March 29, 1984 letter decision, the Office cancelled the hearing, stating that he had already received one hearing and "that a second hearing on the same issue would serve [no] useful purpose."

The Board finds that under the circumstances appellant was not afforded the hearing to which he was entitled under the Federal Employees' Compensation Act.

Section 8124(b) of the Act provides that a claimant not satisfied with a decision on his claim is entitled, upon timely request, to a hearing before a representative of the Office. There is no provision in the Federal Employees' Compensation Act entitling a claimant to more than one hearing.[9] If a claimant has received a hearing on an issue or set of issues and the hearing representative affirms the Office's decision, a claimant is not entitled to another hearing on that issue or set of issues even if he proffers new evidence. He may receive a second hearing only if the Office, in its descretion, grants him a hearing.[10]

The Board finds that the facts present in the instant case are distinguishable from those in *Pilar Costales*[11] where the decision of the Office to deny a second hearing on the issue of the causal relationship of appellant's emotional condition and his federal employment was affirmed. In *Costales*, the second request for a hearing presented the same issue to the Office as had been resolved at the first hearing. That is not the case in the instant appeal.

In this case the Office proceeded to determine appellant's loss of wage-earning capacity in 1976 following the receipt of medical evidence which indicated he was partially disabled. On October 15, 1976 the Office originally determined that appellant had a 71 percent loss of wage-earning capacity based on his ability to perform the job of telephone solicitor. However, by order dated March 24, 1977 the Board set aside this decision based on the motion of the Director of the Office to further develop the case.

Thereafter appellant was referred for medical examination by Dr. Kuhlman, an Office medical adviser provided an opinion on his work restrictions and the position of hotel clerk was selected as representing his wage-earning capacity. By decision dated October 11, 1978 the Office determined that appellant had a 68 percent loss of wage-earning capacity based on his ability to perform the duties of a hotel clerk effective November 11, 1976. Appellant subsequently submitted a report from Dr. Bowdern which indicated he was totally disabled and on July 16, 1979 the Office medical adviser found that a conflict in the medical evidence existed with regard to appellant's disability.

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[9] *Booker T. Jackson*, 29 ECAB 29.

[10] *Pilar Costales*, Docket No. 82-982, issued October 29, 1982.

[11] *Pilar Costales*, *supra*.

Appellant requested a hearing which was held on February 11, 1980. Appellant submitted a February 7, 1980 report from Dr. Bowdern who stated that he was permanently disabled. The issue at the hearing was whether appellant had the capacity to perform the duties of a hotel clerk as determined by the Office effective November 11, 1976. By decision dated April 7, 1980 the hearing representative affirmed the October 11, 1978 loss of wage-earning capacity determination. However, appellant subsequently submitted new medical evidence as to his total disability from Dr. Stronsky who reported that he was totally disabled since May 22, 1974. The Office, on December 1, 1981, modified the October 15, 1976 decision stating that it reinstated appellant's total temporary disability compensation effective April 8, 1981. The Board notes, however, that it had already set aside the October 15, 1976 loss of wage-earning capacity determination based on the job of telephone solicitor in its order dated March 24, 1977. Subsequently, the Board set aside the Office's December 1, 1981 decision by order dated August 16, 1982.

After December 1, 1981 the issue in this case focused on whether appellant was totally or partially disabled for employment for the period of May 22, 1974 to April 8, 1981. This was a separate and distinct issue from that which was addressed at the first hearing, *id est*, whether he had the capacity to perform the duties of a hotel clerk effective November 11, 1976. While certain elements of both issues focus on the question of appellant's partial disability for similar periods, the first hearing did not address the question of his permanent or partial disability from May 22, 1974—a period which commenced prior to the first office loss of wage-earning capacity determination made effective November 11, 1976 and which extended to April 8, 1981, a period well beyond the date of the February 7, 1980 hearing and April 7, 1980 decision of the Office hearing representative.

After the Board's remand dated August 16, 1982, appellant was referred by the Office to Dr. Luechtefeld to address the issue of appellant's disability for the period of May 22, 1974 to April 8, 1981. After several reports and attempts at clarification, Dr. Luechtefeld expressed an opinion on the issue in question and the Office, in a decision dated September 25, 1983, rejected appellant's claim for temporary total disability compensation for the period May 22, 1974 through April 7, 1981. Thereafter appellant made a request for a hearing of the September 25, 1983 de-appellant made a request for a hearing of the September 25, 1983 decision and submitted new medical evidence,[12] which was denied by the Office on March 29, 1984.

Section 8124(b) of the Federal Employees' Compensation Act[13] dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary . . . is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

The Federal Procedure Manual (FECA) at Chapter 2–1601 paragraph 15 states that for cases requiring further action which are returned to the district offices, upon issuance of a new decision, the district office "will again notify claimant of the right to hearing, reconsideration or appeal."

The case record reflects that following the hearing of February 11, 1980, which was based on the Office's October 11, 1978 decision that appellant had a 68 percent loss of wage-earning capacity effective November 11, 1976, the Office proceeded to further develop the case and obtained medical opinions from Dr. Stronsky, who stated appellant could not perform the duties of a hotel clerk and was totally disabled commencing May 22, 1974, and from Dr. Luechtefeld, who opined that appellant was not totally disabled from 1974. Based on Dr. Luechtefeld's report, the Office issued a new compensation order on September 28, 1983 finding that appellant was not totally disabled for the period May 22, 1974 to April 7, 1981 and informed him that he was entitled to a hearing before reconsideration under section 8128(a).[14] Thereafter, appellant formally requested a hearing within 30 days of the issuance of the Office's decision.

The case will be remanded to the Office to offer appellant a hearing concerning the issue dealt within the September 28, 1983 decision.

The March 29, 1984 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings in accordance with this decision.

In the Matter of ROBERT J. O'NEIL *and* U. S. POSTAL SERVICE, POST OFFICE, Chippewa Falls, Wisc.

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[12] The Board notes that according to its Rules of Procedure (20 CFR 501.2(c)) the review of a case is limited to the evidence in the record which was before the Office at the time of its final decision. The last merit decision is dated September 25, 1983 from which appellant has not appealed.

[13] 5 U.S.C. section 8124(b)(1).

[14] See *Barney L. Bailey, Jr.*, 33 ECAB 1243.

Docket No. 84–1048; Submitted on the Record;
Issued September 28, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not "without fault" with respect to an overpayment of compensation benefits and that therefore the overpayment was not subject to waiver.

On May 6, 1963 appellant, then a 36-year-old substitute clerk-carrier, was injured when a truck used for collecting the mail was hit in the right rear bumper while proceeding through an intersection, causing it to fall over. As a result of the accident, he sustained an injury to the lumbar and cervical spine, laceration of both legs, and post-traumatic epilepsy. He received compensation for temporary total disability.

Appellant's attending physician, Dr. Gerald K. Hoffman, a Board-certified psychiatrist, submitted a December 14, 1982 report in which he concluded that appellant had "no physical limitations to employment at the present time." An Office of Workers' Compensation Programs medical adviser reviewed the case record and concurred with Dr. Hoffman's opinion that appellant could return to work.

By decision dated February 3, 1983 the Office terminated appellant's compensation benefits effective February 24, 1983 on the basis that all disability resulting from the May 6, 1963 injury had ceased.

By letter dated February 11, 1983 appellant requested reconsideration on the basis that the employing establishment would not reinstate him.

By compensation order dated March 8, 1983 the Office found that the evidence submitted was irrelevant and immaterial and not sufficient to warrant review of the prior decision.

Due to an administrative error, appellant received compensation through October 5, 1983.

By letter dated November 7, 1983, the Office informed appellant that an overpayment of $4,732.08 had occurred in his case because benefits were erroneously paid for the period February 24, 1983 through October 5, 1983 after a decision was issued denying benefits after February 23, 1983. A preliminary finding was made that appellant was at fault in the matter because he was aware or reasonably should have been aware that he was not eligible for benefits beginning February 24, 1983.

Appellant responded by letter dated November 29, 1983 with the following assertions: (1) that he was later "told the checks would continue and they did," so he "assumed this to be correct"; (2) Mr. Thompson from the Office called on him personally at home and informed him in front of witnesses that he would be reinstated in his job or retrained for another job before compensation stopped; and (3) that because he had not been able to get reinstated or retrained, he assumed his compensation would continue.

By decision dated January 1984[1] the Office advised appellant that it had been determined that he was at fault with respect to the overpayment, noting that he was made aware by the Office's February 3, 1983 letter that as of February 23, 1983 compensation benefits would be terminated. The Office requested that appellant forward a check in the amount of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made because of an error of fact or law, the overpayment may not be waived. The only exception to this requirement is a situation which meets the tests set forth as follows:

> "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [the Federal Employees' Compensation Act] or would be against equity and good conscience."

In order to qualify for waiver, the recipient of an overpayment of compensation must be without fault. If he is not, there is no basis for waiving the overpayment.

In determining whether an individual is "without fault," what constitutes "fault" depends on whether the facts show the incorrect payment resulted from:

> "(a) An incorrect statement made by the payee which the payee knew or should have known to be incorrect; (b) Failure of the payee to furnish information which the payee knew or should have known to be material; or (c) Acceptance of a payment which the payee either knew or should have been expected to know was incorrect."[2]

In the present case it is apparent that the Office applied the third standard to appellant—acceptance of a payment which the payee either knew or should have been expected to know was incorrect.

The Board finds that the case is not in posture for decision.

By letter dated November 7, 1983, the Office informed appellant of the overpayment and its preliminary finding that he was at fault in the matter, and gave him an opportunity to respond to the findings. He replied by letter dated November 29, 1983 that he was later "told the checks would continue" and when they did he "assumed this to be correct." Appellant specially identified Mr. Thompson, his rehabilitation counselor, as telling him that he would be reinstated in his job or retrained for another job before his compensation would be terminated. It appears, however, that the Office failed to consider or address the specific reasons proferred by appellant with respect to the finding "not without fault" in causing the overpayment.

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[1] The decision was dated January 39, 1984, which is obviously incorrect. A review of the case record indicates that the most probable date of the decision was January 3, 1984.

[2] Pursuant to *Califano v. Yamasaki*, 422 U.S. 682, 99 S. Ct. 2545, the Office established procedures to be followed in handling overpayment of compensation cases. These procedures are detailed in the Federal (FECA) Procedure Manual, Chapter 2-807, Developing and Monitoring Payments, Part 2-claims.

On remand the Office should further develop the evidence regarding the reasons proferred by appellant. The Office should specifically determine the exact information given appellant by Mr. Thompson and when this information was given. After any additional development deemed necessary, the Office should issue a *de novo* decision.

The January 1984 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings in accordance with this decision of the Board.

In the Matter of FRANCISCO G. GARCIA *and* DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, San Francisco, Calif.

Docket No. 84-1580; Submitted on the Record; Issued September 28, 1984

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, MICHELE VON KELSCH

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's right to receive compensation benefits effective January 17, 1983 on the ground that he refused to undergo a medical examination as directed by the Office.

On August 28, 1961, appellant, then a 34-year-old exhibits specialist, injured his low back while lifting an aluminum frame. He again injured his low back on May 6, 1963 while lifting a slab of fossil bones into a museum exhibit case. The Office of Workers' Compensation Programs accepted that appellant had an employment-related lumbosacral strain and depression state with anxiety and paid compensation for temporary total disability for intermittent absences from work. Appellant was given light duty until his retirement on disability on April 27, 1968, after which he received compensation for a loss of wage-earning capacity.[1]

Upon the request of the Office that he submit a current medical report on his condition, appellant submitted a June 27, 1980 report of Dr. Robert D. Weyand, a Board-certified neurosurgeon. Upon the request of the Office for a supplemental report on the issue of causal relation with respect to appellant's low back condition and emotional condition, Dr. Weyand opined in an October 23, 1980 report that appellant's low back condition was not employment related. The doctor stated he was "unable to make any statement" concerning appellant's emotional condition.

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[1] The Office determined that appellant had a 57 percent wage-earning capacity, based on his ability to perform the duties of an illustrator, Department of Labor's *Dictionary of Occupational Titles*, Code No. 141.081.

The Office then referred appellant to the Parnassus Heights Disability Services for orthopedic, psychologic, and neurologic examination and evaluation. Based on the reports of the Parnassus Heights group, which stated that appellant's low back and emotional conditions were not employment related, the Office terminated appellant's compensation after November 4, 1981.

Appellant requested reconsideration and submitted a February 10, 1982 report of Dr. Grover Wald, a psychiatrist, which opined that appellant's employment injury and subsequent disability had aggravated a preexisting emotional condition. The Office determined that Dr. Wald's report created a conflict in the medical evidence and referred appellant, along with the case record and a statement of accepted facts, to Dr. Carroll Brodsky, a Board-certified psychiatrist, to resolve the conflict.

By letter dated December 10, 1982, appellant's representative stated that appellant objected to being examined by Dr. Brodsky, asserting he was associated with the Parnassus Heights group, and requested referral to another physician. In a February 10, 1983 letter to appellant's representative, the Office stated that Dr. Brodsky was not associated with any of the physicians previously examining appellant and was qualified to serve as impartial medical specialist.

The Office referred appellant to Dr. Stuart M. Pickel, a Board-certified psychiatrist, and scheduled a March 16, 1983 examination. Dr. Pickel notified the Office in a March 18, 1983 letter that appellant had not kept his appointment.

By letter to the Office dated May 6, 1983, appellant's representative stated:

> "Since you appear to insist that [appellant] be examined by a doctor who is connected with [the Parnassus Heights group],[2] we are at an impasse."
>
> "We have requested a hearing in this matter but we have been informed that this is not possible (in your letter of February 10, 1983). That being the case, please be advised that Mr. Garcia will not be examined by any other doctors of your choosing. ***"

In an August 2, 1983 letter, the Office notified appellant that it was referring him to Dr. Knox H. Finley, a Board-certified psychiatrist, for examination and that it had set up an August 16, 1983 appointment.[3] In a December 12, 1983 letter, the Office asked appellant to notify it whether he would cooperate with any further attempts to schedule an examination. The Office also stated that it had "expended $800.00 in medical costs for no shows."

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[2] This letter did not explicitly refer to Dr. Pickel, but apparently it was meant to assert Dr. Pickel was affiliated with that group.

By letter dated January 5, 1984, appellant's representative stated that "it is regretted your office expended the sum of $800.00 for scheduling medical appointments that it was notified not to make." In a January 20, 1984 letter, appellant's representative stated that it was appellant's position that he "would not accept any more medical appointments scheduled by [the Office] with doctors of their choosing until the Parnassus medical reports and the use of these reports, are legally contested."

By compensation order dated March 29, 1984, the Office suspended appellant's right to compensation "effective January 17, 1983, until such time as [he] cooperates with the Medical Division of this Office pursuant to 5 U.S.C. [section] 8123(d)."

The Board finds the Office properly suspended appellant's right to receive compensation on the ground that he refused to undergo medical examinations as directed by the Office.

Section 8123(d) states as follows:

> "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter [the Federal Employees' Compensation Act] is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee."

The Board has stated that under this provision, "[t]he determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the [Office]. The only limitation on this authority is that of reasonableness." [4]

In the present case, a conflict in the medical evidence under 5 U.S.C. section 8123(a) was created, and it therefore became necessary to refer appellant to an impartial medical specialist to resolve the conflict. Consequently, it was reasonable for the Office to request appellant to undergo further examination,[5] and despite its referrals of him to Drs. Brodsky,

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[3] The case record does not indicate whether appellant refused this particular appointment, but it is clear the examination did not take place.

[4] See *Joseph W. Bianco*, 19 ECAB 426; *Donald M. Davis*, 31 ECAB 1167.

[5] See *Donald M. Davis*, *supra*.

Pickel, and Finley, appellant refused to submit to examination.[6] Under these circumstances, the Office properly invoked the provisions of section 8123(d), suspending his possible entitlement to compensation because he had refused to submit to a medical examination, thereby preventing proper adjudication of the case.

The decision of the Office of Workers' Compensation Programs dated March 29, 1984 is hereby affirmed.

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[6] The Board notes that there is no evidence in the case record that Drs. Brodsky, Pickel, and Finley were affiliated in any way with the Parnassus Heights group. Furthermore, appellant made it clear he would not submit to examination by any physician selected by the Office.

In the Matter of JOSEPH ALBERT FOURNIER, JR. *and* U.S. POSTAL SERVICE, POST OFFICE, Providence, R. I.

Docket No. 84–1023; Submitted on the Record;
Issued September 28, 1984

Before E. GERALD LAMBOLEY, WILLIE T. C. THOMAS, DAVID S. GERSON

The issue is whether appellant sustained an injury in the performance of duty.

On August 26, 1982 appellant, then a 31-year-old substitute mail carrier, filed a claim alleging that on August 9, 1982 he injured his back while working in his mail truck which had been parked at 25 Acorn St. in Providence, Rhode Island. Appellant described the injury as follows: "I had just gotten into the truck after pulling two cartons from the box outside when I slipped on a wet spot on the floor and fell back into the front of the door opening." Appellant also stated that he reported the incident to his immediate supervisor, Eddy Clark, the next day and told him that he would "like to hold off filing a report for awhile to see if the pain [would go] away in a few days." According to appellant, the pain subsided for awhile, but then returned on Monday, August 23, 1982. Thereafter, he first sought medical treatment at the Atmed Treatment Center on August 26, 1982; and he stopped working from August 28, 1982 to September 2, 1982.

The record contains a medical report dated August 26, 1982 by Dr. Thomas Logan, a physician at the Atmed Treatment Center and a specialist in emergency medicine, which indicated that appellant had stated that he banged his back getting out of a truck three weeks before, that the pain had started to subside, and that it then returned. Dr. Logan noted swelling and tenderness at T_{11} - T_{12} - L_1, and diagnosed appellant's condition as "contusion lumbar spine." In an Office of Workers' Compensation Programs form also dated August 26, 1982, Dr. Logan repeated his diagnosis, and related appellant's condition to the described history of injury.

In a letter to the Office dated September 3, 1982, the employing establishment controverted appellant's claim because "the injury occurred off postal premises and the employee was not engaged in official 'off premises' duties." The employing establishment asserted that no collection was made at 25 Acorn St. because business at that location was closed on that day and no mail was generated. The employing establishment expanded upon its objections to appellant's claim in an August 31, 1982 document labeled "Attachments 1 and 2" in which it stated the following:

> "(1) Employee claims injury occurred at Blue Cross Bldg. Business was closed this day and generated no mail—per telephone call David Mancone, Supv. [supervisor] mail room.
>
> "(2) Employee claims no supv. available at MPO [Main Post Office]. Besides the collection supv., there were an additional 19 mail processing supv.
>
> "(3) Employee claims he reported incident to Ed Clark on Tuesday 8/10/82. Mr. Clark frequently covers Esmond Br[anch] on Tuesdays. There is doubt as to whether Mr. Clark was in the Johnston Br[anch] at any time of this day.
>
> "(4) On Thur[sday] 7/22/82 employee reported to Mrs. DeFusio that he had hurt his back the previous night wrestling with his nephew.
>
> "(5) If Holiday Collection #30 was used on 8/9/82 due to [state holiday], 25 Acorn St. is not scheduled for pick-up."

In a memorandum to the Office dated September 7, 1982, the employing establishment pointed out an additional inconsistency in appellant's claim. It stated:

> "Please note discrepancy between initial care provider's statement regarding cause of injury, '[Appellant] states that he banged his back getting *out* of a truck 3 weeks ago,' and the employee's statement on [the Office claim form], 'I had just gotten *into* the truck.'"

The record also contains a narrative medical report dated September 7, 1982 by Dr. Frederick M. Johnson, an orthopedic surgeon. In describing the history of appellant's injury he stated, "On August 9, 1982 appellant states that he slipped on some wet surface while alighting from some sort of vehicle, he is a little vague about the details. He said that he struck the mid-portion of his back." Dr. Johnson noted that upon examination, he found a lump over the "dorsal spinous processes" as well as "some tenderness to local palpation." Dr. Johnson concluded that appellant's history and physical examination at that time were "consistent with a superficial contusion of integument over the mid-portion of the spine in the lumbar area."

In an undated statement, appellant responded to the five objections to his claim listed by the Office in the document labeled "Attachments 1, 2."

With regard to paragraph number 1, appellant stated:

> "This is true. The Blue Cross Building and business was closed and I picked up no trayed mail there. However, my collection for that evening still held me responsible for two mail boxes in front of the building. The accident occurred after I had emptied these cans and while I got into the mail truck."

Appellant responded to the second paragraph by stating that upon return to the main post office on the day in question, he could not find any supervisors in the area and so he ended his tour of duty and went home. In responding to paragraph three, he repeated his assertion that he reported the injury to Mr. Clark on the following day. Appellant responded to paragraph four by denying that he told Mrs. DeFusio that his back hurt from wrestling with a nephew, stating that he had no nephews. With regard to paragraph five, appellant stated, "I was on the standard week night collection assigned to the Johnston Branch, collection 31. I worked my normal assignment this day as it was only a holdiay for Rhode Island."

Appellant also described the employment incident in greater detail as follows:

> "I was carrying 2 inserts filled with mail. I had pulled in front of the factory complex where Blue Cross is located. I slipped on the top step of the one ton vehicle I was using and hit my back on something along the door jam. I was still holding the two inserts that contained an estimated 10–15 pounds of mail."

Appellant stated that there was no witness to the incident.

Appellant submitted a statement dated November 8, 1982 by a medical receptionist at the Atmed Treatment Center in which she stated:

> "[Appellant] states that I was told he was getting into a truck when the back injury occurred, and I stated that it happened getting out of a truck. I do not recall this day or this [appellant], but it is possible I may have typed the report incorrectly."

The employing establishment submitted an undated statement received by the Office on December 15, 1982 by Mrs. DeFusio in which she repeated her assertion that appellant had told her on July 22, 1982 that he had hurt his back the previous evening wrestling with his nephew.

The employing establishment stated that their records indicated that Mr. Clark was at the Johnston Branch on August 10, 1982. It also stated that its records showed that the postal service was not on a holiday schedule on the day of the alleged employment injury, and therefore, 25 Acorn St. would be on appellant's route that day. However, with regards to the operations of Blue Cross on the day in question, the employing establishment stated:

> ". . . [S]ince 8/9/82 was a Rhode Island State Holiday, Blue Cross was closed for the entire day, and therefore, no mail was generated for a collection pick-up. The two previous days were [weekend days and] Blue Cross was closed at this time also.
>
> "The collection mail for Blue Cross is placed in trays inside the building for pick-up by the carrier. On 8/9/82, the doors to the Blue Cross were closed and locked."

The record also contains a December 24, 1982 statement by Mr. Clark, manager of the Johnston Branch, in which he stated:

> "I do not recall [appellant of] this unit, informing me of injury he received in August 1982. [Appellant] claims he mentioned to me on August 10, 1982 that he had a slight injury on August 9, 1982. I have no reason to doubt [appellant's] statement, but I cannot honestly recall the situation."

In a letter to the Office dated July 27, 1982, the employing establishment pointed out that postal mail inserts measure 2′7″ x 3′8″ x 1′1″, and therefore it was unlikely that appellant had been carrying two of these inserts, as he had claimed, at the time of the employment injury. The employing establishment also asserted that it would be impractical to carry such a large article if the contents weighed only 10–15 pounds as appellant had also claimed. The employing establishment also questioned the veracity of appellant's claim based on the lapse of time between the date the injury allegedly occurred and the date appellant first sought medical treatment.

In a letter to the Office dated November 29, 1983, the employing establishment stated the following:

> "We investigated the situation concerning the location of mail boxes outside the building of Blue Cross. We have been advised that there are no boxes outside the building. The pick-up at Blue Cross is definitely and only inside. The nearest collection box to this building is located two blocks away at 33 Acorn St., Blue Cross being at 25 [Acorn St.]."

By compensation order dated December 28, 1983, the Office denied appellant's claim for the reason that "the evidence fails to establish that the employee sustained an injury at the time and place and in the manner alleged.

The Board finds that the evidence fails to establish that appellant sustained an injury in the performance of duty as alleged.

A person who claims benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his claim, including the fact that he sustained an injury while in the performance of duty, and that he had disability as a result. Although an injury does not have to be confirmed by eyewitnesses, the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. He has the burden of establishing the occurrence of the alleged injury at the time, place, and in the manner alleged by a preponderance of the reliable, probative, and substantial evidence.[1] An employee has not met this burden where there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[2]

In the instant case, appellant's assertion that he injured himself after collecting mail from two collection boxes located outside of the Blue Cross Building at 25 Acorn Street on August 9, 1982 is not supported by the evidence of record. Both appellant and the employing establishment agree that the Blue Cross Building at 25 Acorn Street was on the route assigned to appellant on August 9, 1982; that on that day the Blue Cross Building was closed because it was a state holiday; and that as a result, appellant did not have access to any collection mail normally placed in trays inside the building. Moreover, investigation by the employing establishment revealed that there are not any collection boxes located outside the Blue Cross Building at 25 Acorn Street, as appellant claimed, but rather that the nearest outdoor collection box is located two blocks away at 33 Acorn Street.

Appellant's claim is further undermined by the inconsistencies in the record with regard to the manner in which the injury occurred. Appellant stated in his claim form and in supplemental statements that the injury occurred after he got into the truck. However, the history of the injury reported in Dr. Logan's August 26, 1982 report and Dr. Johnson's September 7, 1982 report both indicate that the injury occurred when appellant was getting out of the truck.

Additional doubt is cast upon appellant's claim by the lapse of time between the date the injury allegedly occurred and the date that appellant first sought medical treatment for it. Appellant was allegedly injured on August 9, 1982, but he continued to work without apparent difficulty until August 26, 1982 when he sought medical treatment for the first time. While appellant explains this lapse by claiming that the pain had initially subsided and then flared up, there is no confirmation of this explanation in the record. Similarly, the lapse of time between the date the injury allegedly occurred and the date that appellant first notified the employing establishment of it also discredits appellant's claim. Appellant claims that he reported the injury to a supervisor at the Johnston Branch on August 10, 1982. While the record shows that the supervisor was at the Johnston Branch on that day, the supervisor issued a statement that he had no recollection of being informed of an injury by appellant at that time. The first notification of the injury to the employing establishment which is substantiated by the record was not made until August 26, 1982, the date appellant completed the claim form.

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[1] *John G. Schaberg*, 30 ECAB 389.

[2] *Ernest N. Krome*, 20 ECAB 363.

In view of the inconsistencies in the evidence with respect to the place and manner in which the injury allegedly occurred, together with the delayed filing of the claim and the absence of any persuasive medical evidence of causal relationship, appellant has failed to meet his burden of proving that he sustained an injury in the performance of duty.

The decision of the Office of Workers' Compensation Programs dated December 28, 1983 is hereby affirmed.

In the Matter of HARAN H. GOLDEN *and* TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Decatur, Ala.

Docket No. 83–880; Submitted on the Record;
Issued January 25, 1984

ORDER GRANTING REMAND

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

Appellant appealed from a December 22, 1982 letter decision by the Office of Workers' Compensation Programs which found that appellant was at fault in receiving an overpayment of $71,049.99 because he had not reported his earnings for a period when he was gainfully employed.

The Board, in a May 24, 1983 memorandum, requested that the Director of the Office submit a legal memorandum in this case. The Board indicated that appellant testified that he shared in the profits of operating a farm with his sons. Appellant indicated that his sons performed the physical labor while he provided advice and financial support and arranged for the sales of crops. The Board noted that in *Vernon Booth*[1] the Board held that income consisting of profits from a business which constituted a return on investment could not be considered as earnings even if the profits were augmented by a claimant's personal attention to business.

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[1] 7 ECAB 209.

The Director of the Office, in response, filed a motion to remand on December 15, 1983. The Director stated that the evidence was insufficient to establish that appellant knowingly understated his earnings. He also stated that the decision of the Office in this case was inconsistent with the Board's decision in *Booth*. He indicated that appellant's "earnings" since his employment injury were in the nature of a return on investment, profits from management and business acumen and were not "earnings" within the meaning of 5 U.S.C. section 8106(b). The Director therefore requested that the case be remanded. He indicated that, on remand, the Office would void the overpayment decision and issue a *de novo* decision on all aspects of the case.

Appellant's attorney was served with a copy of the Director's motion but did not respond within the time alloted. The Board has duly considered the matter and

IT IS ORDERED that the decision of the Office of Workers' Compensation Programs, dated December 22, 1982, be set aside and the case remanded for further action in accordance with the Director's motion.

In the Matter of RALPH TREVINO *and* DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, Tex.

Docket No. 83-1322; Submitted on the Record;
Issued January 30, 1984

ORDER GRANTING REMAND

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

Appellant filed an application for review of an April 4, 1983 decision of the Office of Workers' Compensation Programs which terminated his compensation benefits effective March 24, 1983 on the ground he had refused suitable employment under section 8106(c)(2) of the Federal Employees' Compensation Act.

The Director of the Office filed a motion on January 11, 1984 to remand the case on the ground that the Office had reconsidered its policies in connection with the proper application of 5 U.S.C. Section 8106(c)(2), as now set forth in FECA Bulletin No. 83–51, issued October 24, 1983. He indicated that the Office had failed to notify appellant that it had reviewed the evidence to find that the job offered to him was suitable and that appellant had not been advised that monetary benefits under the Act would be terminated if he refused to accept the job. The Director requested that the Board set aside the April 4, 1983 compensation order and remand the case to the Office for reinstatement of appellant's compensation benefits.

Appellant was served a copy of the Director's motion and in a January 17, 1984 letter responded that he concurred in the motion.

The Board has duly considered the matter.

IT IS ORDERED that the April 4, 1983 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action as described in the Director's motion.

In the Matter of LAURENCE R. KANE, JR. *and* U.S. POSTAL SERVICE, POST OFFICE, Cleveland, Ohio

Docket No. 84–290; Submitted on the Record;
Issued March 28, 1984

ORDER DISMISSING APPEAL

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

On November 17, 1983 appellant's representative filed an application for review of an August 19, 1983 decision of the Office of Workers' Compensation Programs.

On January 26, 1984 the Board informed the representative that Section 501.11(a) of the Board's Rules of Procedure (20 C.F.R. section 501.11(a) requires that a statement signed by the appellant authorizing any representation be received by the Board before an appeal can proceed to decision. No response was received.

On March 5, 1984 the Board sent the representative a second letter reminding him of the above requirement, and noted that the appeal docketed as No. 84-290 would be dismissed if such authorization was not received by March 26, 1983. A copy of this letter was sent to appellant's current address.

No response was received within the allotted time. The Board has duly considered the matter and finds that appellant's representative has failed to submit the requested authorization. Therefore, IT IS ORDERED that the appeal docketed as No. 84-290 be dismissed.

In the Matter of JOSEPH F. MCVEIGH *and* NEW YORK CITY POLICE DEPARTMENT, New York, N.Y.

Docket No. 83-1458; Submitted on the Record;
Issued April 6, 1984

ORDER GRANTING REMAND

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, MICHELE VON KELSCH

Appellant, through his attorney, requested that the Board review an April 28, 1983 decision of the Office of Workers' Compensation Programs which rejected the claim on the grounds that "the circumstances surrounding the injury suffered by Officer McVeigh do not fall within the purview of 5 U.S.C. 8191." Appellant's attorney requested that the case be set for oral argument before the Board.

On February 6, 1984, the Director of the Office filed a motion to remand the case. The Director stated that "[i]t was appellant's contention that at the time he was shot, he was attempting to arrest the 'possessor of a firearm and the shooter of a firearm from a person who stole same and transported it illegally in interstate commerce.' " The Director noted that appellant made reference to 18 U.S.C. 9225, *et seq.* The Director asserted that further development is necessary on this case and stated the following:

> "In rejecting this claim, the Office was influenced by what may be called 'the later discovery rule.' In *Edward L. Jackson,* 31 ECAB 550, the Appeals Board held that where an officer is engaged in a purely local police matter and is injured in an apprehension or attempted apprehension, benefits are not allowable where it is later discovered that a Federal offense had been committed. In setting forth this rule, the Appeals Board relied heavily upon the legislative history [citing Cong. Rec., Sept. 11, 1967, p. 24942.] of section 8191 as follows:
>
> 'MR. EILBERG . . .
>
> 'My own feeling would be that if the apprehension were for a particular crime, then if that crime happened to be a Federal crime the individual or his survivors would benefit. But if it is not dis-

> covered until after the police officer's death or injury that the man had committed a Federal crime, he would not be covered.'
>
> "The Director fully agrees that where an apprehension is made for a purely local offense, such as petty larceny, benefits are to be denied for injury in a situation where it is later discovered that the individual was wanted by Federal authorities.
>
> "The Director believes that a different result was intended by Congress in a situation where a local officer was apprehending or attempting to apprehend an individual for activity which constituted a federal crime where the officer did not know at the time that the infraction of law was a Federal offense. This conclusion is supported by Congressman's Eilberg's statement, "My own feeling would be that if the apprehension were for a particular crime, then if that crime happened to be a Federal crime the individual or his survivors would benefit.' "

The Director stated that appellant "may be entitled to benefits," and that "[i]t should be determined with specificity whether the individual whom appellant was attempting to apprehend was in the process of committing a Federal crime." The Director further stated that "[t]he facts indicate that appellant was attempting to apprehend an individual for possessing and discharging a firearm," and stated that if it is determined that the individual's possession or discharge of the weapon was in violation of Federal law, it would not be necessary that appellant knew at the time that a Federal crime had been committed. The Director stated that the Office would issue a *de novo* decision following further development of the case.

Appellant's attorney was served a copy of the Director's motion. He filed no reply within the time allotted.

The Board has duly considered the matter.

IT IS ORDERED that the April 28, 1983 decision of the Office of Workers' Compensation Programs be set aside and the case be remanded to the Office for further development in accordance with the Director's motion. Since the Office will undertake further development of the record, the case is not in posture for oral argument before the Board.

In the Matter of ARTHUR LERAL *and* UNITED STATES POSTAL SERVICE, Long Island City, N.Y.

Docket No. 84-447; Submitted on the Record;
Issued June 15, 1984

ORDER REMANDING CASE

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

Appellant filed an application for review of a compensation order of the Office of Workers' Compensation Programs, dated August 10, 1983, which affirmed a decision of the Office, dated October 14, 1981, finding that appellant had a 49 percent loss of wage-earning capacity on his ability to perform the duties of an employment interviewer effective September 1, 1981.

The Board notes that prior to making its loss of wage-earning capacity decision, the Office referred appellant to Dr. Henry J. Magliato and Dr. Edward S. Rachlin, both Board-certified orthopedic surgeons. In their respective reports dated August 27, 1980 and March 24, 1981, Drs. Magliato and Rachlin stated that further neurological testing should be carried out to determine if appellant was subject to radiculopathy. An Office medical adviser stated: "Upon Dr. Rachlin's recommendation claimant should be referred to a neurologist for EMG studies and CAT scan and examination to ensure that there are in fact no findings to support continued disability."

On April 23, 1981, the Office referred appellant to Dr. Arthur Battista, a Board-certified neurosurgeon, for evaluation. However, appellant refused to attend Dr. Battista's examination. The Office thereupon made its loss of wage-earning capacity decision.

The proper procedure in a case like the present one where there is an obstruction of a medical examination is for the Office to consider the imposition of 5 U.S.C. 8123 (d) which provides: "Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee." [1] Once the obstruction ceases, the Office can further develop the evidence with respect to a loss of wage-earning capacity.

IT IS ORDERED that the compensation order of the Office of Workers' Compensation Programs, dated August 10, 1983, be set aside and the case remanded to the Office for further proceedings as outlined above, to be followed by a *de novo* decision.

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[1] See *Thomas Y. Dempsey*, 31 ECAB 679.

In the Matter of CARLOTTA J. QUACKENBUSH *and* U.S. POSTAL SERVICE, ROYAL OAK MANAGEMENT SECTIONAL CENTER, Royal Oak, Mich.

Docket No. 83–2034; Submitted on the Record;
Issued June 26, 1984

ORDER REMANDING CASE

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

Appellant filed an application for review of a decision of an Office of Workers' Compensation Programs hearing representative, dated and finalized on August 4, 1983, which affirmed a November 12, 1982 decision. By that decision the Office terminated appellant's compensation effective December 2, 1982 under 5 U.S.C. section 8106(c)(2), on the ground that she refused suitable employment.

The Board notes that in the *Ralph Trevino* case,[1] the Director of the Office filed a motion to remand the case on the ground that the Office had reconsidered its policies in connection with the proper application of 5 U.S.C. section 8106(c)(2), as now set forth in FECA Bulletin No. 83-51, issued October 24, 1983. He indicated that the Office had failed to notify appellant that it had reviewed the evidence to find that the job offered to him was suitable and that appellant had not been advised that monetary benefits under the Act would be terminated if he refused to accept the job.[2] The Director requested that the Board set aside the decision in that case and remand it to the Office for reinstatement of appellant's compensation and further review under FECA Bulletin 83-51.

In the instant case, as in the *Trevino* case, the Office failed to follow its policy regarding 5 U.S.C. section 8106(c)(2) as set forth in Bulletin No. 83-51. Accordingly, the Board will remand this case for similar proceedings.

IT IS ORDERED that the November 12, 1982 and August 4, 1983 decisions of the Office of Workers' Compensation Programs be set aside and the case remanded for further action in accordance with this order.

In the Matter of CARLOTTA J. QUACKENBUSH *and* U.S. POSTAL SERVICE, ROYAL OAK MANAGEMENT SECTIONAL CENTER, Royal Oak, Mich.

Docket No. 83–2034; Submitted on the Record;
Issued October 16, 1984

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[1] 35 ECAB 1181.

[2] The Board notes that FECA Bulletin No. 83-51 provides that "the penalty for failure to accept an employment opportunity should be limited to monetary benefits, leaving medical benefits undisturbed," and that the Solicitor of Labor has recommended that the Office readjudicate those cases for which all benefits were terminated.

DECISION GRANTING PETITION FOR RECONSIDERATION, DENYING REQUEST FOR ORAL ARGUMENT, AND REAFFIRMING PRIOR ORDER OF BOARD

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

On July 26, 1984, the Director of the Office of Workers' Compensation Programs filed a petition for reconsideration of the Board's order of June 26, 1984. In its order the Board set aside the November 12, 1982 and August 4, 1983 decisions of the Office, and remanded the case for reinstatement of appellant's compensation and further review under FECA Bulletin 83-51, issued October 24, 1983. The Director requested that if his petition is granted, the Board allow oral argument on the issues raised by the petition. Appellant's representative filed a memorandum in opposition to the petition for reconsideration.

The petition for reconsideration presents contentions not previously advanced during the appeal. After giving the matter careful attention, the Board has decided to grant the petition so that these contentions may be considered. However, the request for oral argument on the petition is denied. The question of whether oral argument shall be allowed on a petition for reconsideration rests within the discretion of the Board.[1] The granting of oral argument, in the opinion of the Board, would unduly delay the finality of this case and would not serve the interests of justice. Further, it would require appellant to undergo the expense of having her attorney travel to Washington for argument.

Turning to the contentions set forth in the petition, the first one is that the Office's November 12, 1982 and August 4, 1983 decisions were proper when made, in light of the fact that FECA Bulletin 83-51 was not issued until October 23, 1983. The Director contends that therefore the decisions referred to above "did not violate the policies yet to be enunciated."

The Board notes, however, that the Director's contention is contrary to that stated in FECA Bulletin 83-51 with relation to its retroactive application. The Bulletin states that "it is consistent with the legislative history and purpose of section 8106(c) that the penalty for failure to accept an employment opportunity should be limited to monetary benefits, leaving medical benefits undisturbed." In order to effectuate this policy, the Bulletin states the following:

> "The Solicitor also advises that, in adopting this policy, OWCP *must readjudicate* where possible those cases for which all benefits were

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[1] Board's Rules of Procedure, 20 CFR 501.7(b); *Clara A. Blackburn*, 10 ECAB 110; *John R. Weaver*, 16 ECAB 537; *Piotr W. Gul*, 17 ECAB 714; *Virginia Faye Gabbert*, 21 ECAB 149; *Irwin E. Goldman*, 23 ECAB 6.

> terminated. Offices are also reminded that in any use of this section of the statute, OWCP has a considerable burden of proof." (emphasis supplied)

The Board concludes that the above-quoted statement contemplates the retroactive application of the policies contained in FECA Bulletin 83-51 to those cases already decided in which "all benefits were terminated." The November 12, 1982 decision of the Office terminated appellant's monetary compensation, as well as her medical benefits, and the August 4, 1983 decision affirmed this result. Therefore, under the language noted above, the Office is to readjudicate appellant's case in accordance with the new procedures set forth in the Bulletin.

Such retroactive application of the policies contained in the Bulletin has specifically been requested by the Director twice since its issuance.[2] The Director's suggestion in the petition that such action is improper is inconsistent with his prior position on this subject, as well as inconsistent with the language contained in the Bulletin itself, and is therefore without support.

The Director's second contention is that the Bulletin was applied by the Board in this case to a situation for which it was never intended. The Director correctly stated that "The purpose was to permit an employee to know that a job offer was within his or her work limitations and to understand the ramifications of a refusal to accept—namely termination of compensation. This afforded the employee the opportunity to challenge whether the job offer was within his or her capability." The Director contended that the case record showed that appellant was aware that the offered position was "suitable," and that her refusal to accept would result in termination of her compensation. The Director therefore concluded that the Board's present application of the Bulletin to this case was improper.

Upon review of the record, the Board notes that the purposes behind the Bulletin were not fully achieved in this case. The Board has stated in both *John Otis Dixon*[3] and *William F. Ward*[4] that FECA Bulletin 83-51 requires "that the *Office* determine that a position offered is suitable and inform the employee of this and of the consequences of refusal of the position prior to the employee's decision to accept or refuse the offered position." (emphasis added)

At the very most, appellant was made aware by the employing establishment (and her private rehabilitation consultant) that the employing establishment considered the offered position to be suitable, and that her refusal would result in the termination of her compensation. However, this notice by the employing establishment is not by the adjudicating agency and therefore is insufficient. It does not satisfy the procedures set forth in the Bulletin, and is in conflict with prior statements made by the Director in reference to this Office's responsibility to give notice before invoking 5 U.S.C. section 8106(c)(2).

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[2] See *Ralph Trevino*, 35 ECAB 1181; *Frank Cervantes, Jr.*, Docket No. 83-1242, issued February 24, 1984. In the present case, the Board in its order of June 26, 1984 relied upon the policy set forth by the Office in the motion it filed in the *Trevino* case. There, as here, the decision of the Office terminating benefits was made prior to the issuance of Bulletin 83-51.

[3] 35 ECAB 906.

[4] Docket No. 84-907, issued June 22, 1984.

In both *Trevino* and *Cervantes*[5], the Director made a motion to remand, stating that "The *Office* failed to notify appellant that it had reviewed the evidence and had concluded that the job was suitable. Further, the *Office* failed to notify appellant that monetary benefits would be terminated if she refused to accept the job." (emphasis added)

The Director's present contention is contrary to the language of the Bulletin, his prior statements on this subject, and the decisions of the Board, and is therefore without merit.

The Director's final contention is that the Board has "sought to avoid deciding the merits of this appeal by a resolution of the case on a technical point which is not an issue."

This argument overlooks the fact that any review by the Board of the merits would be premature if the case was not procedurally in posture for decision. The Bulletin itself notes that section 8106(c)(2) is a penalty, and as such should only be imposed after the appropriate procedures have been followed by the Office. This concern for proper procedure was properly noted by the Office in the pleadings it submitted in the *Trevino* and *Cervantes* cases, and by the Board in the *Dixon* and *Ward* decisions.[6]

Therefore, after careful consideration of the Director's petition, the Board finds that its order of June 26, 1984 was proper in all respects, and it is hereby affirmed.

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[5] See footnote 2.

[6] See also, *Carlos J. Cantu*, Docket No. 84-1873, issued October 5, 1984; *Florence Riedel*, Docket No. 84-1796, issued September 27, 1984; *A. Z. Edwards*, 35 ECAB 1114.

In the Matter of Marjorie Monagin, claiming as widow of William Monagin *and* U.S. Postal Service, Post Office, Detroit, Mich.

Docket No. 83-1972; Submitted on the Record;
Issued August 6, 1984

ORDER GRANTING MOTION TO REVERSE AND REMAND

Before E. GERALD LAMBOLEY, GEORGE E. RIVERS, MICHELE VON KELSCH

An application for review of a decision of the Office of Workers' Compensation Programs dated December 15, 1982, was filed in the above-entitled case. By that decision the Office denied appellant's claim on the ground that "the factual evidence fails to establish that the . . . [employee] was in the performance of duty while on his way to work," when he was struck and killed by a vehicle on August 17, 1979. The Office found that "the accident occurred as a result of a nonemployment-related hazard which is shared by all travelers."

On January 12, 1984, the Board requested that the Director of the Office of Workers' Compensation Programs submit a legal memorandum addressing the issue of whether the employee was in the performance of duty on August 17, 1979 when he was killed en route to work. On June 25, 1984, the Director filed a motion requesting the Board to reverse and remand the case. The Director stated that the Office had reevaluated the claim and had concluded that the deceased employee "was in fact in the performance of duty when he was killed on August 17, 1979." In an accompanying memorandum, the Director stated, among other things, that the parking lot in which the employee parked his car was leased by the employing establishment; that although the employees were not required to park on the lot, "it appears the lot was leased for the exclusive use of U.S. Postal Service employees"; that parking was provided without cost to the employees; and that parking "was controlled by permit by the U.S. Postal Service." The Director pointed out that the parking lot assumed the status of a portion of the employer's premises, and accordingly, "coverage under the Federal Employees' Compensation Act[1] would apply to any injury or death sustained while traveling between the parking lot and place of employment, i.e., [between] two portions of the employer's premises." [2] The Director concluded, therefore, that under the circumstances of this case, the employee was considered to be within the scope of his employment when he was killed while "crossing the street en route between two portions of the employer's premises."

In view of the foregoing, the Director requested the Board to reverse the December 15, 1982 decision "and hold that the employee died while in the performance of duty." The Director added that the case "should be remanded to the Office for payment of appropriate compensation."

Appellant's attorney was notified of the motion to reverse and remand and accompanying memorandum, but failed to respond within the time allotted.

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[1] 5 U.S.C section 8101, *et seq.*

[2] The Director cited Larson, *Workmen's Compensation Law*, section 15.41.

The Board has duly considered the matter, and

IT IS ORDERED that the decision of the Office of Workers' Compensation Programs dated December 15, 1982 be reversed; the case is remanded for further proceedings consistent with the Director's motion.

In the Matter of EDWARD M. KAERS *and* DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, Calif.

Docket No. 84–76; Submitted on the Record;
Issued September 10, 1984

ORDER GRANTING REMAND

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

Appellant appealed from a September 26, 1983 Office of Workers' Compensation Programs hearing representative's decision, made final on September 28, 1983, which affirmed the Office's April 7, 1982 decision. That decision denied appellant's claim for medical benefits for chiropractic treatment on the ground that the medical evidence "does not establish that the claimant sustained a subluxation of the spine on November 19, 1978."

By memorandum dated March 13, 1984 the Board requested the Office to file a memorandum on the issue of how to define a "subluxation" in light of the legislative history of the 1974 amendments to the Federal Employees' Compensation Act. That history indicated that claims for chiropractic services under the Federal Employees' Compensation Act should be treated similarly to those under the medicare provisions of the Social Security Act. The *Medicare Carriers Manual* defined "subluxation" as "an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays."

On August 5, 1984 the Director of the Office filed a motion requesting that the Board set aside the September 28, 1983 decision of the Office and remand the case for further development. The Director stated that the appropriate definition of "subluxation" is to be found in the *Medicare Carriers Manual*. He further stated that a subluxation must be a spinal subluxation and that questionable interpretations of x-rays should be resolved by a Board-certified radiologist. The Director stated that on remand the case record should be referred to a Board-certified radiologist to determine whether appellant has a spinal subluxation in accordance with the *Medicare Carriers Manual* definition. Following any further development deemed necessary the Office should then, according to the Director, issue a *de novo* decision.

Appellant's attorney was served with a copy of the Director's motion. In an August 16, 1984 response received by the Board on August 31, 1984, he argued that the x-rays of record clearly establish the existence of a spinal subluxation. He further stated that if a remand is ordered the Board-certified radiologist should be trained in reading the x-rays of chiropractors and appellant should be allowed to choose him from a list of three radiologists provided him by the Office. The Board has duly considered the matter.

IT IS ORDERED that the September 26, 1983 decision of the Office of Workers' Compensation Programs hearing representative, made final on September 28, 1983, be set aside and the case remanded to the Office for further proceedings as requested in the Director's motion to be followed by a *de novo* decision.[1]

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[1] The Board notes that the Federal (FECA) Procedure Manual, chapter 3-400, pgs. 3-4, sets forth the proper procedure to be followed by the Office for an examination of the claimant or a review of the record by a medical specialist. See also FECA Bulletin 84-1 issued January 31, 1984.

In the Matter of JAMES S. QUINN *and* DEPARTMENT OF COMMERCE, NATIONAL WEATHER SERVICE, South Sioux City, Nebraska

Docket No. 84–1786; Submitted on the Record;
Issued September 28, 1984

ORDER REMANDING CASE

Before E. GERALD LAMBOLEY, MARGARET PALLANSCH, GEORGE E. RIVERS

Appellant filed an application for review of a March 3, 1984 decision of an Office of Workers' Compensation Programs hearing representative who affirmed an April 21, 1983 Office decision which rejected his claim for payment of his chiropractor bills as the evidence failed to support a subluxation of the spine as demonstrated by x-ray to exist as required by 5 U.S.C. section 8101(c) of the Federal Employees' Compensation Act. The chiropractor's services were found reimbursable for the period June 21 to December 10, 1982 as the employing estblishment had authorized treatment; however, the hearing representative denied payment of chiropractic expenses after December 10, 1982 for the reason that appellant was advised by the Office in a letter of that date that further chiropractic treatment was not authorized.

The Board notes that following his injury on June 16, 1982 appellant underwent treatment by Dr. J. N. Walston, a general practitioner, who examined appellant on June 17, 1982, took x-rays of his lumbar and cervical spine, and diagnosed myositis. Dr. Walston indicated that appellant was discharged on June 21, 1982 to be treated by Dr. A. W. Bronson, a chiropractor. Dr. Bronson reviewed appellant's x-rays and diagnosed subluxations of the lumbar and cervical spine.

Thereafter, the Office referred the June 17, 1982 x-rays to the DeWeese Radiological group for review by a Board-certified radiologist and for a report on whether the x-rays showed any subluxation. In an April 20, 1983 report Dr. Timothy D. Kennedy, a Board-certified radiologist, reviewed the June 17, 1982 x-rays but did not respond to the Office's questions as to any subluxation. Thereafter, appellant submitted the July 6, 1983 report of Dr. Vinton L. Albers, a chiropractic roentgenologist, who stated that the June 17, 1982 x-rays demonstrated subluxations at L4, L5-S1 and C5-C6.

These conflicting x-ray reports, leading to conflicting opinions, require the referral of appellant's June 17, 1982 x-rays for review by a Board-certified radiologist for resolution of the conflict. The Board notes that in the case of *Edward M. Kaers*[1] the Director of the Office filed a motion to remand the case on the ground that the Office accepted the definition of "subluxation" as that found in the *Medicare Carriers Manual* and that questionable x-ray interpretations of spinal subluxations should be resolved by a Board-certified radiologist using the *Medicare Carriers Manual* definition. In the instant case, the Office should request that the selected impartial radiologist provide an opinion on whether appellant has a spinal subluxation in accordance with the *Medical Carriers Manual* definition. Following any further development deemed necessary by the Office, a *de novo* decision should be issued to protect appellant's appeal rights.

IT IS ORDERED that the March 3, 1984 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for further proceedings consistent with this order.

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[1] 35 ECAB 1191.